



Appeal Decision

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 August 2020

Appeal Ref: APP/Y0435/X/20/3248233

**Land North and West of Wavendon Business Park, Ortensia Drive,
Wavendon Gate, Milton Keynes, Buckinghamshire**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr George Harkins (Abbey Developments Limited) against the decision of Milton Keynes Council.
 - The application Ref: 19/02988/CLUP, dated 8 November 2019, was refused by notice dated 30 January 2020.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is to implement planning permission under reference 15/02337/OUT and reserved matters under reference 18/01304/REM by the carrying out on the application site of any material operation pursuant to section 56 of the Town and Country Planning Act 1990 without compliance with condition 14 of reserved matters approval under reference 18/01304/REM.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is found to be lawful.

Application for Costs

2. An application for costs made by Abbey Developments Ltd against Milton Keynes Council is the subject of a separate decision.

Background and Main Issue

3. Outline planning permission (Ref: 15/02337/OUT) for the appeal site was granted on 8 February 2017 for up to 134 residential units, 75-100 sqm of A1 (retail use) for the provision of a local convenience store with access from Ortensia Drive and the land north of the site, with associated landscaping, infrastructure and ancillary works. The outline permission was subject to 31 conditions. The only condition relevant to the issue of noise was No 29, which, in short, requires that before any development commences a Construction Environmental Management Plan (CEMP) shall be submitted to and approved in writing by the Local Planning Authority (LPA) and that the development shall be carried out in accordance with the CEMP. The reason given for the condition was to ensure that there are adequate mitigation measures in place and in the

interests of amenities of existing and future residents. The condition clearly pertains to the construction phase of the site.

4. An application for Reserved Matters (RM) approval (Ref: 18/01304/REM) of the internal access, appearance, landscaping, layout and scale of the development was granted on 11 April 2019. Condition 14, which is at the heart of this appeal, was imposed on the RM approval. It reads "*No development shall commence until a Deed of Easement in respect of noise has been submitted to, and approved in writing by, the Local Planning Authority. The Deed of Easement shall relate to the entire development in perpetuity*". The reason given for the condition is "*To safeguard the continued operation of The Stables in accordance with paragraph 182 of the National Planning Policy Framework and to protect the residential amenity of future residents from operational noise at The Stables in accordance with policy D5 of Plan:MK (2019)*". The Stables is a music venue in the vicinity of the appeal site.
5. The LDC application made to the Council the subject of this appeal seeks to establish that condition 14 of the RM approval is ultra vires and is thus of no effect. Consequently, carrying out the development granted by the outline planning permission and subsequently the RM approval, without compliance with condition 14, would be lawful. I note the Council's reason for refusing the LDC application, but that is based on matters of planning merit which are not appropriate in determining the lawfulness of carrying out the development of the appeal site without complying with the requirements of condition 14.
6. The main issue is whether condition 14 is ultra vires. Despite the extensive evidence submitted, the issue is quite straightforward. It requires me to make a judgement about whether condition 14 could and should have been imposed when it was.

Reasons

7. I note all the background about the size of a green buffer on the appeal site, which may have been there for landscape purposes or as part of securing a satisfactory spatial relationship between The Stables and the new houses. However, whatever the intended purpose of the buffer, it is clear the Council took the view when granting the outline planning permission that the potential impact of noise on residential amenity, and the relationship between The Stables and the future residents of the appeal site, could be taken account of when considering the matter of layout at the RM stage.
8. An outline planning permission is 'the' planning permission which sets the parameters of how a site could be developed in the future subject to having the standard reserved matters approved and any other conditions that the local planning authority at that stage consider necessary to make the development acceptable in planning terms. It is a well-established tool used by landowners before marketing a site, with potential buyers then knowing what issues they might face when turning the site into reality. I note the appellant bought the site with the benefit of the outline planning permission.
9. The site was at that stage unencumbered by any noise related restrictions other than those to be addressed during the construction phase and what was known about how the layout of the site was the mechanism for considering and addressing the relationship with The Stables. Moreover, the outline planning

permission allowed for a residential use which did not restrict future occupiers' rights of the peaceful enjoyment of their properties.

10. In contrast, condition 14 has the effect of placing a restriction on future occupiers' rights to peaceful enjoyment of their premises. The purpose of the Deed required by the condition is to prevent future occupiers of the site from objecting to the Stables on the grounds of noise and/or disturbance and the condition's requirements would be determined on this basis. I have had regard to the various legal opinions submitted and the plethora of legal judgements. The consistent view taken by the Courts on this matter is that conditions imposed on a RM approval should not modify or derogate from the outline planning permission.
11. In the total absence of any such restrictions at the outline stage, the imposition at the reserved matters stage of such a draconian limitation on any occupiers' ability to complain about noise clearly goes to the principle of the outline permission and undermines the unburdened nature of the future residential use. This is particularly so given that the deed would apply to the whole site, not just those parts closest to the Stables. Had the matter of noise from the Stables been such an issue when determining the outline application, either it should have been refused, or it should have been granted with the necessary restriction then.
12. I also have no doubt that persons interested in purchasing the dwellings on the site would, in becoming aware of not being allowed to complain about the activities at The Stables, be put off buying which is likely to have a significant adverse effect on sale prices or severely damage the prospect of the dwellings being sold at all. That is also something the purchaser of the land would have been completely unaware of and could not have taken into account when taking the important investment decision to purchase the site. It is very likely to undermine the principle established by the outline planning permission that the site is acceptable for residential use to the extent that it would nullify the grant of planning permission. It would be tantamount to a revocation or modification of the permission which is unlawful.
13. Furthermore, the requirement for a deed puts the power to achieve an implementable consent in the hands of a third party. Should The Stables not agree to a draft Deed meaning that a Deed could not be completed, and such a decision would not be challengeable by the appellant, then the permission simply could not be implemented. That would, in effect, also take away the benefit of the outline planning permission.
14. I have had regard to other case law referred to by the Council in its appeal statement, notably *R (David Pearl) v Maldon District Council [2018] EWHC 212 (Admin)*. However, that is concerned with whether a RM application falls within the ambit of the outline planning permission, which is a different principle to what is at issue here, which is whether a condition imposed on the RM approval undermines the principles of the development granted at the outline stage.
15. All in all, the control that condition 14 seeks to exert on the development of the site is, for all the reasons given, one that should have been imposed at the outline stage. Doing it when issuing the RM approval was unreasonable in all the circumstances and beyond the legal power of the LPA, and thus unlawful. In other words, condition 14 is ultra vires and therefore of no effect.

16. Under the 1990 Act, uses and operations are lawful if no enforcement action may be taken in respect of them whether because they did not involve development or require planning permission or because the time for any enforcement action has expired or for any other reason. In this case, there are two reasons why in my view proceeding with the development under the terms of the outline planning permission and the RM approval would be lawful. First, as already set out, the condition is of no effect. Secondly, for that reason no enforcement action could be taken for proceeding with the development without complying with it. To take such action would also be clearly irrational.
17. Consequently, even if operations have commenced to develop the site as suggested by the Council related to highway works in 'breach' of the pre-commencement requirement of condition 14, that is of no consequence.

Other Matters

18. I am aware of local concerns that the operation of The Stables may be compromised by potential complaints about noise/disturbance from occupiers of the new houses in the future. However, that is not a matter I can properly consider under the remit of this appeal. Moreover, any other matters of planning merit or consequences of using the site for housing I also cannot revisit, particularly bearing in mind that the principle of the residential use of the site has already been found acceptable and granted planning permission.

Conclusion

19. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of that proposed in the banner heading above was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Gareth Symons

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 8 November 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

Condition 14 was imposed unlawfully and is therefore ultra vires and of no effect.

Signed

Gareth Symons

INSPECTOR

Date 18 August 2020

Reference: APP/Y0435/X/20/3248233

First Schedule

Implement planning permission under reference 15/02337/OUT and reserved matters under reference 18/01304/REM by the carrying out on the application site of any material operation pursuant to section 56 of the Town and Country Planning Act 1990 without compliance with condition 14 of reserved matters approval under reference 18/01304/REM.

Second Schedule

Land North and West of Wavendon Business Park, Ortensia Drive, Wavendon Gate, Milton Keynes, Buckinghamshire

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 18 August 2020

by Gareth Symons BSc(Hons) DipTp MRTPI

Land at: North and West of Wavendon Business Park, Ortensia Drive, Wavendon Gate, Milton Keynes, Buckinghamshire

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Scale: Do not scale.

