

## PLANNING APPLICATIONS COMMITTEE 19 JANUARY 2017

	<u>APPLICATION NO.</u>	<u>DATE VALID</u>
	16/P3683	19/09/2016
<b>Address/Site:</b>	27 Lindisfarne Road, West Wimbledon, SW20 0NW	
<b>(Ward)</b>	Village	
<b>Proposal:</b>	Removal of condition 18 (relating to replacement fence on the west boundary of the application site) attached to LBM planning application 15/P0940 for the demolition of existing house and the erection of 2 x detached houses.	
<b>Drawing Nos:</b>	1170/P02A, 04A, 06, 07A, 08A as amended by 1170/C18(B), 09A, 10A, 1170/CO2(A) & CO4, Site Location Plan & Arboricultural Implications Assessment dated 4th March 2015 from Advanced Tree Services.	
<b>Contact Officer:</b>	David Gardener (0208 545 3115)	

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### RECOMMENDATION

#### **GRANT Planning Permission Subject to Conditions**

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#### CHECKLIST INFORMATION

- Heads of agreement: None
- Is a screening opinion required: No
- Is an Environmental Statement required: No
- Has an Environmental Impact Assessment been submitted: No
- Press notice: Yes
- Site notice: Yes
- Design Review Panel consulted: No
- Number of neighbours consulted: 12
- External consultations: None

#### **1. INTRODUCTION**

- 1.1 The applications have been brought before the Planning Applications Committee due to the number of representations received as a result of public consultation.

## **2. SITE AND SURROUNDINGS**

- 2.1 The application site comprises two recently built six bedroom detached dwellings which were granted planning permission in 2015 (LBM Ref: 15/P0940) located at the southeast end of Lindisfarne Road. Lindisfarne Road is a cul-de-sac comprising detached houses and was developed from the 1930s onwards.
- 2.2 The surrounding area is residential in character with Metropolitan Open Land located immediately to the south of the site and a public right of way footpath abuts the sites western boundary. The site is not located within a conservation area but is within an archaeological priority zone.

## **3. CURRENT PROPOSAL**

- 3.1 The current application is the third application to remove condition 18 of LBM Ref: 15/P0940 so that there is no requirement to erect a fence that is sited 1.7m from the side boundary fence of No.25 for the length of the east side boundary of the application site. The existing condition reads as follows:

“ The development hereby approved shall not be occupied until a replacement fence on the west boundary of the application site has been erected. In accordance with approved drawing No. 1170/P02A the fence shall be located a minimum of 1.7m from the eastern boundary fence of No.25 Lindisfarne Road.

Reason: To improve access to the footpath and comply with policy DM T1 of the Adopted Sites and Policies Plan and Policies Maps (July 2014).”

## **4. PLANNING HISTORY**

The following planning history is relevant:

- 4.1 MER642/68 – Double garage. Granted - 01/08/1968
- 4.2 MER443/77 - Alterations to roof for increased headroom. Granted - 18/07/1977
- 4.3 13/P4088 - Outline application for demolition of existing detached dwelling house and erection of 2 x link-detached dwelling houses (access, layout and scale to be determined at this stage). Refused - 11/04/2014;
- 4.4 13/P4090 - Outline application for demolition of existing detached dwelling house and erection of detached dwelling house with ancillary flat located at ground floor level (access, layout and scale to be determined at this stage). Granted - 11/04/2014;
- 4.5 14/P2577 - Application for outline planning permission for the erection of 2 x two-storey detached houses (access, layout and scale to be determined at this stage). Granted - 18/12/2014;

- 4.6 15/P0940 - Demolition of existing house and the erection of 2 x detached houses. Granted - 09/07/2015;
- 4.7 16/P0781 - Application for variation of condition 18 (fencing) of LBM Ref: 15/P0940 regarding demolition of existing house and the erection of 2 x detached houses. Refused - 15/04/2016 for the following reason:
- “ There is currently a minimum 1.7m gap between the side boundaries of the application site and No.25 and as such it is considered that condition 18, which requires a replacement fence to be located a minimum distance of 1.7m from the fence of No.25 is reasonable and necessary to prevent movement along the footpath from being impeded.”
- 4.8 16/P1178 - Application for variation of condition 2 (approved drawing nos.) attached to LBM planning application 15/P0940 dated 16/10/2015 relating to the erection of two detached houses. The amended plans show the addition of a rooflight to the east facing side roof slope and insertion of a side door to the garage of no.29. Granted - 17/10/2016;
- 4.9 16/P2875 - Application for removal of condition 18 attached to LBM Ref: 15/P0940 dated 16/10/2015 relating to the variation of widening of footpath. Refused - 07/09/2016 for the following reason:

“ The proposed removal of condition No.18 is unacceptable as it is considered that a 1.7 wide gap between the boundary treatments of the application site and No.25 is necessary to improve access and enhance the current footpath. The removal of this condition would therefore be contrary to policy DM T1 of the Sites and Policies Plan and Policies Maps (July 2014).”

## **5. POLICY CONTEXT**

- 5.1 The following policies from the Adopted Sites and Policies Plan and Policies Maps (July 2014):  
DM T1 (Support for sustainable transport and active travel)
- 5.2 The relevant policies in the Adopted Core Strategy (July 2011) are:  
CS.13 (Open Space, nature conservation, leisure and culture)
- 5.3 The relevant policies in the London Plan (March 2015) are:  
6.10 (Walking)
- 5.4 Paragraphs 203 and 206 of the National Planning Policy Framework 2012 (NPPF)
- 5.5 Planning Practice Guidance - Use of Planning Conditions March 2014 (as amended)

## **6. CONSULTATION**

6.1 The application was publicised by means of Conservation Area press and site notice procedure and individual letters to occupiers of neighbouring properties. In response, five letters of objection have been received including objection letters from the Wimbledon Society and the Residents Association of West Wimbledon (RAWW). The letters of objection state that a 1.7m wide path is appropriate given amount of usage of the path and the requirements from different users such as parents with children. Concerns were also raised that the footpath being only 1.3m wide at its northern end compromised safety.

### **6.2 Residents Association of West Wimbledon (RAWW)**

6.2.1 RAWW strongly objects to any relaxation of this condition. The first request for removal of this condition (Ref: 16/P0781) was refused to prevent movement along the path being impeded. In that application the applicant stated that the footpath would be kinked if the condition was applied. That was clearly not true. A second application for removal of the condition was made when the development was nearer completion. A fence had been erected between it and the public right of way. At the northern end the fence is only 1.3m from the fence of No.25 in clear contravention of this condition. The applicant stated that a public right of way cannot be widened by condition. This fails to note that the condition relates to the position of the fence and aims to improve access to the public right of way, which it would clearly do. Elsewhere, the footpath is a minimum of 1.7m wide and at its widest is over 2m wide. This is a very well used path which will become busier. Compliance with the condition would improve access to the public right of way and that is the stated aim of the condition which is required to comply with policy DM T1.

### **6.3 The Wimbledon Society**

6.3.1 Objects to the removal of this condition. The Council's planning condition, requiring the new side fence to be realigned to provide a width of at least 1.7m along the side of the application site is considered to be fully justified. It is considered that a wide path is still a necessary link between the Copse Hill conservation area and Raynes Park and should not be narrowed in any way – more so now that Berkeley Homes is undertaking works to improve the part of the path that comes under their development.

### **6.4 Future Merton - Highways**

6.4.1 This public Right of Way is not owned by the London Borough of Merton and does have freeholder ownership. The council does not have any powers to widen or alter a public Right of Way that it does not own the land of. There is also no need for the council to formally adopt the Public Right of Way as the Path has freeholder ownership and the duty and maintenance is against the freeholders. This is a protected path and does not require adoption to maintain that status.

## 7. PLANNING CONSIDERATIONS

- 7.1 The current public right of way footpath abuts the western boundary of the application site. The width of the path was measured during the original application for the two new houses (LBM Ref: 15/P0940) and was shown to be between approx. 1.3m and 1.7m wide. It should however be noted that the boundary treatment of the application site was in a poor condition with the boundary treatment on the southern part of the site comprising a chain link fence which was warped and in a state of disrepair. This meant that an accurate measurement of the width of the path at the southern part of the site was difficult to take. The new boundary treatment has been erected maintaining a footpath width of approx. 1.3m and 1.7m.
- 7.2 The existing footpath was considered to be quite narrow at its northern end and was overgrown with foliage from the application site impeding users of the footpath. Policy DM T1 of the Adopted Sites and Policies Plan and Policies Maps (July 2014) promotes sustainable modes of travel including walking and states that to improve access both on the public highway and off road development will be expected to enhance existing walking and cycling routes. The following condition was therefore attached to improve access on the public highway and to accord with the aims of policy DM T1:
- “ The development hereby approved shall not be occupied until a replacement fence on the west boundary of the application site has been erected. In accordance with approved drawing No. 1170/P02A the fence shall be located a minimum of 1.7m from the eastern boundary fence of No.25 Lindisfarne Road. ”*
- 7.3 There have been two previous applications to remove this condition (LBM Refs: 16/P0781 & 16/P2875). These applications were refused because it was considered that a 1.7 wide gap between the fence line of the application site and No.25 for the whole length of the side boundary was necessary to improve access and enhance the current footpath.
- 7.4 Paragraph 206 of the NPPF advises that planning conditions should only be imposed where they are necessary, relevant to planning and to the development, enforceable, precise and reasonable in all other respects. This is referred to as the six tests. The applicants submitted planning statement states that the condition fails the six tests as it is not necessary, not relevant to planning or the development, is imprecise and not reasonable. The applicant’s solicitors have also asserted that the condition should be removed because the fence as erected is in line with the applicant’s legal boundary, the applicant would have to relocate the fence further back on to their land, and the council does not have powers to widen a public right of way where they do not own the land. It is also considered that it would be unreasonable to insist on planning being dependent on giving away land to construct or widen a right of way, which ought to be done using powers under the Highways Act 1980 which allows for appropriate compensation to be paid. Two legal cases have been referenced (Hall and Company Ltd vs Shoreham by Sea UCD 1964 and City of Bradford vs Secretary of State to the Environment 1986).

- 7.5 Planning policy guidance cites key considerations to take into account when applying the six tests to a condition. With regard to relevance to the development a condition cannot be imposed in order to remedy a pre-existing problem or issue not created by the development. A condition can also not be imposed which requires land to be formally given up to other parties such as the Highways Authority.
- 7.6 Given the evidence that the applicant has submitted in support of their latest application formal legal advice has been sought and is summarised in paragraphs 7.7 to 7.13 below.
- 7.7 With regards to the six tests set out in the NPPF it appears that Condition 18 is not necessary to protect the existing public right of way as there appears to be no encroachment or risk of encroachment.
- 7.8 The link to a planning objective appears fairly weak. Whilst the purpose was to give effect to policy DM T1 which is desirable to improve public access, in reality the purpose is related to a highways width issue which is a highways matter rather than a planning matter. Furthermore, the Council's highways officer has confirmed that there is no highway need to widen the footpath.
- 7.9 With regard to linking Condition 18 to the actual development, it is a pre-existing footpath and the development is unlikely to have an adverse impact on the use of the footpath, nor is there a risk that the width would be decreased as a result of the development.
- 7.10 With regard to the issues of precision and enforceability, in order to comply with Condition 18 it requires reference to the location of a fence on neighbouring land, which is outside of the control of the applicant. Were the neighbour to move the fence and encroach upon the footpath, the applicant could technically be held to be in breach of Condition 18 if the gap is reduced to less than 1.7 metres. Furthermore, as worded, it simply requires a fence to be constructed. As the applicant has noted, this does not prevent them from installing a hedge or a low rise brick wall to prevent members of the public from walking over their private land. Accordingly, there are good grounds in the Applicant's argument that Condition 18 is imprecise and potentially unenforceable.
- 7.11 With regard to the case law in the *Shoreham* and *Bradford* cases. In *Shoreham*, it was held that it was not within the authority's powers to oblige a developer to dedicate part of their land as what the Judge called a "quasi-highway" open to the public at large (a quasi-highway because there was no dedication of a highway, simply a condition imposed to allow passage and re-passage on their land) without compensation. In *Bradford* the condition required the widening of an existing road by one metre and associated works at the developer's expense. It was held that a condition cannot positively require a developer to do an act of widening or building a highway (though it was stated that it may have been acceptable if it had been a Grampian

Condition e.g. negative condition that the development should not proceed or the houses be occupied until the road had been widened).

- 7.12 Whilst the facts are slightly different, and Condition 18 is in effect a Grampian condition, the intended purpose of Condition 18 is essentially to require the owner to give up their land without being compensated. However, in reality it is questionable whether the land would indeed become subject to public rights of passage as part of a wider public right of way and even if it were, the landowner would be responsible for maintaining it and therefore be burdened with additional risk. If the Council wishes to increase the width of the footpath it has statutory highway powers and compensation may be payable. Given the intended effect of Condition 18 in attempting to relinquish control to members of the public combined with the fact that the highway authority does not consider it necessary to increase the width of the footpath it is likely to be considered unreasonable in all circumstances.
- 7.13 With regard to considerations in the PPG, it is clear that the purpose of the condition is to remedy a pre-existing problem (namely increasing the width of a narrow footpath) that has not been created by the development. Whilst the land would not be given over to the highway authority, the intended effect of Condition 18 is to give up control of the land by allowing members of the public at large to pass and re-pass along it.
- 7.14 It should also be noted that thick vegetation previously impeded pedestrian movement along the path as it reduced the width of usable path. Although the path is still be the width as before (1.3m to 1.7m), the fact that the vegetation has now been cleared means access along the path has been significantly improved.
- 7.15 Having carefully considered all of the above, it is considered that condition 18 which was imposed with the good intentions of improving the width of the path, if challenged in Court is likely to be found to not satisfy the tests for a valid planning condition. Accordingly, in these circumstances it is considered that permission is granted to remove Condition 18.

## **8. SUSTAINABILITY AND ENVIRONMENTAL IMPACT ASSESSMENT REQUIREMENTS**

- 8.1 The application does not constitute Schedule 1 or Schedule 2 development. Accordingly, there are no requirements in terms of EIA submission.

## **9. CONCLUSION**

- 9.1 it is considered that if challenged in Court the imposition of Condition 18 is likely to be found to not satisfy the tests for a valid planning condition. Accordingly, in these circumstances it is considered that permission should be granted to remove Condition 18.

## **RECOMMENDATION**

**(1) GRANT permission to remove condition 18.**

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