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Report

Report subject: Focus DIY Store at 108-130 London Road, Amesbury

Report to: Northern Area Committee

Date: 28th July 2005

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Report Summary

To advise Members on issues regarding alleged non-compliance with conditions and allegations of failure to comply with the approved plans in relation to the development at the above site.

(This report has been brought after Members expressed concerns regarding the above matters at their previous meeting on 30th June 2005).

Introduction

On 26th August 2004, planning permission was granted for the erection of a retail warehouse at the above site (reference S/03/2489) subject to 27 conditions.

Work commenced on demolishing the former buildings at the site in December 2004.

The development is currently ongoing. At a recent site visit it was noted that the external shell of the new building was complete and was being fitted out prior to the intended commencement of trading (scheduled for 29th July); the access, visibility splays, car park and service yard have been laid out, surfaced and 96 parking spaces delineated; a right turn lane has been provided to London Road; all in accordance with the approved plans

Conditions requiring compliance before development commenced

Several of the conditions attached to the permission (3, 4, 6, 7, 9, 10, 21, 23, 24, 26, 27) required compliance before any development commenced at the site. These conditions required, amongst other things, prior approval of external materials, hard and soft landscaping, boundary treatments, off-site highway works, a scheme for control of noise from the rear service yard, contamination studies and remedial action, surface water drainage and a programme of archaeological investigation and evaluation.

Prior to and since development commencing, details have been submitted by the developers and their agents to comply with several of the above conditions. At the time of writing, however it appears that the following conditions still have not been complied with: -



Awarded in:
Housing Services
Waste and Recycling Services



Conditions 4 & 9 (landscaping) –details of landscaping have been submitted but an acceptable scheme involving additional planting is still being negotiated by your Officers.

Condition 12 (external lighting) –details of the lighting have been submitted but an acceptable scheme is still being negotiated by your Officers. The lighting has been erected. It is understood that negotiations include, among other things, repositioning certain columns.

Condition 21 (noise emanating from the site)- details of a noise attenuation scheme in respect of the rear service yard have been submitted but an acceptable scheme is still being negotiated by your Officers.

Condition 26 (surface water drainage) –the Council's records do not appear to show that any details have been supplied to comply with this condition. The agents are investigating whether details were in fact submitted/ agreed in relation to this condition.

Conditions requiring compliance prior to the unit opening for trading

Condition 8 (provision of acoustic fencing, to southern and western boundaries), condition 10 (completion of right turn lane onto London Road); 11 (construction, laying out etc of access and parking areas); 13 (provision of access visibility splays); condition 17 (bicycle parking and shopping trolley controls) are required to be complied with before the unit first opens for business.

With regard to these conditions, condition 10 has been complied with by provision of the right turn lane, whilst conditions 11 & 13 have been complied with. The details pursuant to condition 17 have been approved and partly implemented.

However, it is unclear from the Council's records as to whether details have been submitted and agreed in relation to condition 8. This is currently being investigated in conjunction with the agents and a response is awaited.

Conditions imposing ongoing requirements

Other conditions imposed restrict the range of goods that can be sold from the premises (14 & 15), control external storage (16) and control deliveries (22). Additionally conditions restrict construction of further mezzanine floors (18); and require submission and implementation of a Green Travel Plan three months after trading commences (19).

History of enquiries

According to Council records the Enforcement Team was approached in early April 2005 concerning a number of matters at this site. Following an investigation however it was established that none of the matters raised were planning matters.

A subsequent enquiry in June regarding the number of parking spaces was concluded because the site was still under construction; the car park had yet to be formally laid out and the spaces delineated, thus there was no breach of planning control at that time. As already noted above, it has since been established that the parking area has been constructed in accordance with the approved plans.

Planning policies

Replacement Salisbury District Local Plan:

G1 (sustainable development);

D1 (design-extensive development);

TR11, TR14, TR12 & TR19 (Transportation)

PPG 18

Circular 10/97.

Circular 02/2005.

Considerations

Breaches of conditions

As noted above, at the recent site visit it was observed that development was being carried out in accordance with the approved plans (also see further below).

However, as already noted above whilst details have been submitted, at present the developers appear to have failed to comply with certain of the conditions requiring compliance before development commenced (pre conditions): 4,9,12, 21 & 26 by not having received the Council's written approval in respect of the details.

Other conditions requiring compliance prior to the unit opening for trading or ongoing compliance have not been breached at the time of writing, as the store is not yet open for business. These conditions will be the subject of further monitoring to ascertain compliance –see further below.

Therefore, the matters constituting a breach of planning control at the site at the present time are confined to the failure to comply with certain of the conditions requiring compliance before development commenced identified above: 4,9, 12, 21 & 26.

Whilst as already noted, details have been submitted in relation to most of these conditions, the details supplied have not been satisfactory. Continuing development at the site without the Council agreeing to the details submitted pursuant to the conditions, is in breach of planning control.

The Expediency of Enforcement Action

The outstanding conditions were imposed to, amongst other things, achieve a satisfactory standard of design and implementation for the landscaping scheme (4); to enable control over the lighting installation and/or the levels of illumination in the interests of visual amenity and the amenities of adjacent residential occupiers (12); to minimize disturbance from noise from the development on the amenities of nearby dwellings (21), and; to ensure a satisfactory means of drainage (26). All of the conditions were imposed to ensure that the resulting development accorded with the above policies of the Replacement Salisbury District Local Plan.

Full compliance with the outstanding conditions precedent is therefore considered necessary to ensure that the above requirements are fulfilled and that development of this site is undertaken in an acceptable manner. The manner which any such action should be approached is considered in more detail below.

Options for Enforcement

The following options would appear to be open to Members to instruct Officers to secure compliance with the conditions in question:

1. *Officers to continue to negotiate to secure compliance with the outstanding pre -conditions (4,9, 12, 21 & 26.*

As already noted above, Officers have already received some details in respect of most of the above conditions, which are the subject of continuing negotiations with the agents.

Whilst the Council and the agents are in active discussions to attempt to address outstanding issues relative to the above conditions, receipt of such details has not, to date enabled to the relevant conditions to be discharged.

The failure to take further steps to enforce compliance with the conditions at this stage could then lead to further delay in resolving the breaches of conditions, when works at the site are already at an advanced stage.

PPG 18 above favours informal discussions to resolve breaches of planning control, without recourse to formal enforcement action.

However, PPG 18 also indicates that the failure of negotiations to resolve matters should not hamper or delay formal enforcement action in cases where unacceptable harm to local amenity is being caused.

2. *Serving a Breach of Condition Notice (BCN) to enforce compliance with conditions 4, 9, 12, 21 & 26.* This would give the developer a limited period (a minimum of 28 days must be given) in which to submit and have received the approved the details required under the above conditions.

Members will be aware that failure to comply with a BCN is an offence, which can lead to a fine of up to £1,000 on first conviction. Serving a BCN would be a clear signal to the developers that the Council is not prepared to tolerate the continuing uncertainty and delay in complying with the conditions in question.

As most of the matters would appear relatively straightforward to resolve, it is considered that the minimum time limits for compliance set out below are not unreasonable.

3. *Serving a BCN as option 2 above after the store commences trading, to also include any breaches of conditions 8 (acoustic fencing to southern and western boundaries) & 17 (inc. shopping trolley controls) -if such breaches are established after further monitoring.*

This would entail a short delay in commencing formal enforcement proceedings but if breaches of conditions 8 & 17 were established after the store commenced trading it would then allow all breaches of conditions at the site to be dealt with at the same time.

4. *Serving a Temporary Stop Notice (TSN):* Such a Notice can be served where there has been a breach of planning control in relation to any land and it is expedient that the activity (or part of the activity) should cease immediately. It is an offence to not comply with a TSN, however compensation is payable if the development was lawful at the time the Notice was issued or it is later withdrawn. Only one TSN can be issued in relation to a particular breach.

As part of the process of determining whether a TSN should be issued, the Council should carry out a cost/ benefit analysis.

A TSN is only effective for 28 days, by the end of which the Council must decide whether further enforcement action is appropriate.

As the store has not commenced trading at the time of writing, and the matters relating to outstanding pre conditions relate to matters where impacts are likely after the store starts trading, it is not considered expedient to issue a TSN at this time.

After the store opens for trading however, any failure to have had submitted and approved details of acoustic fencing to the southern and western boundaries (condition 8); failure to have approved noise control measures relating to the service yard (condition 21) and failure to have approved details of external lighting (condition 12) in particular are considered likely to be detrimental to the residential amenities of neighbouring properties to the extent that the issue of a TSN, may then be considered expedient.

As already noted above, a TSN may be used to prohibit part of activities at a site. Relevant guidance suggests that TSNs should therefore only prohibit what is essential to safeguard neighborhood amenities

In this case, a TSN could be used to remedy the harm identified to amenities above by prohibiting use of the rear service yard, until such time as conditions 8 and 21 have been complied with, and prohibiting use of external lighting until condition 12 has been complied with.

Cost/benefit analysis

The costs arising from issuing a TSN would be borne by the store operator, suppliers and potentially, if the store loses trade or ceases trading due to stock shortages, their employees.

The benefits would be to local residents and the general amenity of the locality by preventing undue noise and disturbance and visual intrusion arising from use of the service yard and external lighting.

Officers are concerned that use of a TSN where, as in this case, the developers have submitted details for approval and are known to be actively working to resolve issues, could be viewed as inconsistent with PPG 18 guidance above and could also be viewed as lacking proportionality.

Officers are also concerned with regard to the actual effectiveness of TSNs in dealing with breaches, particularly where, as in this case, the financial incentives associated with the store receiving deliveries of goods for onward sale are likely to outweigh any penalty later imposed by the Courts.

Moreover at the end of the period specified in the TSN, the Council would still be faced with taking further enforcement action in respect of any conditions still not then complied with.

However, use of a TSN in support of a BCN would demonstrate the seriousness with which the Council views the continued non-compliance with the relevant conditions and its determination to see the matter remedied as quickly as possible.

In addition to all the above options, the developer will also need to submit a further planning application to gain retrospective planning approval to vary the time limit for complying with conditions. This is because commencing development without complying with pre conditions has had the effect that they cannot be complied with. The above is to ensure that the development is authorised and that the remaining outstanding conditions and those imposing ongoing requirements 'bite' on the development in future.

Changes in levels in the service yard at the rear of the site

It is understood that this matter was raised by a neighbour (29 The Drove) at the last Northern Area Committee meeting.

Officers have compared information from before the site was developed with the current situation and have not been able to establish any clear evidence of any significant increase in ground levels across the area now forming part of the service yard.

On the basis of the available evidence, it cannot therefore be concluded that any breach has occurred in this instance.

Human Rights

The developer's rights under Article 1, Protocol 1 of the HRA (protection of property) is considered relevant to the consideration of enforcement action in this case.

However, the developer's rights have to be balanced against neighbours' and the general public interest of ensuring that Development Plan policies are upheld protecting local and general amenities by ensuring that conditions attached to planning permissions are complied with.

Conclusions

It is considered that there has been a breach of planning control at this site by reason to the failure to comply with conditions attached to the above permission. Whilst the agents are actively working to resolve these issues, Members may take the view that these conditions will continue to be breached and there may be further breaches in future, unless compliance with the relevant conditions is enforced before the store starts trading.

Formal enforcement action by way of issuing a Breach of Condition Notice may therefore be considered an expedient course of action to attempt to remedy the breach (es) of conditions.

However, it is also considered appropriate to wait until the store starts trading in order that action can be taken against breaches of any other relevant conditions at the same time.

An application to retrospectively vary the time limits for complying with the various precedent conditions will also be required.

RECOMMENDATION:

A: That NO FURTHER ACTION should be taken at this time, until the store commences trading and/or two weeks after the date of this meeting (whichever date is the sooner); and

B: After the sooner of the above dates, that the Head of Development Services be authorised to issue a Breach of Condition Notice under Section 187A of the Town and Country Planning Act 1990 (as amended) and serve it on the appropriate person.

In respect of the following breaches of conditions:

The failure to comply with conditions 4, 9,12, 21 & 26 attached to planning permission S/03/2489 dated 26th August 2004, before development commenced at the site, subject to the Head of Legal Services being satisfied that there is a still a breach of the conditions at that date (such conditions which are complied with within the above timescale to not be included in the Notice)

Subject to the Head of Legal Services being satisfied that there is a breach of condition at that date, the failure to comply with conditions 8 &17 of the above planning permission before building and service yard are brought into use.

Requiring the following steps:

1. To submit a scheme of landscaping to the Local Planning Authority.
2. If the above scheme submitted pursuant to step (1) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
3. To submit a scheme showing the hard surface treatment of the site to the Local Planning Authority.
4. If the above scheme submitted pursuant to step (3) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
5. To implement in full the scheme of hard surface treatments approved by the Local Planning Authority pursuant to steps (3)&(4) above.
6. To remove all of the external lighting (including columns and fittings) unless: (a) a scheme of external lighting of the site has been submitted to the Local Planning Authority (b) If the above scheme submitted pursuant to step (a) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
7. To implement in full the scheme of external lighting of the site approved by the Local Planning Authority pursuant to steps (6a&b) above.
8. To submit a scheme for the control of noise emanating from the site (with particular reference to the rear service yard) to the Local Planning Authority.
9. If the above scheme submitted pursuant to step (8) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
10. To implement the scheme for the control of noise emanating from the site approved under steps (8)&(9) above.
11. To submit a scheme for the discharge of surface water from the building to the Local Planning Authority.
12. If the above scheme submitted pursuant to step (11) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
13. To implement in full the scheme for the discharge of surface water approved under steps (11) &(12) above.

14. To submit a scheme for acoustic fencing to the south and western site boundaries to the Local Planning Authority.
15. If the above scheme submitted pursuant to step (14) is not approved by the Local Planning Authority, to submit a further scheme, which fully addresses the Local Planning Authority's objections.
16. To implement in full the scheme of acoustic fencing to the south and western site boundaries approved under steps (14)&(15) above.
17. To implement in full the scheme for control over trolleys leaving the site submitted to the Local Planning Authority on 8th April 2005 approved by letter dated 15th June 2005.

Time For Compliance:

Steps 1,3,4, 8,11, 17 –28 days.

Steps 2,4,5,6,9,12,14 –35 days.

Steps 7,10,13,15,16- 42 days.

C: In the event of any breaches of conditions 8, 12 and 21 not being remedied within 3 days of the store commencing trading, that a Head of Legal and Property Services be instructed to issue a Temporary Stop Notice prohibiting use of the rear service yard, until such time as conditions 8 and 21 have been complied with, and prohibiting use of external lighting until condition 12 has been complied with, and serve it on the appropriate person(s).

D: To invite the developer to submit a planning application seeking retrospective approval in respect of conditions not complied with before the relevant compliance dates.

Implications:

Financial: None at this time.

Legal: Detailed in the report.

Environmental Considerations: Detailed in the report.

Council's Core Values: Protecting the environment.

Wards Affected: Amesbury.

Human Rights: Detailed in the report.