



Appeal Decision

Site visit made on 13 February 2024

by K Lancaster BA (hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 June 2024

Appeal Ref: APP/A2335/W/23/3330242

Co-Op Building, John Street, Carnforth, Lancashire LA5 9DA

- 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 Marshaw Developments Ltd against the decision of Lancaster City Council.
- The application Ref is 23/00755/VCN.
- The application sought approval for the change of use of commercial building into six apartments (C3) without complying with a condition attached to application Ref 22/00393/PAC, dated 6 June 2022.
- The condition in dispute is No.1 which states that:

The approval relates to:

- *Proposed Elevations and Floor Plans - LF/SH/3702B - Dated: 18.05.2022 - Received: 18.05.2022*
- *Proposed Sections and Heights - LF/SH/3725 - Dated: 25.04.2022 - Received: 10.05.2022*
- *Location Plan - Received: 06.04.2022*

The approved plans shall be implemented in full prior to the residential unit being brought in use or first occupation.

- The reason given for the condition is:
For the avoidance of doubt, to ensure a satisfactory standard of development and to safeguard residential amenity.
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Decision

1. The appeal is allowed and planning permission is granted for the change of use of commercial building into six apartments (C3) at the Co-Op Building, John Street, Carnforth, Lancashire LA5 9DA in accordance with the application Ref 23/00755/VCN, without compliance with condition number No.1 previously imposed on planning permission Ref 22/00393/PAC dated 6 June 2022 and subject to the conditions in the attached schedule.

Applications for costs

2. An application for costs was made by Marshaw Developments Ltd against the Lancaster City Council. This application is the subject of a separate decision.

Preliminary Matters

3. Two further appeals¹ have been submitted relating to the appeal site. Each appeal has been considered on its own merits and forms the subject of a separate decision.

¹ Appeal Refs: APP/A2335/W/23/3336666 and APP/A2335/W/23/3337571

Background and Main Issues

4. As noted above, this appeal is pursuant to an application made under Section 73A (S73A) of the Town and Country Planning Act 1990 (the Act). S73A allows for applications to be made for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
5. In this particular case, the previous planning permission was granted for development consisting of the change of use of a commercial building into six apartments under Schedule 2, Part 3, Class MA of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) subject to limitations and conditions. The Council imposed planning conditions, in addition to those imposed by the order itself.
6. The appellant is seeking approval to carry out the proposed development without complying with condition No.1, in order to revise the internal layout of the six approved apartments.
7. The Council refused the application on the basis that the submitted plans include external works to the existing building that are beyond the scope of development permitted under Schedule 2, Part 3, Class MA of the GPDO. The second reason for refusal states that proposed development and the further works carried out on site would go beyond the remit of the development permitted by the original prior approval application 23/00393/PAC and therefore the works are contrary to the conditions MA.2(1) and (2) of Schedule 2, Part 3, Class MA of the GPDO.
8. The Council has drawn my attention to a number of appeal decisions² which confirm that an application for prior approval made under a Class which does not permit operational development can only consider the change of use. This is a matter which is not disputed by the parties. However, for the avoidance of doubt this is not an appeal against refusal to grant prior approval, therefore these considerations are not relevant to the proposal before me.
9. My attention has also been drawn to a Court Judgement³ which clarified that an application may be made under S73A of the Act for the development of land without complying with conditions subject to which a previous planning permission was granted by a development order.
10. For the avoidance of doubt, any success in this appeal would not mean that the prior approval is somehow varied. It would instead mean that a full planning permission is granted under S73A of the Act for the change of use of commercial building into six apartments (C3) subject to fewer or varied conditions which were previously imposed.
11. Whilst Class MA of the GPDO cannot grant approval for operational development including external works to the building, a S73A application can. The submitted plans clearly show works to the exterior of the building, regardless of whether or not it was the intention to apply for these works. I have not been presented with an amended plan which omits these details and therefore I will consider the appeal on the basis of what has been submitted.

² Appeal Refs: APP/H5390/W/17/3187381; 3187382; 3187384; 3192651 and 3192563 and APP/N5090/E/19/3243616

³ Pressland vs London Borough of Hammersmith and Fulham [2016] EWHC 1763 (Admin)

12. Consequently, in determining an application under S73A I am not bound by the provisions of the GPDO. Therefore, the main issues are whether the proposal to vary the condition can be dealt with under S73A of the Act and if so:
- whether the proposal would provide adequate living conditions for future occupiers; and
 - the effect that varying condition No.1 would have on the living conditions of neighbours.

Reasons

13. The Planning Practice Guidance⁴ states that there is no statutory limit on the degree of change permissible to conditions under an application made through S73A of the Act, but the change must only relate to conditions and not to the operative part of the permission.
14. The judgement in the Finney Case⁵ established 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. That is, the description of the development for which the original permission was granted.
15. More recently, the Fiske Case⁶ states that a S73 permission must not introduce a condition that creates conflict or is inconsistent with the operative wording of the operative wording of the development and it must not fundamentally alter the development permitted by the original application.
16. Therefore, the first matter for me to consider is whether the variation of condition No.1 would result in conflict with the operative part of the permission.
17. The original description of development did not seek to control the number of bedrooms or minimum size of the accommodation units. There is, therefore, no reason in this particular case to prevent six smaller flats being developed within part of the building, where this is consistent with the original description of development.
18. Although the Council has submitted representations stating that they consider that conflict would arise with the operative part of the development, in that the internal alterations would lead to the creation of eight apartments, thereby increasing the total number of units which would conflict with the description of development, this is not the proposal before me.
19. Whilst I also acknowledge that there is a separate application for the creation of two flats within the basement, in relation to the submitted plans which are before me for consideration, this part of the building is clearly labelled as 'landlord accommodation' and no approval is being sought as part of this scheme for the creation of any additional units.
20. On this basis, I find that the proposal before me would not result in conflict with the operative part of the permission and would provide six apartments, albeit with a revised internal configuration.

⁴ Paragraph: 013 Reference ID: 17a-013-20230726

⁵ John Leslie Finney v Welsh Ministers, Carmarthenshire County Council, Energiekontor (UK) Limited [2019] EWCA Civ 1868

⁶ R (Fiske) v Test Valley Borough Council [2023] EWCA Civ 1495.

21. For these reasons, I am therefore satisfied that the proposal as amended would not affect the operative part of the original permission and can therefore be considered under S73A of the Act.

Planning Merits

22. As I have found that the proposal would not conflict with the operative part of the permission, it falls to be considered whether the proposal is acceptable having regard to the planning merits of the case.
23. However, as the reasons for refusal of the application, relate solely to technical matters which have been outlined above, I sought additional comments on the planning merits of the case from the main parties. I am therefore satisfied that neither party will be prejudiced by taking this approach.
24. In respect of the proposal, the Council has drawn to my attention Policy DM29 of A Local Plan for Lancaster District – Part Two: Review of the Development Management Development Plan Document (DMDPD), which is concerned with the design of new development.
25. As outlined above, the proposed development would involve change of use of part of the appeal building to provide six apartments spread over three floors. There is a communal entrance and staircase which serves the properties. Each flat has two bedrooms, a bathroom and open plan living, dining kitchen. The basement is labelled as 'landlord accommodation'.
26. Although two of the proposed flats would be smaller than originally approved, it is not disputed between the parties that all of the flats meet the minimum standards set out in the Nationally Described Space Standards, providing an adequate amount of internal floor space. The development mostly utilises existing openings, albeit, with some small variations and these were previously found to provide adequate levels of daylight and sunlight for the residential use of the building.
27. Furthermore, the Council has raised no specific concerns in relation to the revised internal layout and based on the evidence before me and my own observations, I see no reason to disagree. Consequently, I therefore find that the proposal would provide adequate living conditions for future occupiers.
28. In their submissions, the appellant has clearly stated that they are only seeking approval for the variation of condition no. 1 on the basis of the revisions to the internal layout, even though the submitted plans also show external works for which consent has not previously been granted. The appellant has suggested the imposition of a planning condition which would expressly state that planning permission is not granted for any external works shown on the submitted plan⁷. However, for the reasons set out, such a condition would not meet the statutory tests for conditions, in that it would not be necessary, in this particular case.
29. I also note that the submitted plan before me is not reflective of the works which have been undertaken to the appeal building and which I observed at my site visit. As outlined in my preliminary matters, there is a separate application and appeal currently under consideration for works to the exterior of the building. However, notwithstanding this, I can only consider the proposal

⁷ Plan Ref: 724-030

before, which includes the window openings and layout as shown on the submitted plans.

30. It therefore follows that the only matter of dispute to consider is the acceptability of the external works. These works include a reduction in number of rooflights on west roof slope, changes to fenestration in south elevation, two additional windows on the first floor of the east elevation, and removal of two small windows in the ground-floor. The proposals also include the removal of the external staircase to the north elevation removed, and the reconfiguration of the basement level windows.
31. Policy DM29 of the DMDPD states that development will be expected to contribute positively to the identity and character of the area through good design, having regard to local distinctiveness, appropriate siting, layout, palate of materials, separation distances, orientation, and scale. It also states that it should ensure there is no significant detrimental impact to amenity in relation to overshadowing, visual amenity, privacy, overlooking, massing, and pollution.
32. The surrounding area is characterised by tight-knit residential streets of mostly terraced properties. In such a context, and where a proposal involves the re-use of an existing building and existing openings within a building, it is not always possible to achieve the minimum distance between windows and blank walls or habitable windows set out in the supporting text to Policy DM29 of the DMDPD. However, the use of the wording 'normally' within the supporting text to the policy indicates a flexible approach which can consider the site-specific circumstances when assessing acceptability.
33. Within the immediate vicinity, New Steet, Edward Street, Back New Street and Booth Street all have limited distances between windows due to this tight-knit relationship. The scheme relates to the re-use of a building, which by virtue of its proximity to these properties, cannot achieve the standards contained with Policy DM29 of the DMDPD and furthermore, those standards do not reflect the prevailing pattern of development nor the existing character of the surrounding area. I observed at my site visit that there is already a high degree of overlooking within the area, particularly from upper floor windows. This is due to the limited separation distances between the rows of terraced properties and narrow streets which are prevalent in the surrounding area.
34. Nevertheless, although submissions have been sought, the Council has not raised any specific concerns in relation to the submitted plans and the impact on the living conditions of neighbouring occupiers. Therefore, whilst I accept that these windows would be in close proximity to each other and would fail to meet the minimum standards suggested in the supporting text to Policy DM29 of the DMDPD, I have not been presented with any compelling evidence that the proposed amendments would result in adverse harm to the living conditions of the occupiers of neighbouring properties.
35. For these reasons, I therefore find that the proposal would provide adequate living conditions for future occupiers and does not cause adverse harm to the living conditions of neighbouring properties. Thus, it complies with Policy DM29 of the DMDPD which requires, amongst other things, that there is no significant detrimental impact to amenity in relation to overshadowing, visual amenity, privacy, overlooking, massing, and pollution.

36. It also accords with Paragraph 135 of the Framework which states that development should create places with a high standard of amenity for existing and future users.

Other Matters

37. The appeal site is located within the Carnforth Conservation Area (CCA). I have therefore paid special attention to the desirability of preserving or enhancing the character or appearance of that area, as set out in section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act).
38. The significance of the CCA lies in its historic and architectural interest as a small market town. The town centre has a strong and consistent character resulting from the extensive survival of late 19th Century architecture. The former Co-Operative Building is noted as being a striking building. The town is densely developed with few open spaces. There is a consistent urban form throughout the CCA. Which consists of an irregular street grid, and creates a tight, enclosed feel, especially as most of the streets are relatively narrow.
39. The appeal site comprises a former warehouse building, attached to the Co-Operative Building, which is prominently sited on the corner of New Street and John Street. Its significance lies in its historic and architectural interest and as a remaining building of the 19th century expansion of the town.
40. The proposal would contribute to the re-purposing of the building as residential accommodation, including the improvement of the external appearance of the building and finding a long-term viable use for the building. The proposal is therefore considered to conserve and enhance the significance of the CCA.
41. The appeal site is located within 1.5km of the Morecambe Bay Special Area of Conservation, Special Protection Area and Ramsar site. The SPA and SAC have been designated because they support internationally important populations of seabirds and wading birds, together with the habitats that support these birds.
42. The Conservation of Species and Habitats Regulations 2017 (the Habitats Regulations) require the Competent Authority to consider whether the proposal could adversely affect the integrity of the protected sites, either alone or in combination with other plans and projects.
43. As a result of the proximity of the proposed development to the sensitive sites, it could have a detrimental impact upon these internationally designated sites, particularly as a result of increased recreational pressure and disturbance.
44. However, the proposed variation of condition no.1 would not lead to an increase in the number of residential units at the appeal site, and as a result would not lead to any increased recreational pressure on the nearby designated sites. I am therefore satisfied that subject to the imposition of an appropriately worded planning condition requiring mitigation measures in the form of 'homeowner packs', that the proposal would have a neutral effect on these designated sites.

Conditions

45. To assist with clarity, the Planning Practice Guidance sets out that decision notices for the grant of planning permission under section 73A should repeat the relevant conditions from the original permission, unless they have already

been discharged. I have had regard to the Council's suggested conditions and also the comments made by the appellant. However, whilst I note the appellants comments, they only applied to vary condition No.1 and they did not seek approval to remove or vary any of the other conditions originally imposed by the Council. I have therefore considered the appeal and the imposition of suitable conditions on this basis.

46. As the development has already commenced, it is not necessary to impose the standard time condition. However, it is necessary to specify the amended list of approved drawings as this provides certainty and defines the permission.
47. From the evidence before me, the conditions relating to submission of a construction management plan and photographic record of the building have been discharged. Therefore, I will not reimpose these conditions.
48. Whilst the evidence before me indicates that car parking has already been provided for the occupants of the flat, the appeal is not supported by any details of the car parking arrangements nor any mechanism to secure its ongoing provision. For these reasons, I have therefore imposed a condition requiring the submission and approval of a car parking scheme, and to secure its retention. This condition is necessary in the interests of highway safety.
49. A further condition is necessary to secure the relevant mitigation measures for protection of the nearby designated sites.

Conclusion

50. For the reasons given above, I conclude that the proposal accords with the development plan and the Framework. The appeal is therefore allowed.

K Lancaster

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans:
 - 724-0300 (Proposed Plans)
- 2) Unless within three months of the date of this decision a car parking scheme is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within three months of the local planning authority's approval, the occupation of the site for residential purposes shall cease until such time as a scheme is approved and implemented.

If no car parking scheme in accordance with this condition is approved within three months of the date of this decision, the use of the site shall cease until such time as a scheme approved by the local planning authority is implemented.

Upon implementation of the approved car parking scheme specified in this condition, it shall thereafter be retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- 3) Unless within three months of the date of this decision details of a homeowner pack are submitted in writing to the local planning authority for approval and unless the approved homeowner packs are created and distributed to the occupiers of the development hereby approved within three months of the local planning authority's approval, the occupation of the site for residential purposes shall cease until such time as a scheme is approved and implemented.

The homeowner packs shall include details of the nearby sites designated for their nature conservation interest (and the wider Morecambe Bay Coastline), their sensitivities to recreational pressure and shall promote the use of alternative areas for recreation, in particular dog walking areas.

If no details of the homeowner packs required in accordance with this condition are approved within three months of the date of this decision, the use of the site shall cease until such time as a scheme approved by the local planning authority is implemented.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.