

TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF MISTLETOE FARM

DOMULSEA DEVELOPMENTS LIMITED

OPINION

Introduction

1. On 6 March 2019 Arun District Council (“ADC”) granted outline planning permission (CM/37/18/OUT) for Domusea Developments Limited’s re-development of what is previously developed land at Mistletoe Farm, Horsemere Green Lane, Littlehampton for the erection of two 4-bedroom detached bungalows. The permission contained a number of conditions. Condition 1 related to the time limit for the submission of the reserved matters in relation to layout, scale, appearance and landscaping. Condition 4,5 and 6 related to drainage. Condition 4 stated to be a pre-commencement condition, but I have no instructions as to whether its imposition was agreed beforehand with the applicant.
2. Subsequent to the grant of outline planning permission, the relevant officer at ADC dealing with drainage matters has sought, in effect, to widen the scope of the original condition by objecting to the reserved matters application (CM/13/19/RES) on the basis of her assertion that the information supplied is somehow inadequate. For the reasons set out below, her approach is legally flawed.

The Outline Planning Permission

3. The decision notice also contained a number of informatives regarding drainage but, as is accepted law, informatives do not form part of the operative provisions

of a planning permission, are of no legal effect and had any of those matters covered by an informative been crucial to the development, they should have been dealt with by being incorporated within the body of a relevant and appropriately worded condition specific to that development.

4. In this case it is also important to stress that the application site is located in an established residential area, contains an existing bungalow and is located close to a scheme for up to 300 dwellings granted on appeal (APP/C3810/W/17/3187601).
5. In preparing this Opinion I have studied both the documents supplied with my instructions and the online record of this application including the Planning Statement and the statement regarding drainage matters (which demonstrated that the development could be satisfactorily drained). I have also examined the relevant policies of the adopted Arun Local Plan. As mentioned above, had there been any issue with drainage then it should have been dealt with before outline planning permission had been granted. It was not. It is clear, therefore, that the principle of the development (and its overall acceptability in drainage terms) is beyond dispute.

The Law

6. More generally, as a matter of law, the scope of the development permitted by a planning permission is defined in the description of the permitted development and in the specific wording of the conditions. Informatives on planning permission are legally irrelevant – as can be seen from the fact that the enforcement mechanism contains no means of enforcing against any breach of an informative. Furthermore, the extremely limited relevance and status of informatives was illustrated by Keene J in *R v Ashford Borough Council, ex parte Shepway Borough Council* (1999) PLCR 12. As with any issue of interpretation of a planning permission (which ultimately is a matter of law for the courts), what matters with is the wording of the description of the permitted development together with the wording of any condition and the reason for its imposition. The wording binds the local planning authority as much as it binds the applicant.

7. Whilst the power to impose planning conditions is set out in broad terms in section 70(1) of the Act, it is settled law that the discretion is not unfettered – see Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,'; nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their power for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction ..."

8. This formulation has been endorsed in numerous cases. It was most recently endorsed by the Supreme Court in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] – see Lord Hodge JSC at paragraphs 28 – 32 where he discussed the requirements for a condition to be lawful. In paragraph 28 he summarised the law as follows:

"28 A planning condition is a statutory creation. Section 37(1) of the 1997 Act (para 26 above) and similar legislative provisions in England and Wales (section 70(1) of the Town and Country Planning Act 1990 ("the 1990 Act")) authorise a planning authority to impose planning conditions when it grants a planning permission. The apparently unlimited power ("subject to such conditions as they think fit") has long been interpreted restrictively by the courts to prevent its abuse. The courts have formulated three principal constraints. First, the conditions must be imposed for a planning purpose and not solely to achieve some ulterior object, however desirable in the public interest that object may be. Secondly, the conditions must "fairly and reasonably relate to the permitted development". Thirdly, the conditions must not be unreasonable in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, 233-234)."

9. It follows from the above that the imposition of a condition, without any technical or other supporting justification for so doing, would be unlawful.
10. It is trite law that in most circumstances (such as apply to this permission) each development must be determined on its own merits. What may or may not have

been imposed on another development elsewhere in relation to drainage matters will ordinarily be irrelevant. The application of a blanket policy outside the terms of the adopted local plan may also be considered unreasonable unless the local planning authority were able to justify its application to a specific development. To do otherwise would give rise to the suspicion that the blanket policy had been adopted for an ulterior purpose and was outside the legal powers of the local planning authority.

Policy considerations

11. In addition, to the legal requirements in relation to conditions, national planning policy is also highly relevant. National planning policy is to be found in the NPPF (July 2018). The national policy regarding conditions is long-established and both mirrors and supplements the legal position.
12. The key advice is to be found in paragraphs 54 & 55 of the NPPF. In short, planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. By failing to take into consideration the clear advice in the NPPF, a local planning authority will have failed, in law, the statutory duty to take into account all material consideration as required by section 38(6) of the Planning and Compensation Act 2004.
13. Further detail on the application of the national planning policy is to be found in the National Planning Guidance. It makes clear that conditions should only be imposed where all six tests mentioned above are satisfied. Any proposed condition that fails to meet any of the six tests must not be imposed, even if the applicant agrees to it. Conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness.
14. This national policy also affects the way in which the local planning authority subsequently discharges conditions such as the drainage condition on this planning permission. If it acts unreasonably then it will have failed to act in

accordance with national planning policy and guidance and, furthermore, it could lay itself open to the accusation that it is reneging on its earlier grant of planning permission. Fundamentally, the local planning authority will have to demonstrate, with evidence, that its action was justified if an appeal under section 78(1)(b) were to be pursued. The officer in question must also be prepared to have to justify their stance under cross-examination. If the local planning authority were then unable to demonstrate that the additional requests for further drainage information were reasonable, it is likely that an award of costs would be made against it. It is important also to mention that inspectors now have the power to unilaterally award costs for unreasonable conduct even if the appellant has not sought such an award.

15. Finally, in relation to policy, it appears that the attitude of the officer is at odds with the policy in paragraph 38 of the NPPF to approach proposed development in a positive and creative way.

Discussion

16. In this case the outline planning permission was granted on 6 March 2019. Subsequently, in emails (most particularly of 16 April and 22 May [and 29 May 2019 from Laura Gibbons]) the local planning authority have asserted, without any technical evidence in support or explanation, that the information supplied is “inadequate” and is currently recommending refusal of the reserved matters application (CM/13/19/RES). The email of 29 May 2019 from Laura Gibbons makes reference to policy W DM3: Sustainable Urban Drainage Systems. However, no attempt has been made by her to identify any contravention of the specific wording of that policy. In short, I fail to see how the drainage scheme for this development contravenes any of the drainage policies referred to in the outline decision notice. Furthermore, Domusea’s drainage engineer is confident that the drainage scheme proposed by Domusea is acceptable. It is also unacceptable and unreasonable for the officer to seek to justify her requirements on what she has sought to impose on another unrelated development.

Conclusion

17. In my opinion, the approach currently being taken by the local planning authority with regard to drainage matters is unreasonable and wholly without justification.
18. The interpretation of a planning permission is ultimately a matter for the courts. The law is clear. The scope of the planning permission is defined by the description of the development permitted and by the precise wording of the conditions and reasons for the imposition of those conditions. Informatives have no legal effect. Any condition imposed on a planning permission must as a matter of law meet three tests: first, it must be imposed for a planning purpose and not solely to achieve some ulterior object, however desirable in the public interest that object may be; secondly, the condition must "fairly and reasonably relate to the permitted development"; and, thirdly, the condition must not be unreasonable in the *Wednesbury* sense. Furthermore, any condition must also comply with the policy set out in the NPPF and in the national planning guidance.
19. Each development must be viewed on its own merits. Where a specific technical reason for the imposition of a condition exists, it should be clearly dealt with by the imposition of a relevant condition for that purpose. If a local planning authority either imposes a condition or, subsequently, refuses to discharge a condition where the application to discharge meets with the technical requirements of the condition without technical justification it will have acted unreasonably and, possibly, unlawfully and could be subject to an award of costs on any related section 78 appeal. Similarly, the application of a non-statutory or informal blanket policy as suggested by the officer in her email of 29 May 2019 may well be unlawful.
20. In the event that ADC refuses to grant consent for the reserved matters application (CM/13/19/RES) then an appeal under section 78 will become necessary. It is the only avenue of legal challenge available at this stage (the

courts require all statutory avenues of appeal to be used before an application to the court can be made). In my opinion, a refusal grant consent for the reserved matters application (CM/13/19/RES), in the absence of any technical justification (and none has been offered), would result in an appeal under section 78 and in my view the prospects of the appeal succeeding are high, as are the prospects of an application for costs against the authority.

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