



Appeal Decision

Site visit made on 26 June 2020

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 6 July 2020

Appeal Ref: APP/Y0435/W/20/3246822

Land north of Wavendon Business Park, Ortensia Drive, Milton Keynes

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
 - The appeal is made by Abbey Developments Ltd against the decision of Milton Keynes Council.
 - The application Ref: 19/01357/REM, dated 23 May 2019, was approved on 16 August 2019 and planning permission was granted subject to conditions.
 - The development permitted is reserved matters following 15/02337/OUT for internal access, appearance, landscaping, layout, and scale for Phase One (west side) comprising 79 residential units.
 - The condition in dispute is No 25 which states that: *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).*
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Background Information and Main Issue

1. This appeal was originally to be determined by way of a hearing. However, on being referred to me I took the decision that a hearing would not be necessary. The matter to be determined is, as I set out below, relatively straightforward. I am aware that there are many representations and petitions, all of which I have taken into account, but this in itself does not justify an oral event. There is no reason why any expert witnesses should need to be called or questioned as the matters at issue are not complex and can be readily understood (including the various legal opinions) and can be dealt with in writing. I therefore took the decision, after giving full consideration to all submitted representations, to proceed with the appeal by way of the written representation procedure. In my judgement this has not led to any prejudice to the case advanced by any party to the appeal, including third parties.
2. The original outline planning permission relating to this site was for up to 134 dwellings, a convenience store and access from Ortensia Drive. That permission was subject to 31 conditions. The only condition relating to noise was No 29, which deals with a construction environmental management plan to be followed during construction. The spatial relationship between the site and The Stables venue to the east was considered at that time. It is clear from the submitted documentation that the Council's Officers considered that the

detailed relationship between the 2 sites could be appropriately addressed at reserved matters stage, and that this would enable a satisfactory development.

3. In the event the current appellant submitted a reserved matters application for the whole site, and this was approved, but subject to a condition requiring a Deed of Easement, similar to the condition now in dispute in this appeal (Condition No 14 in that case). Condition 14 had not been recommended by the Council's Officers as the professional judgement made was that other conditions (Nos 9 to 14 as proposed, but not the No 14 actually imposed) and the details of the dwellings and layout satisfactorily addressed the relationship between the site and The Stables.
4. In light of concerns relating to condition 14 the Appellant submitted a second reserved matters application which covers only the western part of the site. This was designed to omit any development which might be affected by noise from The Stables. The planning merits of residential development of the site are not disputed by the Council. Notwithstanding the Council Officer's recommendation to permit the proposal without the now disputed condition (No 25 in this case) that condition was imposed, for the reason set out in the headings above.
5. Despite the copious amount of material submitted with this appeal it seems to me that at its heart it is a relatively straightforward case. The question to be answered is whether the disputed condition meets the tests set out for planning conditions in the National Planning Policy Framework (NPPF) and elsewhere. In particular is the condition necessary to make this proposed development acceptable. That is the main issue in this appeal.
6. I note here that a separate appeal has been submitted in relation to a Certificate of Lawful Development relating to the entire site, which was refused in early 2020. That is not before me and I restrict myself to the single disputed condition in this appeal. I further note that the appeal before me does not apply to the eastern portion of the site. As and when any further application is submitted relating to that land the matter of conditions (if approved) will need to be considered at that time.

Decision

7. The appeal is allowed and the planning permission Ref: 19/01357/REM for reserved matters following 15/02337/OUT for internal access, appearance, landscaping, layout, and scale for Phase One (west side) comprising 79 residential units at land north of Wavendon Business Park, Ortensia Drive, Milton Keynes granted on 16 August 2019 by Milton Keynes Council, is varied by deleting condition 25.

Application for costs

8. An application for costs was made by Abbey Development Ltd against Milton Keynes Council. This application is the subject of a separate decision.

Reasons

9. The outline permission conditions did not seek to require that a Deed of Easement be entered into. Such a deed, as now sought, would restrict any future residents of the development from making complaints about activities at The Stables which result in noise and/or disturbance to which exception might

be taken. It is clear to me that such a deed, with the effect of permanently binding occupiers of dwellings, would be likely to significantly affect the prospect of dwellings being able to be sold on the site. As such a deed of the type sought should be fundamental to the grant of outline planning permission such that any developer purchasing the land with outline permission would know at the outset what constraints had to be addressed.

10. It is not disputed that a Deed of Easement is capable of being a material consideration in planning and that such a deed can be lawfully entered into. Nor is it disputed that conditions can be imposed on reserved matters approvals. However, those conditions should address matters arising out of the reserved matters, and not seek to fundamentally alter the nature of, or modify, the outline permission. I have received extensive case law on this point and it is not necessary to revisit it all here. The principle is well established and the fundamentals are set out in *Kingsway*¹ and elsewhere.
11. The condition now appealed seems to me to go beyond what can be regarded as reasonable at the stage it is sought to be imposed. Clearly the disputed condition would modify and derogate from the outline permission, which was granted without any equivalent condition. As it is put in one of the legal opinions submitted, the disputed condition “undermines the unburdened nature of the future residential use”. The condition would also put the power to achieve an implementable planning permission in the gift of a third party (The Stables). Should it not be possible to agree a completed deed then the permission would not be capable of being implemented. That would nullify the grant of permission.
12. Furthermore, the condition has been imposed on a reserved matters application which envisages development at some distance from The Stables. There would be a significant gap between the easternmost house and The Stables (more than 200m) which I observed at my site visit. The dwellings concerned with the application before me would be so far distant from The Stables that any potential for nuisance emanating therefrom would be small. The noise submissions submitted on behalf of the Appellant are the most convincing in this regard. I accept that the risk would be greater for outdoor events, but that would apply also to dwellings located in other directions. In any event the evidence before me suggests such events are uncommon. I therefore find it difficult to accept that it could reasonably be countenanced that a Deed of Easement would be an appropriate response to dwellings in the proposed locations. There is simply no basis to conclude, as feared by many local residents, that the lack of a deed would place the future operation of The Stables in jeopardy. I am told that other developments exist and have been approved in closer proximity to The Stables without a deed being required.
13. Even if a Deed of Easement was appropriate, this is a matter which should have been considered at the outline stage. It is clear from the evidence before me that noise was in fact properly considered at the outline stage, and it was determined that appropriate safeguards could be introduced at reserved matters stage without a deed. These safeguards were envisaged for the area closest to The Stables, but not for the site of this appeal.
14. NPPF paragraph 55 sets out the tests for the imposition of conditions. Taking all the above matters into account I have no doubt that the disputed condition

¹ *Kingsway Investments Ltd v Kent County Council* [1970] AC 72

in this case signally fails to meet those tests. Because I consider that the condition fundamentally undermines the benefit of the outline permission, certainly in relation to this part of the site, I agree with the legal opinion which indicates that it is unlawful. Even if I was wrong in that respect, the condition is nevertheless wholly unreasonable in seeking to fetter the development (and future residents) of the whole site when it is clear that it is not necessary to seek any such restriction on this phase of the development. Whilst I can agree that the proposed condition is relevant to planning and to the development, for the reasons given above it is not reasonable. Nor do I find it to be necessary. It would not be necessary to refuse permission in the absence of the condition.

Other Matters

15. Local residents and others have made it very clear in representations that The Stables is a valued community facility. I applaud their support for it and recognise their worries as genuinely held concerns for its future. However, for the reasons I have set out I see no reason why The Stables should be put to any disadvantage in relation to this development without the disputed condition. The dwellings proposed are sufficiently distant from The Stables to retain satisfactory living conditions.
16. Some of the representations made relate to the principle of residential development on the site. However, that is a settled matter and is not open for review in this appeal. Similarly, any comments made in relation to traffic or local services are not matters which can properly be taken into account in this appeal.
17. Reference has been made to other developments nearby which have a closer relationship with the Stables, but do not have restrictions of the type suggested here. I do not know any more about those developments other than what has been submitted, and in any case, I have assessed this appeal on the basis of its individual merits. Other cases are unlikely to replicate this one to the extent that they can be regarded as precedents.

Overall Conclusion

18. The disputed condition is unreasonable as it addresses a matter which goes to the principle of development. This should have been, and indeed was, considered at the stage of the outline application. At that time it was not deemed necessary to require a Deed of Easement as other adequate measures could be introduced at reserved matters stage. In addition the condition is not necessary as the phase of development proposed is sufficiently distant from The Stables that no unacceptable impact on the living conditions of residents is likely. Neither the cited policy of the development plan nor the advice of the NPPF support the imposition of this condition.
19. For the reasons given above, and having had regard to all the representations made, I conclude that the appeal should succeed and that the disputed condition should be removed.

Philip Major

INSPECTOR