Planning Inspectorate

Appeal Decision

Site visit made on 4 February 2025

by Mark Philpott BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 March 2025

Appeal Ref: APP/V2255/W/24/3347790
Woodgate Oast, Woodgate Lane, Borden, Kent ME9 8JX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant 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 Mr Neil Jones-Barlow (Mr N & Mrs S Jones-Barlow Partnership) against the decision of Swale Borough Council.
- The application Ref is 24/500383/FULL.
- The application sought planning permission for: 'Change of use from agricultural to bed and breakfast, office and residential' without complying with a condition attached to planning permission Ref SW/11/1491, dated 24 February 2012.
- The condition in dispute is No 10 which states: 'The area identified for use as a residential dwelling on the approved plans hereby permitted shall cease, and the residential accommodation vacated within 12 months of the cessation of trading of the bed and breakfast use or the office use hereby permitted'.
- The reason given for the condition is: 'In recognition of the functional need between the residential accommodation and bed and breakfast accommodation which has allowed an exception to be made to the rural restraint policies that usually prevent new residential accommodation in the countryside, in pursuance of policies E1, E6 and RC6 of the Swale Borough Local Plan 2008'.

Decision

1. The appeal is dismissed.

Background and Procedural Matters

2. The site relates to a converted oast and surrounding land used for bed and breakfast, office and residential purposes following planning permission being granted under SW/11/1491 (the 'original permission'). The residential use takes the form of a single dwelling.

3. The scope of the proposal in the heading is based on details on the planning application form, but an alternative to condition No 10 has not been proposed. Instead, the application sets out that the appellant's aim is to gain a permission that enables the site to be used for 'residential and/or bed and breakfast/guest accommodation, office and residential' purposes or, in other words, provides flexibility so it could be wholly residential. The Council approached the application in this manner. It would also provide for guest accommodation at the site, albeit it is unclear how this would operate differently to bed and breakfast accommodation. In any case, in response to a query to the appellant and the Council in part regarding the Finney judgement[1], it has been clarified that the appellant actually aims to gain

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

flexibility so any use or combination of uses quoted above could be (and therefore some potentially may not be) carried on at any given time.

4. The original permission is subject to several other conditions that are pertinent to what is sought by the appellant. Condition No 7 intends to restrict specific parts of the site to uses falling within Class B1[2] of the Town and Country Planning (Use Classes) Order 1987 ('the Order'), which once related to business uses including offices, research and development and light industrial uses. However, amendments to the Order have merged Class B1 into Class E[3], which covers a broad range of commercial, business and service uses. In contrast, condition No 8 intends to restrict parts of the site to bed and breakfast and associated purposes specifically. Additionally, the objective of condition No 9 is to require the residential element to be occupied by persons involved in the management of the bed and breakfast accommodation, whereas condition No 11 aims to prevent its long term occupation.

5. Varying or omitting condition No 10 would not enable the site to be used as intended unless some action is also taken in respect of condition Nos 7, 8, 9 and 11. However, Section 73 of the Town and Country Planning Act 1990 ('the Act') provides the power for not only condition No 10 to be considered, but also enables new conditions to be imposed and conditions imposed on the original permission to be modified or omitted. Accordingly, I have considered the proposal based on what the appellant seeks to achieve, rather than limit my decision to consideration of condition No 10 only.

6. The Finney judgement 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 permission to which it would relate. An implication of this is that the proposal, including any conditions that may need to be imposed, cannot be inconsistent with the description of the development for which the original permission was granted. I sought the views of the main parties regarding this matter, as indicated above, and have taken the responses into account in making my decision. This is considered in the first main issue below, whereas the second main issue encapsulates the Council's reason for refusing the application.

7. It is important to note that the original permission was modified by a non-material amendment (NMA) granted under Section 96A of the Act and given reference SW/11/1491/NMA2. At my request details of this were submitted, which include drawings altering the approved layout of the oast[4]. However, these do not reflect the existing layout, which appears to align with the existing first floor plan and drawings in various sales particulars submitted to support the proposal[5].

8. I gave the main parties an opportunity to provide views as to the approved layout of the oast and whether they consider the site includes a single planning unit or multiple disparate units. In the absence of any other potentially relevant permissions or justified alternatives, I will make a decision based on the NMA drawings showing the approved layout. However, the appellant's contention that the site constitutes a single planning unit is compelling, as the NMA drawings clearly show the bed and breakfast, office and residential elements of the oast

[2] Class B of Part B of the Schedule to the Order at the time the decision was made
[3] Class E of Part A, Schedule 2 of the latest revision to the Order
[4] Drawing references: WF/06A and WF/07A
[5] Drawing reference: WF/30; document references: GH2615 and 8846249

internally connected. The officer's report for the original permission supports this stance. I have also proceeded on that basis.

9. Additionally, the appellant has submitted drawings showing proposed alterations at first floor level which would result in a different balance of bed and breakfast and residential accommodation to what is shown on the NMA drawings. However, I do not consider these any further given that securing a specific layout would plainly be contrary to the appellant's aim to use the site flexibly.

10. In an attempt to overcome the Council's objections to the scheme, updated marketing and associated evidence has been submitted with the appeal. The Council had an opportunity to comment on this during the appeal process and so I have taken it into account in making my decision.

11. The revised National Planning Policy Framework came into force on 12 December 2024. The 2023 Housing Delivery Test results were also published on the same date. However, the changes to national policy are not directly relevant to the key issues for this appeal and there are no implications arising from the test results. As such, I have not sought further views from the main parties about these matters.

Main Issues

12. The main issues are:

- whether the proposal is within the scope of Section 73 of the Act; and
- the effect of the proposal on the development plan's settlement strategy, employment and tourism.

Reasons

Scope of proposal

13. The original permission clearly relates to bed and breakfast, office and residential uses at the site. There is nothing in the description of the development which suggests that just one of those uses may be carried out at the site exclusively. This is reinforced by the conditions, which intend to secure that specific parts of the building are used for prescribed purposes. Consequently, it would not be possible to vary condition Nos 7 to 11 to enable the site to be used in the manner quoted in paragraph 3 above, or otherwise enable just one or some of the proposed uses to be carried on, as this would conflict with the operative part of the permission.

14. I have also considered the Reid judgement[6], which establishes that 'when a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way'. However, even if condition Nos 7 to 11 were removed, the appellant's aims would seemingly still not be achieved given that to align with the operative part of the permission the site would need to include bed and breakfast, office and residential uses. Moreover, even if the site comprised multiple planning units, the site would still be restricted to other uses within the same use classes[7] or those permitted by the Town and Country Planning (General Permitted Development) (England) Order 2015, which in many cases require prior approval as to various considerations that I could not pre-empt.

[6] Freddie Reid v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 3116 (Admin)
[7] A change of use to another purpose in the same use class is not development due to the operation of Section 55(2)(f) of the Act

15. Additionally, the Planning Practice Guidance states that Section 73 of the Act 'cannot be used if there is no relevant condition in the permission listing the originally approved plans'[8], but there is nothing in legislation that prevents an application being made and determined without such a condition. Furthermore, the NMA decision letter makes clear that the development should be carried out in accordance with the uses specified on the associated drawings, which are those principally relevant to the conditions pertinent to the appellant's aims. In this respect there is no issue with the scope of the proposal.

16. However, as neither the variation nor removal of the conditions could achieve the appellant's aims, the proposal is beyond the scope of Section 73 of the Act. That being said, the removal of condition Nos 7 to 11 would give latitude for the site to be used more flexibly. For this reason, and in the interests of completeness, I go on to consider the acceptability of the potential impacts of this below in the context of the Council's concerns.

Settlement strategy, employment and tourism

17. The site is in open countryside and outside built up area boundaries as designated by the Council's Local Plan[9] (LP). Policy ST3 of the LP sets out the settlement strategy for the borough. It states that development will not be permitted unless it is supported by national policy and demonstrated that it would contribute to protecting and, where appropriate, enhancing the intrinsic value, landscape setting, tranquillity and beauty of the countryside, its buildings and the vitality of rural communities. While the Council does not include this policy in the refusal reason, it is clear from the evidence that it is relevant. Indeed, it is informed by LP Policy ST1, which explains that to deliver sustainable development, proposals should accord with the settlement strategy and support a prosperous rural economy, including tourism.

18. Similarly, LP Policy DM3 specifies that permission will be granted for the sustainable growth and expansion of business and enterprise in the rural area. However, it also states that permission for residential development will not be permitted where this would reduce the potential for rural employment and/or community facilities unless a site is demonstrated as having no demand for such purposes or its use would be undesirable or unsuitable. Furthermore, the supporting text to the policy suggests that evidence such as marketing of the property should be undertaken 'for a reasonable period in a manner and at a price that reflects its use' to show that it is neither viable nor likely to become so, and that alternative employment uses should be considered.

19. Furthermore, LP Policy CP1 sets out that development should safeguard or enhance Swale's 'Principal Tourism Assets' which include guest houses and bed and breakfast establishments as set out in LP Statement 4. It also indicates that proposals that would result in the diminishing of existing employment sites should be avoided where these are appropriately located and suitable and viable for users under normally functioning economic conditions.

20. This policy context suggests that bed and breakfast and similar forms of accommodation constitute a tourism asset that supports a prosperous rural economy and thus the vitality of rural communities. Additionally, Class E uses can reasonably be interpreted as including employment or at the very least employment

[8] Reference ID: 17a-018-20230726
[9] Bearing Fruits 2031: The Swale Borough Local Plan 2017

generating uses that broadly align with the aforementioned policies insofar as providing amenities to support rural areas. Consequently, the most significant and obvious potential impacts of removing the conditions would be that the amount of non-residential floorspace could be reduced. In this respect, condition Nos 7 to 11 serve useful purposes in securing the retention of the non-residential floorspace and restricting the residential use.

21. A large amount of marketing, financial and other evidence has been submitted in an attempt to demonstrate that loosening the restrictions on the site is appropriate to facilitate its sale. The property was first advertised for sale in 2022. Since then, various companies have marketed the site and the asking price has changed. The sales particulars do not fully reflect the precise terms of the permission. However, I appreciate that these need to present the site in a positive light in order to garner interest, and statements such as 'the property can be used purely for commercial purposes'[10] go some way to demonstrating that the site has been marketed for alternate employment purposes. Moreover, it is clear from the evidence that the site has been marketed widely for a significant length of time.

22. Despite this, there is no substantive evidence that the non-residential elements at the site are, or alternative uses aligning with the terms of the original permission would be, unviable. Furthermore, though there are unlikely to be any directly comparable properties for sale, both because a converted oast is not a commonplace building and as there are precise restrictions on how it should be used, there is little in the way of robust objective analysis justifying the asking prices adopted. Indeed, correspondence[11] has been provided discouraging a valuation. Summaries of other properties and sales prices have been submitted, but analysis has not been submitted to show how the locations, sizes, facilities and qualities of these compare to the particular attributes of the site and thereby justify the asking price.

23. Importantly, offers to purchase the site have been made, which indicates demand in and desirability for the combination of uses at the site, even though purported decline in the tourism industry in recent years is reflected in some of the appellant's income evidence. None of the offers have been at the asking price but, in the absence of a robust objective assessment of the site's value, there is nothing firm before me which demonstrates that the asking prices were realistic when the offers were made. In that context, the shortfall between the offers and the asking prices were not so obviously significant so as to substantiate a conclusion that the offers were clearly unreasonable.

24. Consequently, the submitted evidence does not demonstrate that there is no demand for the site, or that it is undesirable or unsuitable in its current form. Accordingly, the conditions should not be varied or omitted, as doing so could lead to a reduction in the quantity of tourist and employment floorspace at the site. In these ways, the site's contribution to the rural economy and thereby the vitality of rural communities would be reduced. I therefore consider the proposal to be contrary to LP policies ST3, ST1, DM3 and CP1.

[10] Rightmove website marketing by Nationwide Business Sales
[11] Email dated 21 September 2023 from Neil Barlow to Nationwide Business Sales

Other Matter

25. The appellant contends that the Council's approach to the application was inconsistent with the pre-application advice given prior to its submission. The advice does not set out that the proposal would be permitted. Moreover, irrespective of what the Council may or may not have said, pre-application advice is not binding, and this is made clear in the response. In any event, I have found the proposal to be unacceptable for the reasons identified.

Conclusion

26. For the above reasons, the appeal is dismissed.

Mark Philpott

INSPECTOR