

Tesco bid to avoid planning condition deemed unlawful

by Marie Sharp Local Democracy Reporter

A bid by supermarket company Tesco to avoid paying £400,000 towards school provision in Musselburgh has been ruled 'unlawful' by Scottish Ministers.

Tesco asked East Lothian Council to amend planning conditions attached to its original planning permission for its current Olivebank store, removing its obligation to contribute the funds towards local education services.

The supermarket chain had argued that the decade-old plans, which were part of a mixed use development including housing, changed because a third party took over the housing provision and it built the store under a new application.

It said the contribution to schooling should now be covered by the third party; however, the local authority refused to amend the condition and threw out the application.

An appeal to Scottish Ministers led to the initial request being branded unlawful by the Scottish Government Reporter.

He ruled that the request to have the condition amended to name Dundas Estates as the third party breached legislation at the time of the application which said changes could not be

made to conditions which involved “non-applicants”.

The Reporter said: “Dundas Estates is not an applicant in this case and is therefore a ‘non-applicant’.

“The application was not therefore lawfully made within the terms of the relevant legislation.”

He added that since the original application to the council was not valid, the decision could not be appealed and dismissed the case as having “no remit”.

Tesco says it built the Olivebank supermarket and petrol station now on the site under a separate planning permission and no longer had any involvement in the rest of the site included in the original planning permission.

In its appeal, it argued: “Tesco was previously involved in a land transaction which enabled residential development to be constructed on the site of the former Tesco store site.

“This transaction took place over a decade ago and the land of the residential development site is not owned by Tesco.”

The Section 75 agreement, which was signed by East Lothian Council, Dundas Estates and Development Ltd and Tesco as first, second and third proprietors in that order, covers contributions to be made to funding of infrastructure impacted by the new development.

Education contributions are based on the number of houses and impact on local schools.

A report by East Lothian Council’s planning officers last July said that, following the original agreement, Tesco sold the site of its former store at Olivebank to Dundas Estates for residential development and Dundas sold Tesco the neighbouring land, which had originally been set aside for housing, for the new store.

But when the council notified Dundas Estates of Tesco's request to change the agreement to make them responsible for the school contribution, it was "vigorously" opposed.

The report said: "Their reasoning is that it was always Tesco Stores Limited who agreed to be responsible for the education contribution."

Refusing Tesco's request to have its name taken off the agreement, the planning officer said: "The council has clear documentation from the time of the drafting of the agreement setting out that Tesco Stores Limited agreed to be a specific, non-transferable, named party responsible for the education contribution.

"Tesco Stores Limited are a legitimate party to whom the education contribution is enforceable, despite them not being the current owners of the third subjects.

"Tesco Stores Limited benefited as the landowner of the third subjects from the grant of the mixed use planning consent, including the residential element of the mixed use development, and the need for the education contribution arises from that element of the mixed use planning consent."

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