BR/153/09

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OUR REF: GB/Variation/Lift of Condition

19 June 2009

Mr K Wheway: Principal Planning Officer
Planning Services
Arun District Council
Arun Civic Centre
Maltravers Road
Littlehampton
West Sussex BN17 5LF

Dear Mr Wheway,

VARIATION OF CONDITION 17 AND THE REMOVAL OR VARIATION OF CONDITION 23 OF BR/60/08 PROPOSED ERECTION OF 36 SHELTERED APARTMENTS (CATEGORY II), HOUSE MANAGER'S ACCOMMODATION, COMMUNAL FACILITIES, LANDSCAPING AND CAR PARKING FOR McCARTHY AND STONE (DEVELOPMENTS) LTD

SITE AT 262 HAWTHORN ROAD, ALDWICK, BOGNOR REGIS, PO21 2UP

As you are aware, planning permission was granted for the above mentioned development on 6th May 2008 subject to a number of planning conditions. This application seeks to vary Condition 17 and to remove (or vary) Condition 23.

The application is accompanied by a fee of £170 and the following plans/documents:

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Drawing No	Title	Scale
	OS Plan	1:1250

Stage 1 Safety Audit. The following plans should be viewed in the context of the Audit Report:

Drawing KWS 57 WSCC Pedestrian Refuge Islands Types R1 and R2;

Drawing/1441/006 Rev A Hard Landscaping Plan (Illustrating Access Details and Refuge) and Drawing 1441/002 Refuge Details

Designers Response to Safety Audit. The following plans should be viewed in the context of the Designers Response:

Drawing/1441/006 Rev B Hard Landscaping Plan (Illustrating Access Details – No Refuge);

Drawing 1441/002 Refuge Removed and

Drawing 6809/02 Rev A Tree Protection Plan

Correspondence:

WSCC letter 21/2/2006; MS letter 23/5/2007; WSCC letter 31/5/2007; WSCC letter 4/6/2008; WSCC letter 23/7/2008; WSCC letter 30/7/2008; WSCC letter 19/11/2008 and Report Update to BR/60/08

CONSIDERATION OF CONDITION 17

Condition No 17 states "The access from the site to the public highway shall be designed, laid out and constructed with kerb radii, visibility splays and sight lines in all respects in accordance with plans and details to be submitted to and approved by the Local Planning Authority before any other operation or use authorised by this permission is commenced."

Reason: In the interests of highway safety in accordance with policies DEV1, NE17 of the West Sussex Structure Plan and GEN7 of the Arun District Local Plan".

As you may recall, the above condition was in fact discharged in August 2008 (Your Ref CR/CP/1441). However as part of the review of Condition 23, it is proposed to carry out some judicious improvement to the approved access point (Condition 17). The realignment of the access drive would improve access and egress to the site; improve sight lines/visibility for

vehicles emerging on to Hawthorn Road and the provision of a footway on the eastern side of the access road would assist pedestrian movements within the site.

The condition could be amended to read *" The access from the site to the public highway shall be laid out and constructed with kerb radii, visibility splays and sight lines in all respects in accordance with Drawing/1441/006 Rev B Received on DATE TO BE INSERTED unless otherwise agreed in writing with the LPA."*

CONSIDERATION OF CONDITION 23

Condition No 23 states: "A new 2 metre wide footpath shall be provided on the north side of Hawthorn Road linking the existing path before any other development is commenced"

Reason: In the interests of highway safety in accordance with policy NE17 of the West Sussex Structure Plan".

As you are aware the Condition was amended by virtue of planning permission BR/229/08 for the footpath to be provided **".....prior to occupation"**.

When the Condition was imposed, the Highway Authority was of the view that it formed part of the highway (please see WSCC letter dated 21/2/2006). The Highway Authority became aware of the disputed status of the land during the course of the application (the applicant reliant on WSCC) and in its updating comments to BR/60/08 – Report Update advised
" Therefore if due to the doubts over the actual ability of the Applicant to provide the new footway and that subsequently the Planning Authority is minded to remove the requirement for the new footway, then no objection would be raised to this."

The comments cleanly indicated that whilst a footpath may have been considered desirable it was by no means essential (I note that on BR/369/05 and BR/48/06 – that the submitted plans stated that the verges were public highway and WSCC were also adamant that the verges formed part of the highway.)

The doubts about the status of the land No 252 Hawthorn Road have continued as you will see from the attached letters that WSCC subsequent to the grant of planning permission on 23rd

May 2008 has been unable to confirm that the land outside No 252 Hawthorn Road or beyond actually forms part of the highway.

While my Client would be happy to construct the footpath to link to the footpath which presently terminates outside of No 240 Hawthorn Road, this is clearly not possible due to uncertainty regarding the status/ownership of part or possibly the whole of land required to form the footway. A point now unresolved over a 12 month period or more.

Therefore with due regard to the Condition itself my Client would prefer to have the **Condition Removed** in its entirety. Accordingly I will address the appropriateness of the Condition with regards to Circular 11/95 Planning Conditions and to Circular 5/05 Planning Obligations.

Circular 11/95 – The Use of Conditions in Planning Permissions

Introduction

Circular 11/95 identifies the appropriateness of imposing conditions in order to enable planning permission to be granted where otherwise planning permission would have to be refused. Paragraph 2, states *"...The objectives of planning, however, are best served when that power exercised in such a way that conditions are clearly seen to be fair, reasonable and practicable..."*

Paragraph 3 goes on to stress that *"conditions should only be imposed where they are necessary and reasonable, as well as enforceable, precise and relevant both to planning and to the development to be permitted."*

Paragraph 4 identifies that under Section 73 of the Act, local authorities can grant planning permission to develop land that comply with conditions or indeed, vary such conditions.

With respect to financial contributions and other legislation paragraph 13 of Circular 11/95, which states *"permission cannot be granted subject to a condition that the applicant enters into a planning obligation under Section 106 of the Act or an agreement under other power".*

Paragraph 14 identifies the six tests necessary for the imposition of conditions. It states *"on a number of occasions the courts have laid down the general criteria for the validity of planning conditions. In addition to satisfying the courts criteria for validity, the Secretaries*

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of State take the view that conditions should not be imposed unless they are both necessary and effective and do not place unjustifiable burdens on applicants. As a matter of policy, conditions should only be imposed where they satisfy all of the tests described in paragraphs 14 – 42". In brief, these explain that conditions should be:

i) necessary;
ii) relevant to planning;
iii) relevant to the development to be permitted;
iv) enforceable;
v) precise; and
vi) reasonable in all other respects

Test (i) That the Condition is Necessary: Paragraph 15 makes it clear that in considering whether a particular condition is necessary, **"authorities should ask themselves whether the planning permission would have to be refused if that condition were not to be imposed. If it would not, then the condition needs special and precise justification. The argument that a condition will do no harm is no justification for its imposition: as a matter of Policy, a condition ought not to be imposed unless there is a definitive need for it. The same principle, of course, must be applied in dealing with applications for the removal of a condition under Section 73 or Section 73A: a condition should not be retained unless there are sound and clear cut reasons for doing so".**

Paragraph 17 goes on to state that **"conditions should be tailored to tackle specific problems, rather than impose unjustified controls".**

In order for a condition to be imposed, it must be necessary. Necessity is not simply a question of desirability but it must be clearly demonstrate that without such a condition a development should not be allowed to proceed i.e. that planning permission ought to be refused.

With regards to Condition 23, the issue is twofold, whether the Condition itself is necessary and secondly whether the required performance is reasonable. The Planning Report Update BR/60/08 Agenda Page 83-96 which quotes the comments of the Highway Authority states:

"I should also add that there are adequate pedestrian facilities on the opposite side of Hawthorn Road along with a suitable crossing point in the vicinity of the proposed development. Residents of the proposed care home would therefore be able to cross Hawthorn Road safely and conveniently. Therefore if due to the doubts over the actual ability of the Applicants to provide the new footway and that subsequently the Planning Authority is minded to remove the requirement for the new footway, then no objection would be raised to this."

The comments indicate that the existing facilities were and are appropriate and that residents could conveniently cross Hawthorn Road utilising the existing facilities. The comments further indicate that the provision of a footpath was thought desirable as opposed to essential. Indeed their comments relate to the use of the site as a "care home" rather than a sheltered development with its higher level of non ambulatory residents.

The concluding sentence is also telling as it indicates that if the footpath could not be provided (should the claims regarding the ownership of the strip of land outside 252 Hawthorn Road be true or unresolved) that there would not be any objection to removing the condition. It now appears that the uncertainty regarding the verges extends beyond 252 Hawthorn Road.

It must therefore be the case that the footpath sought by the Condition is a matter of desirability rather than necessity and thus the condition itself **fails Test (i) necessity**. It is also unreasonable to preclude development based on a dispute over land which my Client has no control.

The issue of ownership between the Highway Authority and the owners of 252 Hawthorn Road of the strip of land outside this property appears to be unresolved. Indeed it appears that the status of the land along the remaining frontages is also uncertain. Consequently my Client does not know whether it can construct the footpath; if it cannot, the Council could potentially serve a Breach of Conditions Notice although it would not be enforceable.

Test (ii) Relevant to Planning: Paragraphs 22 and 23 of the Circular set out guidance that planning conditions should be relevant to planning and not duplicate other controls. The

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condition as a matter of principle is not irrelevant to planning but if it is unnecessary (or unlawful) in the first place, this test is somewhat redundant.

Test (iii) Relevant to the Development to be Permitted: Paragraph 24 states that **"unless a condition fairly and reasonably relates to the development to be permitted, it will be ultra vires".** Paragraph 25 explains this in more detail. It identifies that it is not sufficient that **"a condition is related to planning objectives: it must also be justified by the nature of the development permitted or its effect on the surroundings".**

In order for off-site works and/or a financial contribution to be required, it must be shown that it arises because of the nature of the development permitted or its affect on the surroundings. As paragraph 25 of Circular 11/95 states, the desirability of achieving broad planning objectives does not justify the imposition of such conditions. In this instance as discussed in relation to the "necessity test", the need for the footpath is not required.

Test (iv) Enforceable: Paragraph 26 makes clear that conditions should not be imposed if such cannot be enforced. If the condition is not necessary in the first instance enforcement would not be appropriate or expedient. In this respect a Breach of Conditions Notice could not be complied with by my Client unless the land in question was within its control or with the consent of a third party. The Highway Authority when it suggested the condition assumed that it was within its control.

However, even if the land was part of the highway, the condition should not have been imposed as the land did not form part of the application site. The condition is therefore unlawful as well as unenforceable.

Test (v) Precision: Paragraphs 30 to 33 identify the importance of precision in framing conditions. This issue is not central to the applicant's case, but the uncertainty underlying the condition as to whether or not it involves highway land hardly makes its requirement precise.

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Test (v) Reasonable In All Other Respects: Firstly paragraph 36 of the Circular is applicable to this particular case. It states **"Even when a condition would not be so unreasonably restrictive as to be ultra vires** (ref paragraphs 34 and 35 author's comments)**, it may still be so onerous that as a matter of policy it should be avoided."**

Paragraph 37 repeats the importance of taking care if the conditions require works to be carried out on land, which is not within the control of the applicant. Indeed, paragraph 38 makes it abundantly clear that it would be unreasonable **"to impose a condition worded in a positive form which developers would be unable to comply with themselves, or which they could comply with only the consent or authorisation of a third party".**

In this particular case, while the applicant is precluded from constructing the footpath due to a dispute between the Highway Authority and the owners of 252 Hawthorn Road, and possibly other owners. But even if such a dispute did not exist, the fact remains that:

(i) the necessity of the Condition per se is not required;
(ii) even if the Condition was necessary, it is unenforceable and unlawful.

Secondly, the reason for the imposition of the condition as set out in the Update Report is not due to necessity but because the Highway Authority wished for *"any disputes over the extent of the highway would have to be first resolved*". This is placing an unreasonable burden on the applicant regarding a matter under which it has no control and for a purpose which from the comments of the Highway Authority identified as not being strictly necessary.

The test of **"reasonableness in all other respects"** is such that even if the first four tests of Circular 11/95 were met, that the condition is still inappropriate. I submit that in this case the issues identified in relation to the first four tests "spill over" in to the issue of reasonableness. I submit that the condition unreasonable even were it to be lawful.

Circular 5/05 Planning Obligations

The requirements of this Circular are fundamental in this Appeal because if its requirements are not met, a "contribution" whether financial or otherwise, cannot be requested. In such circumstances planning permission should neither be withheld nor only approved subject to the imposition of unwarranted planning conditions.

The tests of Circular 5/05, are similar to those in Circular 11/95. The Circular in Paragraph B3 explains that Section 106 Agreements are only intended to make *"acceptable development, which would otherwise be unacceptable in planning terms"*. The comments from the Highway Authority set out in the Planning Report Update make it clear that the provision of the footpath is not necessary to make the development acceptable.

Paragraph B5 makes clear that contributions should *"only be sought where they meet all of the following tests."* It states that a planning obligation must be: (i) *necessary, (ii) relevant to planning, (iii) directly related to proposed development, (iv) fairly and reasonable related in scale and kind to the proposed development, (v) reasonable in all other respects.*

The remainder of the Circular must be read within the context of Paragraph 5 and the five tests. It is only if all five tests are met, that a contribution can be sought, or in this case the "footpath" required by Condition No 23.

Paragraphs B6 adds that planning permissions should not be "*bought or sold*" and paragraph B7 states that *"...obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a betterment levy*". If the footpath is not necessary as required by Circular 11/95 or Paragraph B5 of Circular 5/05, its provision cannot be but a levy on the development.

Paragraphs B8 and B9 set out further explanation regarding the five tests. Paragraph 8 makes it clear that even if a contribution is required that such should only be pursued "*that development ought not to be permitted without them - for example paragraph there should be a functional or geographical link between the development and the item being provided...*"

Paragraph B9 states that *"Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development"*.

The five tests are in my view explicit, restrictive and place the burden upon the decision maker not only to justify each and every request, but to then assess and apply "planning

balance" to the matter having regard as to whether: *"the development ought not to be permitted without them..(para B8 Circular 5/05)".*

Having failed to meet the tests of Circular 5/05, it is contended that there is no basis for the imposition of the Condition 23.

Policy Justification

Condition 23 is justified on the basis of Policy NE17 of the Structure Plan. However this is a "permissive" strategic policy rather than one requiring highway works to be carried out in association with proposed developments. The policy basis for the condition is unsound.

Conclusion

While it would be preferable to remove the Condition in its entirety (not least because it is considered to be unenforceable), my Client remains willing to construct the footpath up to the boundary with 252 Hawthornn Road (and potentially beyond if WSCC could categorically confirm that it formed part of the highway). Condition 23 could be varied as follows: ""**A new 2 metre wide footpath shall be provided on the north side of Hawthorn Road on highway land up to the boundary with 252 Hawthorn Road before the development hereby approved is occupied.**

My Client has also investigated the Highway Authority's suggestion to terminate the footpath at the boundary with the disputed land outside of 252 Hawthorn Road and to install of a new pedestrian refuge on Hawthorn Road. It was because of this investigation which involved the Safety Audit undertaken by Mr Williams that revisions to the access drive as described in relation to Condition 17 are now proposed.

With respect to a pedestrian refuge, the applicant first considered providing refuge to the south eastern end of the site near but the carriageway width was insufficient to safely accommodate it. Therefore an alternative location, as shown on the plans to the south west of the site was proposed (the subject of the Safety Audit).

While such a refuge would be safe, as identified in paragraph 2.4 of the Safety Audit, its actual need is questionable given the fact that most movements would be in a westerly direction where there would be ready access to the existing crossing. Residents wishing to travel eastwards

could also utilise the existing crossing point. Alternatively they could cross the road at a point close to the eastern boundary of the site; Hawthorn Road is not heavily trafficked. Dropped kerbs with tactile paving could be incorporated in any new footpath up to the disputed land outside 252 Hawthorn Road.

If there are any aspects of the application that you wish to discuss do not hesitate to contact me.

Yours sincerely

[redacted]

Principal Planning Associate

αβχδ VALIDATION CHECKLIST

APPLICATION FOR REMOVAL OR VARIATION OF A CONDITION FOLLOWING GRANT OF PLANNING PERMISSION (SECTION 73 OF THE TOWN AND COUNTRY PLANNING ACT 1990)

Three copies of all documents unless stated otherwise or submitted electronically. This form must be completed in accordance with the Arun District Council Validation checklist National and Local list of requirements. Failure to complete all boxes will result in your application being returned as invalid.

	YES	N/A
Completed form *	☑	
Completed Ownership Certificate	☑	
Location plan	☑	
The appropriate fee (if n/a, why?)	☐	☐