DELEGATED DECISION OFFICER REPORT

AUTHORISATION	INITIALS	DATE
File completed and officer recommendation:	ML	05/02/2020
Planning Development Manager authorisation:	TF	07/02/2020
Admin checks / despatch completed	CC	07/02/2020
Technician Final Checks/ Scanned / LC Notified / UU Emails:	KM	07/02/2020

Application: 19/01728/LUPROP **Town / Parish**: Clacton Non Parished

Applicant: Tendring Developments Ltd

Address: Elm Farm Little Clacton Road Clacton On Sea

Development: Occupation of 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.

1. Town / Parish Council

Clacton – No Town Council

2. Consultation Responses

n/a

3. Planning History

16/00740/OUT	Outline planning application with all matters reserved for residential development of 14 dwellings.	Refused **(Appeal Allowed)**	10.08.2016
17/01550/DISCON	Discharge of Condition 4 (Construction Method Statement) of application 16/00740/OUT (APP/P1560/W/16/3164552).	Approved	15.09.2017
17/01642/HRN	Removal of 100 metres of hedge and ditch. Ditch to be piped.	Approved	24.10.2017
18/00662/FUL	14 bungalows.	Approved	17.10.2018
19/00889/DISCON	Discharge of conditions 2 (Landscaping), 4 (Boundary Treatment), 9 (Dropped Kerb), 10 (Estate Roads), 11 (Residential Information Pack) and 13 (SUDS) of approved application 18/00662/FUL.	Approved	31.07.2019
19/01728/LUPROP	Occupation of proposed development of 14 dwellings without the ability for compliance	Current	

with Condition 5 imposed upon planning permission 18/00662/FUL in respect of the provision of 2m footpaths connecting to the existing footways.

4. Relevant Policies / Government Guidance

n/a

Status of the Local Plan

The 'development plan' for Tendring is the 2007 'adopted' Local Plan. Paragraph 213 of the NPPF (2019) allows local planning authorities to give due weight to adopted albeit outdated policies according to their degree of consistency with the policies in the NPPF. Paragraph 48 of the NPPF also allows weight to be given to policies in emerging plans according to their stage of preparation, the extent to which there are unresolved objections to relevant policies and the degree of consistency with national policy. As of 16th June 2017, the emerging Local Plan for Tendring is the Tendring District Local Plan 2013-2033 and Beyond Publication Draft.

Section 1 of the Local Plan (which sets out the strategy for growth across North Essex includin Tendring, Colchester and Braintree) was examined in January and May 2018 and the Inspector's initial findings were published in June 2018. They raise concerns, very specifically, about the three 'Garden Communities' proposed in north Essex along the A120 designed to deliver longer-term sustainable growth in the latter half of the plan period and beyond 2033. Further work is required to address the Inspector's concerns and the North Essex Authorities are considering how best to proceed.

With more work required to demonstrate the soundness of the Local Plan, its policies cannot yet carry the full weight of adopted policy, however they can carry some weight in the determination of planning applications. The examination of Section 2 of the Local Plan will progress once matters in relation to Section 1 have been resolved. Where emerging policies are particularly relevant to a planning application and can be given some weight in line with the principles set out in paragraph 48 of the NPPF, they will be considered and, where appropriate, referred to in decision notices. In general terms however, more weight will be given to policies in the NPPF and the adopted Local Plan.

In relation to housing supply:

The NPPF requires Councils to boost significantly the supply of housing to meet objectively assessed future housing needs in full. In any one year, Councils must be able to identify five years' worth of deliverable housing land against their projected housing requirements (plus an appropriate buffer to ensure choice and competition in the market for land, account for any fluctuations in the market or to improve the prospect of achieving the planned supply). If this is not possible, or housing delivery over the previous three years has been substantially below (less than 75%) the housing requirement, paragraph 11 d) of the NPPF requires applications for housing development needing to be assessed on their merits, whether sites are allocated for development in the Local Plan or not. At the time of this decision, the supply of deliverable housing sites that the Council can demonstrate falls below 5 years and so the NPPF says that planning permission should be granted for development unless the adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework as a whole. Determining planning applications therefore entails weighing up the various material considerations. The housing land supply shortfall is relatively modest when calculated using the standard method prescribed by the NPPF. In addition, the actual need for housing was found to be much less than the figure produced by the standard method when tested at the recent Examination In Public of the Local plan. Therefore, the justification for reducing the weight attributed to Local Plan policies is reduced as is the weight to be given to the delivery of new housing to help with the deficit.

5. Officer Appraisal (including Site Description and Proposal)

The Law

The Town and Country Planning Act 1990 s 72 [TCPA] section 191(3) 1990 provides so far as is relevant to this matter that:

"uses and operations are lawful at any time if:

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

Section 192 of the TCPA provides that any person who wishes to ascertain whether:

"(a) any proposed use of buildings or other land; or
(b) any operations proposed to be carried out in, on, over or under land, would be lawful may apply to the LPA for a certificate.

The TCPA 1990, s 192(2) requires that if TDC are satisfied that the proposed use or operations 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'. The onus of proof is on the applicant who must prove the application on the balance of probabilities.

The Council have to be satisfied that the proposal does not require express planning permission. In considering this question, TDC will have to take into account not only the definition of development, permitted development rights etc, but also whether the proposals would involve a breach of any condition or limitation subject to which planning permission has already been granted DOE Circular 10/97, Annex 8, para 8.27 (cancelled but helpful).

The Application

This application is made under section 192 and asserts that the proposed use by occupation of the dwellings without complying with condition 5 of 18/00662/FUL would be lawful. The applicant considers that condition 5 was improperly imposed and is invalid. Condition 5 seeks to secure the following;

Prior to the first occupation of the development, the proposed estate road, at its bellmouth 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.

It is the applicant's assertion that Condition 5 cannot be implemented in respect of the provision of a 2m footway to connect with the existing footways, both in terms of width and the fact that there is no footway connection to the north of the proposed access.

Consideration

Power to impose conditions

The Town and Country Planning Act 1990 s 72 provides the power to impose conditions on the grant of planning permission, which although wide, is not unlimited. In particular, a condition must have a planning purpose, must fairly and reasonably relate to the permitted development, and must be such as a reasonable planning authority could properly impose. A condition must be

certain, in the sense of being capable of being given a sensible or ascertainable meaning, but there is not a complete bar on implying terms.

Conditions imposed can be challenged by the applicant in two ways. Firstly the applicant can appeal against a conditional grant of planning permission in the ordinary way under the TCPA 1990, s 78.

Secondly an application may be made by the applicant to the High Court for judicial review of the LPA's decision to impose the condition, with a view to obtaining an order of certiorari to quash it or a declaration that it is invalid.

The effect of a successful challenge

If a condition is declared by the court to be invalid, the planning permission itself will be a nullity unless the offending condition can be severed from the permission, although a condition which is fundamental or important cannot be severed. In Hall & Co Ltd v Shoreham-by-Sea UDC1 [1964] 1 All ER 1, [1964] 1 WLR 240, 15 P&CR 119, CA. conditions requiring construction of a service road along the company's frontage and to give rights of passage over it to and from roads on adjoining land were found invalid and fundamental, so the permission fell when the conditions were found invalid.

Can the validity be challenged by the current application?

Legal advice taken is of the view that the Council do not have the power to decide that a condition imposed by itself on a planning permission is invalid. After the issue of a planning permission any question of validity is a matter for either the court by way of judicial challenge or by way of an appeal against conditions imposed.

In Basingstoke & Deane Borough Council v Secretary of State for Communities and Local Government [2009] EWHC 1012 (Admin) the High Court upheld a decision by a Planning Inspector to grant a certificate of lawfulness on the basis that the agricultural occupancy condition breached was invalid. Thus it is clear that on appeal an Inspector would have power to decide an invalidity point in relation to the present application. This is in line with the Inspectors power in relation to a section 78 appeals. The case is not an authority for the proposition that the Council has the power to determine the point the applicant relies upon, namely that condition 5 is invalid.

The burden of proof in relation to this application rests with the applicant. The assertions in the planning statement relate entirely to the invalidity of condition 5. The applicant provides no evidence and refers to no statutory basis which would allow the Council to act as a judge of the validity of condition 5. Legal advice received is unaware of any judicial authority or statutory authority that would allow the Council to consider the validity of a planning condition in the circumstances of this application. Moreover the applicant fails to provide any evidence that condition 5 is severable from the planning permission 18/00662/FUL. As such it is the Council view that the applicant has not met the burden of proof in relation to this application.

Conclusion

The argument put in the applicant's planning statement is that the condition is 'ultra vires', unreasonable and incapable of being enforced" if the condition were ultra vires that would mean it had been imposed without lawful authority and hence would be potentially invalid. Legal advice confirms that only a court decision or an appeal is capable of deciding the issue of invalidity of a condition.

The application alleges that the condition cannot be implemented. While the application points to some practical difficulties as a matter of fact the condition is capable of being achieved albeit with cooperation from others.

Occupation of any of the dwellings constructed without condition 5 having first been complied with is a breach of condition hence not lawful and a section 192 application must fail.

6. Recommendation

- Refusal of Certificate

7. Reasons for Refusal

1 The argument put in the planning statement is that the condition is "'ultra vires', unreasonable and incapable of being enforced" if the condition were ultra vires that would mean it had been imposed without lawful authority and hence would be potentially invalid. Legal advice confirms that only a court decision or an appeal is capable of deciding the issue of invalidity of a condition.

The application alleges that the condition cannot be implemented. While the application points to some practical difficulties as a matter of fact the condition is capable of being achieved albeit with cooperation from others.

Occupation of any of the dwellings constructed without condition 5 having first been complied with is a breach of condition hence not lawful and this section 192 application must therefore fail.

8. Informatives

Are there any letters to be sent to applicant / agent with the decision? If so please specify:	YES	NO
Are there any third parties to be informed of the decision? If so, please specify:	YES	NO