



Appeal Decision

Site visit made on 13 October 2020

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 December 2020

Appeal Ref: APP/P1560/X/20/3250784

Elm Farm, Little Clacton Road, Clacton-on-Sea CO16 8DZ

- 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 Tendring Developments Ltd against the decision of Tendring District Council.
 - The application, Ref 19/01728/LUPROP, dated 11 November 2019, was refused by notice dated 7 February 2020.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as the occupation of a proposed development of 14 dwellings without the ability for compliance with condition 5 imposed upon planning permission 18/00662/FUL in respect of the provision of 2m footpaths connecting to the existing footways.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well-founded.

Reasons

3. The appeal relates to a parcel of land which is currently under development. Several dwellings have been erected on the site together with some fencing and the bell mouth of an access road onto Little Clacton Road. Adjacent to the carriageway of Little Clacton Road in the vicinity of the appeal site there is a grass verge, a ditch and parallel to them a stretch of newly erected boundary fencing. Whether the fencing marks the extent of the appellant's ownership is unclear but the Highway Authority confirm that they do not own the ditch and the appellant confirms that there is a ransom strip in between their site and the road.
4. Planning permission was granted in 2018 to erect 14 dwellings on the site subject to various conditions including condition 5 which requires:

Prior to the first occupation of the development, the proposed estate road, at its bell mouth junction with Little Clacton Road, shall be provided with 10.5m radius kerbs returned to an access road carriageway width of 5.5m and flanking footways 2m in width returned around the radius kerbs and connecting to the existing footways. The new road junction shall be constructed at least to

binder course prior to the commencement of any other development including the delivery of materials.

Reason: To ensure that all vehicular traffic using the junction may do so in a controlled manner and to provide adequate segregated pedestrian access, in the interest of highway safety.

The description of the LDC application was amplified in the appellant's Statement of Case as seeking 'Confirmation that condition 5 could not be achieved/implemented'. The appellant complains that in refusing the LDC application, the Council changed the terms of it, not by changing the words describing the proposal but that they considered it differently to how the appellant envisaged the application would be determined. I will address this in the following paragraphs.

5. Based on the appellant's submissions, it seems to me that the question being asked in the LDC application is whether the occupation of the dwellings would be lawful if condition 5 was not complied with.

The appellant's case

6. The appellant claims the occupation of the dwellings can take place without condition 5 because:
 - the condition was imposed without consulting the appellant to see if it could be achieved;
 - the appellant's land does not abut the highway land, there is a ransom strip in between owned by someone else, 2m cannot be achieved, at one point only 1.2m can be built on highway land;
 - the condition is therefore unimplementable and unenforceable, it is also not precise as the Council failed to undertake due diligence to ensure the condition could be discharged, it is therefore *ultra vires*.

The Council's response

7. The Council's legal advice is that the appellant is in effect seeking to challenge the condition. This however can only be done in two ways, by either submitting an application to remove the condition and appealing the subsequent refusal or by way of judicial review. As such, the Council does not have the power to determine the LDC application, which is seeking to show that the condition imposed by the Council is invalid. An Inspector could decide validity or otherwise at appeal and furthermore, the appellant has provided no evidence that the condition is severable from the planning permission.

Assessment

8. On the face of the planning permission, if the dwellings were occupied without compliance with condition 5, then there would be a breach of planning control. This is because there would be non-compliance with the condition against which, the Council could take enforcement action or issue a breach of condition notice. It was open to the appellant to make an appeal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act) following the grant of planning permission subject to conditions or, to make an application under

section 73 of the 1990 Act to remove or vary the condition. Indeed, this latter route is still available to the appellant.

9. Notwithstanding this, the basis of the application is that if the condition were found to be invalid then the Council would not be able to take enforcement action against it. Should I find it to be invalid, my findings will not determine whether the condition is severable from the planning permission or what the status of the permission would be in those circumstances. This is because I am only being asked to certify the position in respect of condition 5.
10. In response to the appellant's submissions, I have considered whether condition 5 meets the legal and policy tests¹ for the imposition of conditions. The fact that the condition was imposed without consultation is unfortunate but that would not make it invalid. Furthermore, on the basis of the information that is before me, it appears that the condition was also necessary and relevant to planning. It was also relevant to the development permitted in order to provide adequate segregated pedestrian access, in the interest of highway safety.
11. It is also enforceable as either an enforcement notice or breach of condition notice could be issued. The condition might be difficult to enforce but that does not make it invalid. Its wording is also precise, there is no doubt what the appellant is required to do. Whether it is reasonable in all other respects appears to be the point of difference between the parties.
12. The Council's view is that the condition is capable of being achieved albeit with co-operation from others. The appellant's view is that the condition cannot be implemented as it requires the agreement of a third party, who has the ability to hold a ransom over him. It is therefore not enforceable and thus unreasonable. In the appellant's mind this makes the condition invalid or *ultra vires*.
13. It is considered though that technically the condition is not *ultra vires* as that phrase means carrying out an act without legal authority. The Council had the power² to impose the condition and did so with due authority. The condition is also not invalid as it was lawfully imposed. The appellant's arguments address, in effect, a section 78 appeal to remove the condition, which was not made.
14. Looking at the wording of the condition, it is my view that it resembles a 'Grampian'³ type condition, which is a condition requiring something to be done before the permission is implemented. In this case it requires the new 'road junction' to be constructed at least to binder course prior to the commencement (my emphasis) of any other development. This is indicative of a 'Grampian' type condition. From reading the rest of the condition, it is also my view that the 'road junction' works caught by the 'Grampian' wording includes the 2m footway. This is because the condition specifies the highway works for the junction as: the provision of 10.5m kerb radii, carriageway width of 5.5m and flanking footways 2m in width 'returned around the radius kerbs and connecting to the existing footways'.

¹ Town and Country Planning Act 1990 section 72, and the six tests for imposing planning conditions as set out in the National Planning Policy Framework paragraph 55 and amplified in the Planning Practice Guidance

² Section 72 of the 1990 Act

³ Grampian Regional Council v City of Aberdeen DC [1984] 47 P&CR 633

15. In conclusion, within the legislative framework of an LDC appeal, there is no provision to enable a decision maker to remove or vary a condition. To answer the question posed in the submission of the application, the occupation of the dwellings would not be lawful as the occupation would be in breach of condition 5, which I find to be valid.

Conclusion

16. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the occupation of a proposed development of 14 dwellings without the ability for compliance with condition 5, imposed upon planning permission P/18/00662/FUL, in respect of the provision of 2m footpaths connecting to the existing footways was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

D Fleming

INSPECTOR