

**Application Number:** 19/02988/CLUP

**Description** Certificate of Lawful Development (Proposed) for implementation of planning permission 15/02337/OUT and reserved matters application 18/01304/REM without compliance with condition 14 of reserved matters approval under reference 18/01304/REM.

**At** Land North And West of Wavendon Business Park, Ortensia Drive, Wavendon Gate Milton Keynes

**For** Mr George Harkins, Abbey Developments Limited, Abbey House, 2 Southgate Drive, Potters Bar, EN6 5DU

**Statutory Target:** 03.01.2020

**Ward:** Danesborough and Walton

**Parish:** Wavendon Parish Council

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## **1.0 RECOMMENDATION**

### **1.1 Recommendation A**

It is recommended that permission is refused due to the fact that non-compliance with condition 14 will cause a detrimental effect to the residential amenities of the future occupants of the proposed dwellings, by virtue of the likely impact of operational noise associated with the adjoining Stables venue.

### **1.2 Recommendation B**

That appropriate enforcement action is undertaken if works are commenced on site without the discharge of condition 14 of reserved matters application 18/01304/REM and delegated to officers, in agreement with the chair and vice-chairs of Development Control Committee.

## 2.0 INTRODUCTION

### The Site

- 2.1 The site lies directly to the North of Wavendon Business Park and to the East of Ortensia Drive. To the north the site is bounded by land for which two residential developments have been approved; the north western parcel to the site being outline approved (ref: 17/03205/OUT) and the north eastern parcel to the site benefiting from Reserved Matters approval (ref: 17/03283/REM).
- 2.2 To the east of the site lies 'The Stables'. This is an established live music venue with two stages, dining and conference facilities. Events are held daily on the site along with around 250 educational sessions a year, and it is licenced until 2am.
- 2.3 The application site has extant reserved matters planning permission for 134 residential units and a convenience retail store of 100 sq m under planning reference 18/01304/REM dated 11.04.2019. This related to an earlier outline planning permission 15/02337/OUT dated 08.02.2017. As part of the reserved matters application reference 18/01304/REM, a condition (No. 14 - Deed of Easement) was attached requiring a Deed of Easement in respect of noise, which is as follows:
- 2.4 *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.*
- Reason: 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).*
- 2.5 The purpose of the condition is to protect the residential amenity of future residents of the development from noise at The Stables music venue and in turn, to ensure that The Stables can continue in its current use. It should be noted that this would not affect the resident's legal rights to be protected against statutory noise nuisance.

### The Proposal

- 2.6 The proposal is seeking permission to implement the extant planning permission at the site without compliance with Condition 14. The form of the application as a Certificate of Lawful Proposed Development is based on the assertion by the applicant that the implementation of the planning permission without compliance with condition 14 would be lawful. This is on the basis that the imposition of this condition is beyond the remit of the Local Planning Authority.

### Reason for Referral to Committee

- 2.7 The application has been referred to committee due to the level of controversy and public interest related to the previous reserved matters planning application at the site reference 18/01304/REM.

### Scope of Debate/Decision

- 2.8 As a Certificate of Lawful Proposed Development, this application needs to be considered using Section 192 of the Town and Country Planning Act 1990, which sets out the details that are to be taken into consideration when a Local Planning Authority is determining a certificate of lawfulness for proposed use. This differs to the usual process used for regular planning applications.
- 2.9 Section 192 (2) states:  
"If, on an application under this section, the Local Planning Authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application."
- 2.10 The proposal itself is described in paragraph 2.6 above. The case put forward by the applicant in support of the application is discussed in more detail later in the report.

## **3.0 RELEVANT POLICIES**

- 3.1 The proposal is for a Certificate of Lawful Development (Proposed) under Section 192 of the Town and Country Planning Act 1990 (as amended)
- 3.2 It is not a planning application and so there is no relevant planning policy related to the proposal as such.

## **4.0 RELEVANT PLANNING HISTORY**

**15/02337/OUT** – Outline application for up to 134 residential units, 75-100 sq m 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  
Application Permitted 08.02.2017

**18/01304/REM** - Reserved matters application for internal access, appearance, landscaping, layout, and scale for 134 residential units, 100 sqm of A1 (retail use)  
Application Permitted 11.04.2019  
(Deed of Easement was applied as Condition 14 at Development Control Committee at the instruction of members.)

**19/01357/REM** - Reserved matters application following 15/02337/OUT for internal access, appearance, landscaping, layout, and scale for Phase One (west side) comprising 79 residential units.  
Application Permitted 16.08.2019

(Deed of Easement was applied as Condition 25 at Development Control Committee at the instruction of members.)

## **5.0 CONSULTATIONS AND REPRESENTATIONS**

5.1 The proposal is for a Certificate of Lawful Development (Proposed) under Section 192 of the Town and Country Planning Act 1990 (as amended).

5.2 It is not a planning application and so there are no statutory requirements for consultation of neighbours, elected members or third parties. However, consultation with Ward Councillors was undertaken due to the scale of interest in the previous applications. In addition a representation was received by representatives of 'The Stables' live music venue.

5.3 Cllr D Hopkins Danesborough and Walton

Concerns highlighted about the impact on The Stables music venue.

5.4 Cllr V Hopkins Danesborough and Walton

No comments received

5.5 Cllr Bramall Danesborough and Walton

No comments received.

5.6 Stables Music Venue

Concerns highlighted in relation to the application and the harmful impact this could have on the Stables, summarised below:

- Concerns that no consultation was undertaken with the Stables, despite the level of interest in the scheme.
- The developer has stated that the deed of easement would affect sales values but evidence has not been provided and this resistance to the deed of easement is based more on an in-principle objection.
- The legal issues regarding Condition 14 were addressed at the second Committee Meeting, with QC opinion provided supporting the Condition and Members made a unanimous decision that the condition should be attached.
- Request for members and officers to bear in mind the previous decision made.
- Noise is a material consideration for the Reserved Matters stage

## **6.0 MAIN ISSUES**

- a) Background to Application
- b) Consideration Of Current Application
- c) Potential Future Enforcement

## 7.0 CONSIDERATIONS

### Background to Application

- 7.1 The reserved matters application reference 18/01304/REM for the erection of 134 dwellings was recommended by officers to be approved without a condition requiring a Deed of Easement of noise to be entered into. However Members disagreed with officers and approved the development but felt it necessary to include such a condition and this was subsequently added to the decision (as Condition 14). The reason for the imposition of the condition by members is set out in paragraph 2.5 of this report.
- 7.2 As part of this Certificate of Lawfulness application, the applicant has submitted a legal opinion by Matthew Reed QC. The opinion concludes that *“[c]ondition 14 is ultra vires and therefore is invalid. It is of no effect and if the development under the Outline Permission commenced in breach of Condition 14, it would nevertheless be an effective implementation of the Outline Permission. Consequently, a certificate should be issued which certifies that the implementation of the Reserved Matters Approval without compliance with Condition 14 would be lawful”*
- 7.3 The Council sought a legal opinion from Counsel for reserved matters application 18/01304/REM. Counsel opinion was that a Deed of Easement was capable of being a material planning consideration where it is considered necessary to make the development acceptable in planning terms. In the report to Development Control Committee, officers were of the view that the application was considered acceptable in planning terms due to the mitigation measures that were agreed and would have been put in place, therefore it was not considered necessary that the applicant enter into a Deed of Easement.
- 7.4 A further legal opinion was submitted on behalf of Wavendon Allmusic Plan Ltd, who own the Stables adjoining the site. This opinion advised that an additional measure in the form of a Deed of Easement would be lawful.

### Consideration of Current Application

- 7.5 The applicant states that Condition 14 of planning permission 18/01304/REM is ultra vires and on that basis is unlawful. However, when the reserved matters application was considered by Development Control Committee, and due to the number of objections received and representations made, members were very concerned about the impact of the adjacent Stables music venue on the future occupiers of the proposed dwellings and how the proposed dwellings may affect its viability in the future. Consequently, when weighing up all the issues and the legal advice given, the Committee decided to impose the condition requiring the deed of easement.
- 7.6 Officers are of the view that no new evidence or information has been provided with this current application to convince the Local Planning Authority that the development can be implemented without compliance with the condition. Therefore, the application is recommended for refusal.

## Potential Future Enforcement Issues

- 7.7 Section 278 highways works are currently taking place, and there are a number of other pre-commencement conditions that need to be approved prior to commencement of development. However, if works were to commence without compliance with Condition 14, enforcement action could be taken by the Local Planning Authority for a breach of the condition. The type of enforcement action would depend on the nature of any particular breach. For example, a breach of condition notice may be served, and if the Courts found in favour of the Local Planning Authority, the penalty would be a fine. However, the Local Planning Authority may also consider serving a temporary stop notice. This ensures that work on site ceases whilst the Local Planning Authority decides whether to issue a formal enforcement notice (28 day period). Members need to be aware that there is a risk of compensation to the applicant if the notice is not upheld.
- 7.8 Based on the controversial nature of the application and the number of representations in relation to the reserved matters application, it is recommended that Development Control Committee should agree that enforcement action should be taken if there is a breach of planning control. Members are recommended to delegate to officers, in agreement with the chair and vice chair of Development Control Committee, the necessary enforcement action should it be required.

## **A1.0 FULL CONSULTATIONS AND REPRESENTATIONS**

The proposal is for a Certificate of Lawful Development (Proposed) under Section 192 of the Town and Country Planning Act 1990 (as amended)

### **A1.1 Cllr D Hopkins Danesborough and Walton**

I will not comment or support discharging anything until The Stables are content.

The future security of this iconic MK Music venue is the most important issue in all of this.

### **A1.2 Cllr V Hopkins Danesborough and Walton**

No comments received

### **A1.3 Cllr Bramall Danesborough and Walton**

No comments received.

### **A1.4 Stables Music Venue**

Thanks to the diligence of one of The Stables customers, we have been alerted to a CLOPUD application by Abbey Homes requesting that Milton Keynes Council confirms that carrying out the development to the west of The Stables without complying with condition 14, which the Planning Committee determined at their meeting on 1 August 2019, will be lawful.

Although there is no formal obligation for a Local Planning Authority to consult on a CLOPUD application, the fact that The Stables hasn't been approached for comment (e.g. to provide a legal view on the points being raised) is shocking, given the enormous interest in the development and its impact on The Stables. There is nothing to prevent the Local Planning Authority consulting on a CLOPUD application and this is surely an example of where this should have happened. At the very least, The Stables could and should have been notified that the application had been submitted.

This is yet another attempt – the third in fact – by the developers to avoid the condition which was applied – twice – by the Planning Committee, and which will protect the future of The Stables and future residents. The application re-runs the legal arguments that were aired during the Committee Meetings and seeks a determination that the committee decision was ultra vires.

The developers have stated that the reason for the application is because the need for a deed of easement is affecting sales values. However, no evidence has been provided that this is the case. Instead, it is our belief that the developers have an in-principle objection to the deed, as they have consistently said they will never sign one, and have spent thousands on legal advice to make their case, forcing The Stables (a charity) to do the same.

The legal issues were played out particularly strongly in the second Committee Meeting. That Committee was presented with barristers' Opinions on the matter and were advised by Officers that condition 14 – a deed of easement on the whole of the development site – could be unlawful. They were also informed that the view of David Elvin QC (acting for The Stables and one of the country's leading planning barristers), was that it would be lawful. Having heard the arguments, the Members were unanimous in their decision that the condition should be imposed and stated that they would 'robustly defend' any attempt to undermine that decision – in Court if necessary.

This application will not be heard at Committee, as it's not a planning application. Instead, the decision on the future of The Stables will be taken out of the hands of elected Members and placed firmly in the hands of your Officers.

Whilst we hope that your Officers will respect and apply the previous decisions of Members on this matter – as nothing has changed – we are writing to ensure that the Members' views are placed at the forefront of that decision so that the application is refused.

It is perhaps worth us reminding Milton Keynes Council that The Stables has had to fight every step of the way to defend its ability to continue its operations without fear of the proposed developments impacting adversely. We have attended many meetings with planning officers over the years who continually stressed that our concerns would be resolved at Reserved Matters stage and that we shouldn't worry about outline applications and permissions.

We therefore trust that Milton Keynes Council will stick to that advice. Noise is a material consideration for the Reserved Matters stage. It is no different to the quality of the building materials proposed. The detail of noise assessments matters. It also matters that the national guidance for planning authorities has changed during this period (2015-2019) and planning decisions have created precedents for difficult cases like this where deed of easements have been imposed to protect music venues.

The developers have sought to overturn the condition of a deed of easement twice and twice Milton Keynes Council has stood up to its responsibilities, in full knowledge of the legal risks. Nothing has changed!

To that end, we trust that Milton Keynes Council's resolve and commitment to protect the future of one of its few cultural assets will continue and that the CLOPUD will be refused.

Appendix 1

Site Location Plan

