The Planning Inspectorate

Appeal Decision

Site visit made on 17 November 2014

by S J Papworth DipArch(Glos) RIBA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 11 December 2014

Appeal Ref: APP/P3800/A/14/2224956
Kendalls New Wharf, Brighton Road, Shoreham by Sea, West Sussex BN43 6RN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant 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 Kendall Bros (Portsmouth) Ltd against the decision of West Sussex County Council.
- The application Ref WSCC/012/14/SU, dated 12 February 2014, was refused by notice dated 26 June 2014.
- The application sought planning permission for unloading, preparation and storage of mineral aggregates with concrete batching plant without complying with a condition attached to planning permission Ref WSCC/068/12/SU, dated 18 January 2013.
- The condition in dispute is No 1 which states that: The use of the land. Buildings and structures hereby permitted shall cease and the site be cleared of all buildings, structures and works erected pursuant to this permission on or before 31st December 2014.
- The reason given for the condition is: In order not to prejudice consideration of future proposals for the locality and to enable the County Planning Authority to review the special circumstances under which this permission is granted.

Decision

1. I allow the appeal and grant planning permission for unloading, preparation and storage of mineral aggregates with concrete batching plant at Kendalls New Wharf, Brighton Road, Shoreham by Sea, West Sussex BN43 6RN in accordance with the application Ref WSCC/012/14/SU, dated 12 February 2014 subject to conditions 1) to 12) on the attached schedule, including conditions 1) and 2) which are varied from those attached to the previous grant of permission.

Main Issues

2. These are;

    - The effect of continued use of the site on the regeneration of Shoreham Harbour Western Arm area.

    - The effect of continued use of the site on the living conditions of existing residential occupiers.

Reasons

Planning History and Policy

3. This is set out in both the Council's Committee Report and by the appellant. The present use was permitted in 2000 for a temporary period and that period was extended in 2006 and again in 2009. That latter renewal was sought until 2014, but was granted until 2012 only, based on a concern that any longer period would prevent regeneration plans from proceeding. A further application in 2012 for a three year extension was granted only for another two years, and this decision was taken to appeal where the Inspector allowed the appeal and granted permission till 31 December 2015. That is the permission under which the operation is currently taking place and the date by which it must cease. The subject of the present appeal is a proposal to extend the use until 31 March 2020.

4. It appears that the conditions covering how the site should be operated have remained consistent, with operating hours that do not appear unusually lengthy and are within the range often needed to protect the amenity of nearby residents. It is noted however that due to the tidal nature of the western harbour, the permitted hours for unloading ships is longer, between 0700hrs and 2300hrs. There is reference to this being the only permitted method of delivery of aggregates, with concrete and graded products leaving by road. The Council also state that whilst until 2012 there were legal agreements in place controlling the unloading times, these were not carried forward as conditions were deemed to be able to provide the necessary level of control.

5. The appeal Decision referred to above is a material consideration as it looked at similar issues to those to be considered now with regard to the effects of the continuation of the use, but residents have expressed doubts as to the reasons why only six complaints were stated to have been received by the Council since 2002, and the Inspector's findings on the effect on regeneration would have been based on circumstances pertaining at the time of that Decision.

6. The policy background does not appear to have changed significantly since the previous Inspector's Decision. The National Planning Policy Framework had been published at that time and contains the references previously cited on securing economic growth and support for business. Section 13 sets out the importance of minerals to support sustainable economic growth, with the need to safeguard wharfage, storage, handling and processing facilities for bulk transport, including by sea. The West Sussex Minerals Local Plan 2003 contains similar safeguarding requirements at Policy 40. The Adur District Local Plan Policy AE7 on the role of Shoreham Harbour sets out the primary function of the harbour as a commercial port. However in relation to the harbour it is clear that much has changed in the area since these Plans were formulated and later documents, whilst not part of the Development Plan are material considerations.

7. These later documents include the emerging Adur Local Plan 2014 which states at Policy 8 the broad location policy for Shoreham Harbour, and the aims of maximising the potential of the harbour, delivering mixed use developments including housing, and consolidating and enhancing the operations of the harbour. The Shoreham Harbour Joint Area Action Plan 2014 sets out at Policy JAAP 11 the comprehensive approach to be taken to the Western Harbour Arm area to include housing and new employment, with the principles to be

established in the Western Arm Development Brief. This Brief was adopted as planning guidance and Strategic Objective SO2 on supporting a thriving harbour, SO4 on housing and community provision, SO8 on recreation and leisure, and SO9 on design quality are referred to in the reasons for refusal.

8. The Shoreham Port Masterplan 2010 identifies the appeal site and surrounding area as being redeveloped for non-port related uses such as business, leisure and residential, with port-related businesses being relocated. Interim Guidance for Shoreham Harbour 2011 states that development may not be supported if it is considered likely to prejudice the emerging Shoreham Harbour policies and regeneration objectives, or is inconsistent with the Masterplan, national and local policies.

Regeneration

9. Part (a) of the first reason for refusal concerns a failure to show that there would be no alternative site in the harbour for use at the expiry of the 2013 permission at the end of 2015. Part (b) is that continued use of the appeal site after that date has not been shown to be necessary. The reason for refusal goes on to identify the harm that it is considered would occur to the aims of regeneration through the operation staying at the site longer than is considered necessary.

10. This stance appears a reasonable balance between the stated policy aim of safeguarding mineral wharfage, and the aspirations for regeneration in the Action Plan. An alternative site that did not jeopardise the development of regeneration sites would satisfy both of these aims, whereas merely ceasing operations could jeopardise the supply of aggregates needed to promote growth. The Committee Report sets out the requirements for aggregates, advising that whilst the findings of studies in 2014 on aggregates, railheads and wharfs were that there was no ongoing need for the appeal site wharf, there is a need for the use of the site to 2018.

11. The appellant sets out the consultations with the Port Authority over the availability of alternative sites which indicated that a site may come forward at Britannia Wharf, but only in 2016/17. The reasons given for the delay are that although it is a minerals wharf, another business is in occupation, and even if they were required to vacate, there would be a need for repairs to the quay wall. In any event there would have to be time allowed for the move, as Condition 1) requires the site to be cleared by the end of 2015, which would require cessation of the operation some time prior to that, and in order to provide continuity of supply, as well as continuity for the business, customers' businesses and employment, the alternative site would need to be available well ahead of the end date. On the information available it does appear to be the case that there is no readily available alternative site at Shoreham for the operation to move to at or before the end of the present permission.

12. With regard to the possible harm to regeneration, since the previous appeal Decision, Adur District Council has resolved to grant planning permission for a food store, leisure, residential and other development on the site immediately to the west of the appeal site (Ref; AWDM/0762/13). It appears likely that development would be commenced, and possibly occupied, at some time within the requested lifetime of the operation of the site to 2020. Remaining at the present site could result in the minerals operation becoming an incompatible use in relation to the proposed residential one next door, significantly closer

than the existing residential development. Whilst the Council do not cite the effect on prospective residents in the second reason for refusal, there is a risk of the continued use of the appeal site having a dampening effect on the success of the redevelopment of the neighbouring site and hence the regeneration of the area.

13. The Committee Report gives further information on the nature of the adjacent full and outline planning permissions and an estimate of the likely timescales for their construction and occupation. The view is that the full permissions would be built earlier than the outline ones, which appears entirely reasonable, but that it would be unlikely that residents would be living in the adjacent development properties until at least 2018. That conclusion, along with the Officer's views on the effect with regard to existing residents across the harbour, gave rise to the recommendation to extend the permission until 2018, but not to the full five years requested.

14. There is no information on the imminence of plans for the appeal site itself and the appellant refers to there not being any planning application, to the length of the lease and to the site's landlord having objected to the Action Plan, not supporting the inclusion of the land in the regeneration scheme. The appellant wishes to link the length of the permission to the remaining length of the lease, but this is not a reasonable planning consideration. However, all of these matters indicate a lengthy timescale before the occupation of the site has any adverse effect on redevelopment of the site itself.

15. In conclusion on this main issue, the balance of the considerations lie in there being no likelihood of harm to the regeneration of the Shoreham Harbour Western Arm, in the period up to March 2018, and that such an extension would not conflict with the Development Plan policies, national and local planning guidance and the various documents specific to the Shoreham Harbour area. Moreover, such an extension would provide continuity in the supply of aggregates and employment, and would allow time for an alternative site to be brought into use to ensure that continuity.

Living Conditions

16. A point made in the Committee Report is that the residents of the development on the south side of the harbour moved into their homes with the expectation of the use of the appeal site ceasing and a mixed use regeneration scheme taking its place 'in the relative short term'. In the event, and as outlined in the planning history, the appeal site use has continued with the benefit of temporary permissions, the present one running until the end of 2015.

17. Representation has referred to Paragraph 109 of Circular 11/95 *"The Use of Conditions in Planning Permissions"* which stated that the material considerations to which regard must be had in granting any permission are not limited or made different by a decision to make the permission a temporary one. Thus, the reason for granting a temporary permission can never be that a time-limit is necessary because of the effect of the development on the amenities of the area. That Circular was cancelled by the launch of the web-based Planning Practice Guidance in March 2014, but it would have been current at the time of all of the previous grants of temporary permissions.

18. The latest grant of temporary permission, on appeal in 2013, was in consequence of the Inspector's conclusion that the proposal would not have a

materially adverse impact on the living conditions of any local residents, and hence complied with the Framework on the subject of the residential environment, although the temporary nature of the use does appear to have been weighed in the balance. Reliance was placed on the Environmental Management Plan, secured by Condition 2) and the ability of the Council to deal with any problems. The Committee Report places similar reliance on this document and the Inspector's findings as to the ability of another business to use the wharf without being bound by the Plan.

19. Condition 2) referred to an Environmental Management Plan approved by the County Council in March 2006 and required it to be adhered to at all times, to minimise the environmental impacts arising from the operation of the sites in the interests of the amenities of nearby residents, properties and the safety of highway users. A resident of Anchor Close on the south side of the harbour refers to having moved into the property in 2001, so it is clear that the 2006 Plan should have been approved with the interest of those residents in mind, and the effect on residents was not the reason for the permission being granted on a temporary basis. The reason for the temporary permissions is clearly in relation to the regeneration plans.

20. There is however criticism of the Plan and its enforcement, and it appears that dust does settle on and in homes to the south as seen at the site inspection. It is suggested that there is insufficient damping down and that a lack of shading allows aggregate piles to dry out, although the appellant refers to the operation as a wet process. The small number of complaints logged by the Council is explained in representation by it not being obvious when a breach has occurred as it is not clear to residents what the Plan requires. It is also stated that ships unload outside the already lengthy times allowed, and that a barge has been used that can unload outside of the limited 'window' either side of high water.

21. There is a balance to be struck between the effect on residents and the benefits of the process continuing. The Council were previously of the view, expressed in justification for earlier grants of permission, that the approved Environmental Management Plan would be sufficient. The previous Inspector relied on it and Officers maintained that view in the Committee Report, but the Council members concluded otherwise. Such a Plan should be as capable now as it was considered to be previously in avoiding or mitigating harm. There is the evidence of neighbouring residents on why dust becomes airborne, on detonation of ordnance without warning, and other actions that should be capable of being addressed. A new Environmental Management Plan has been submitted with this application, dated February 2014, but the residents maintain doubts over its effectiveness and its enforceability.

22. The nature of a section 73 application to develop or use land without complying with a condition attached to a previous permission, such as in this Appeal, is that any new permission granted with a revised condition, sits alongside the original permission, and other conditions may be varied or omitted, not just the disputed condition. In this case therefore the 2013 permission would continue to be valid and capable of being continued with until the end of 2015, alongside any new permission granted. That fact means that there would be no disadvantage to the appellant if Condition 2) was to be altered from that suggested by the Council, to require approval of the 2014 Environmental Management Plan as the time taken for this process and any physical works would not prevent use of the site.

23. As drafted suggested Condition 2) is not capable of being enforced against as it required the revised Environmental Management Plan to be submitted 'prior to the commencement of the use herby approved' and that use has already been commenced and been in operation for many years. The Plan appears to cover the matters raised by residents but remains vague as to definitions of such as 'high wind' and whether 'northerly' as a wind direction too prescriptive. It is reasonable to provide for a further revision to be submitted for approval within 3 months of the date of this decision, failing which the permission would lapse. This does not prevent continued operation under the 2013 permission in the short term.

24. With that provision, and with its effective monitoring and enforcement, it is concluded that the use of the site would not have such a serious effect on the living conditions of residents on the south side of the harbour as to adversely affect their living conditions in planning terms and that the aims of the Framework on residential amenity would be complied with.

25. A resident has referred to Article 1 of the First Protocol of the Human Rights Act 1998 and to the interference to his peaceful enjoyment of his property. This is a qualified right where interference with a right may be necessary if it relates to the regulation of land use through development control measures that are recognised as an important function of Government. In this case the need for the continuing use, and the lack of available alternatives until 2018 have been weighed elsewhere in this decision against the possibility of harm resulting. The effect on the rights of the resident would be proportionate in furthering economic activity, employment and growth.

Conclusions

26. The application was for an extension of the use until 2020, but if that were to happen there would be a risk of adverse effects on the regeneration of the Shoreham Harbour area due to the likely occupation of adjoining housing development, expected to be in 2018. It is also possible that an alternative site would be available and capable of being used by 2018. In the balance required between the effects and the benefits, it is found that the granting of a further permission to 31 March 2018 would be justified, but only with full adherence to the revised Environmental Management Plan and its complaints procedure, which takes into account the legitimate expectations of residents, who were otherwise expecting the use to have ceased in 2015.

27. For the reasons given above it is concluded that the appeal should succeed. A new planning permission is granted with new Conditions 1) and 2) and restating those undisputed conditions that are still subsisting, capable of taking effect and which are required to ensure the acceptable operation of the facility.

S J Papworth

INSPECTOR

Schedule of Conditions

1) The use of the land, buildings and structures hereby permitted shall cease and the site be cleared of all buildings, structures and works erected pursuant to this permission on or before 31 March 2018.

2) Unless within three months of the date of this Decision a revised Environmental Management Plan, is submitted in writing to the Local Planning Authority for approval, and unless the approved scheme is implemented in accordance with the approved timetable, the use of the site shall cease until such time as an Environmental Management Plan is approved and implemented. The Environmental Management Plan shall include details of the sprinkler system, drop heights, stockpile height management, and details of wind speeds and directions that trigger specific mitigation measures. The scheme shall include a timetable for the provision of any equipment, the completion of any physical works, and the implementation of the measures required by the scheme.

3) The Environmental Management Plan approved pursuant to Condition 2) above shall be adhered to at all times.

4) The area marked out for vehicle parking shall be used for no other purpose.

5) No change in colour, texture or substitution of the materials and finishes of the plant, buildings and equipment illustrated on plan 9515.03. C (revised October 2009) shall be made other than with the prior written agreement of the County Planning Authority.

6) Any fuel, oil lubricant or other potential pollutant shall be handled on the site in such a manner as to prevent pollution of any watercourse or drainage system. For any such liquid other than water this shall include storage in suitable tanks and containers which shall be housed in an area or structure surrounded by bund walls of sufficient height and construction so as to contain 110% of the total contents of all containers and associated pipework. The floor and walls of the bunded area shall be impervious to both water and oil. The pipes shall vent downwards into the bund.

7) With the exception of the unloading from dredgers of marine dredged aggregates that shall on any day take place only between the hours of 0700 and 2300 no operations authorised or required under this permission shall take place except between the hours of: 0700 and 1800 Mondays to Fridays; 0700 and Noon on Saturdays, save that no use of the aggregate processing plant shall on any day take place before 0800 hours. No working, including the maintenance of plant and machinery, shall take place on the site on Sundays or public or bank holidays. Deliveries of aggregates to the site shall only be by sea, with the exception of additives, including cement, necessary for the process of making concrete.

8) All vehicles and plant operating regularly from, or continuously on, the site shall be equipped with upward directed exhaust outlets.

9) Notwithstanding the provisions of Part 2 and Part 8 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order, 1995 (or any Order amending, replacing or re-enacting that Order), no fixed plant or machinery, buildings, structures, erections, including hardstanding, shall be installed, constructed, erected, extended or replaced nor shall any change be made to the colour of paintwork or cladding of structures and buildings on

the site without the prior agreement in writing of the County Planning Authority.

10) Other than intruder activated lighting, the site shall not be artificially illuminated except during the permitted hours of working or during the course of unloading of cargo from a ship at the wharf. No lighting fitment shall be installed or at any time operated on the site from which the source of the light is directed towards a public highway or residential properties.

11) The offices included within the site shall be used only for purposes ancillary to the permitted operations.

12) At least seven days prior to the cessation of the use of the site for the uses allowed by this permission, written notice shall be given to the Minerals Planning Authority. The use shall not resume without at least seven days written notice being given to the Minerals Planning Authority.