

Date of Meeting	10 th June 2015
Site Address	Lewington Close/Longford Road, Melksham
Proposal	Discharge of Section 52 legal agreement under Town and County Planning Act 1971
Applicant	Selwood Housing Association
Town/Parish Council	MELKSHAM
Ward	MELKSHAM SOUTH
Case Officer	Matthew Perks

Members considered a report on the discharge of a Section S52 Agreement under the Town and Country Planning Act 1971 at the meeting of 20 May 2015 and resolved that:

- i) Officers should research the land charge records to ascertain whether there is an associated restrictive covenant in place; and
- ii) Officers should further clarify from researching the old microfiche records again, the reasoning for imposing the s.52 in the first place; and what the views of the current owner of the site are (in relation to discharging the s.52).

Restrictive Covenant

Whilst there is a reference at clause 2 of the S52 Agreement to an obligation to enter the necessary restrictive covenant as a Land Charge in the event of sale of the land, the Council's Local Land Charges do not have any record of any such covenant being registered,. In any case, a restrictive covenant of this nature would not itself normally be entered as a Local Land Charge but would be a matter for the Land Registry to record against the property title (see next paragraph).

From the Sale Contract document submitted by the solicitors separately representing both Mrs Hawkins and Selwood Homes it is clear that a portion of the original land containing the bungalow has been sold, with Mrs Hawkins retaining a remaining portion to the rear of No 11 Longford Road. That Sale Contract includes an extract from the Land Registry confirming that a covenant was placed on the land in 1980 in accordance with the S52 requirements. That covenant restricts development to a maximum of one dwelling the removal of which is a matter to be resolved between the seller and the buyer and is not a material planning consideration.

Mrs Hawkins

Where Mrs Hawkins still owns one of the portions of land that would form part of the development under Planning application 14/04399/FUL, i.e. land to the rear of 11 Longford Road, the solicitors acting on behalf of Mrs Hawkins have confirmed that she has agreed to allow disclosure of the content of the Sale Contract of her property to Selwood Housing Society for the purposes of resolving the issue on the S52 obligations raised by the members. That transfer document reveals clearly that, on completion of the sale, Mrs Hawkins will release the property covenants affecting 17A Longford Road that she has had registered by virtue of her obligation at Clause 2 of the S52 Agreement.

The transferring Attorneys state: *“Therefore, I hope it is clear that it was always contemplated that Mrs Hawkins would also release the property covenants of which she is a direct beneficiary (provided the Council first released the S52 Covenants themselves). Therefore, upon completion of the sale of 11 Longford Road, the S52 covenants and the corresponding property covenants will be released and extinguished.*

This confirms that from Mrs Hawkins' perspective her intention as the only remaining party to the S52 Agreement apart from the Council of agreeing to termination of the S52 Agreement. .

Microfiche Research

The original application that led to the S52 was referenced 75/01031/OUT. This was an Outline application for one dwelling. There is no officer report on the microfiche recording the deliberations of the old District Council planning committee are therefore not known. However a copy of a letter is on the film, indicating that there were discussions between the Council and the Applicant (Mr. Hawkins). In the letter the Council official states that the Planning Sub-Committee resolved to grant permission subject to the completion of the S52 Agreement to restrict the use of the site permanently to one dwelling. A further letter from Mr Hawkins confirms that he is agreeable to the restriction to one dwelling. It is noted in the Council's letter that the Committee had been informed of Mr Hawkins' willingness to enter into such an agreement and that Council's legal officer had been instructed to draw up the agreement and, that, upon completion the permission would be granted.

It is reasonable therefore to come to an informed view that the discussions with the applicant were a response to the neighbour objections at the time, but also the Committee would presumably have considered the context of the un-developed or lower density character of the immediately surrounding area. (None of the developments on adjacent land at Lewington Close [2005 and 2007] and Peel Court [2002] were in existence).

Further relevant considerations

In evaluating whether or not to discharge the S52 Agreement in the light of the above, the following considerations, repeated largely from the previous report, are also of relevance:-

Section 52 agreements were the Town and County Planning Act 1971 predecessor to what are now Section 106 agreements under the Town and Country Planning Act 1990. The enforcement/discharge/modification therefore of such Agreements are governed by general contract/planning law considerations which do not fall to be considered as Planning Applications.

Whilst Section 106A of the Town and Country Planning Act 1990 allows applicants to modify or a discharge a legal agreement those provisions do not extend to Section 52 Agreements. Planning case law indicates that as a matter of law a Section 52 Agreement can be discharged/modified by the parties that entered into that agreement (or the successor(s) in title to the original owner(s)) on a consensual basis. If there is no mutual agreement, then the matter by law needs to be referred to the Upper Lands Tribunal for a decision. In other words, unlike Section 106 agreements, there is no provision for an appeal to the Planning Inspectorate where the local planning authority is not in agreement with the discharge/modification of the S52 Agreement.

Whilst the strict provisions of S106A do not apply, the relevant case law demonstrates that the tests that the Local Planning Authority must apply where an application is submitted to discharge/modify a Section 52 Agreement are essentially the same. In this respect, it is necessary for the Local Planning Authority to consider whether the obligation continues to serve a useful purpose. In the event that it is concluded on an objective basis that the obligation no longer serves a useful purpose then the obligation is required to be discharged. Alternatively, if it is considered by the Local Planning Authority that the obligation does continue to serve a useful purpose then the planning obligation should continue to remain in force with or without modification.

When considering if a useful purpose is being served by the obligation, case law indicates that issues to be taken into account include current planning policies and whether the overall planning circumstances of an area have changed since the obligations were first imposed.

The NPPF in addition states in Para. 205: *“Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.”* As a result, the applicant’s request to discharge the Section 52 Agreement should be considered against the tests referred to above, that is whether the obligation(s) continue to serve a useful purpose.

Subsequent to the 1976 agreement and under the old West Wiltshire District Council the site was included within the development limits for Melksham under two Development Plans, being the 1996 District Wide Local Plan and the West Wiltshire District Plan, 1st Alteration 2004. These development limits are carried through to the now adopted Core Strategy. The only constraint ever placed to development under the West Wilts plans at least from 1996 was a Policy aimed at protecting the old route of the Wilts & Berks Canal through Melksham, with a possible view to re-instating it. This was in turn captured in the old West Wiltshire Leisure and Recreation DPD.

The Core Strategy has now abandoned the concept of re-instating the old route of the canal under Core Policy 53, where the supporting text states that “The historic alignment of the Wilts and Berks canal through Melksham is no longer suitable for reinstatement as a canal, and an alternative route has been identified (see Core Policy 16: Melksham Link Project).” The canal route thus no longer comprises a reason to limit development on the site.

The site has been within Melksham development limits, i.e. by definition in a sustainable locality in terms of Local Policy since at least 1996 and in particular in terms of the NPPF. On surrounding land there has been a significant extent of infill of residential housing, to the west with the Peel Court cul-de-sac replacing the old Police Station and its grounds in 2002, and to the north the Lewington Close developments in 2005 and 2007.

Although the discharge of the S52 Agreement and the Planning Application under 14/04399/FUL are separate matters to be considered, it is relevant that, in respect of the latter, a development was negotiated so to be reasonable and feasible on the site without unacceptable harm to neighbouring properties, and Melksham Town Council supported the application, albeit recording neighbour concerns. Neighbour objections were recorded in the 14/04399/FUL report and issues such as ecology, tree planting, privacy, overshadowing and highways that were raised were addressed either by condition or by negotiation to provide a layout that adheres to acceptable planning standards.

The site is not in an area subject to a special designation such as a Conservation Area so there is no heritage reason for maintaining the open space. The space is not accessible to public use, being private property. The issue of preserving a view is not a planning consideration and appropriate separation distances between buildings were achieved. The restriction to one dwelling unit in those respects no longer serves a useful purpose such that not discharging the S52 Agreement would effectively stall development of the site (without any Planning Policy in place to justify it) in perpetuity, or until it was agreed to discharge the obligation some time in the future.

For the reasons previously mentioned, it is not possible to know exactly what the considerations were when the S52 Agreement was originally proposed, but if it is taken that it was the result of members at the time considering neighbour objections in the context of the then less dense level of development immediately surrounding the site, then it is clear that subsequent changes to Policy and surrounding circumstances have rendered the need for such a restriction wholly redundant.

In terms of Local Development plan policy the site has long been within development limits and no policy was ever adopted to reflect the constraints inherent to the S52 restrictions on the site. It is therefore considered that the S52 Agreement no longer serves a useful purpose

RECOMMENDATION

That the obligation, the subject of this application, no longer serves a useful purpose and therefore that no objection be raised by members in Committee to the Discharge of

the Section 52 Agreement by virtue of which officers are authorised to proceed with the necessary actions.

Appendices

A Copy of Section 52 Agreement

Appendix A : Copy of Section 52 Agreement

1975 DC
27/5/76
50P
THIS AGREEMENT is made the *twenty second* day of *June*
One thousand nine hundred and seventy-six BETWEEN THE WEST WILTSHIRE
DISTRICT COUNCIL (hereinafter called "the Council") of Bradley Road
Trowbridge in the County of Wilts of the one part and ARTHUR HAWKINS
AND VIOLET JOAN HAWKINS
(hereinafter called "the Owner") of 11 Longford Road Melksham in the
said County of Wilts of the other part

WHEREAS:-

- (1) The Council is empowered by Section 52 of the Town and Country Planning Act 1971 to enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land
- (2) The Owner is seized in unincumbered fee simple in possession of an area of land (hereinafter called "the said land") 0.30 hectares in extent situate adjoining No. 11 Longford Road Melksham in the District of West Wiltshire in the County of Wilts the said land being shown for the purposes of identification only edged blue on the plan annexed hereto
- (3) On the tenth day of November One thousand nine hundred and seventy-five the Owner submitted to the Council an application (hereinafter called "the said application") under the Council's Reference W75 1031 for planning permission for the erection of a dwelling on the said land
- (4) The Council have resolved to grant planning permission (hereinafter called "the said permission") to the Owner (subject to conditions) in pursuance of the said application subject to the Owner by this Agreement agreeing to restrict the development of the said land permanently to one dwelling
- (5) The Council and the Owner have agreed to enter into this Agreement

for the purposes of Section 52 of the Town and Country Planning Act 1971 for the purpose of restricting and regulating the development use of the said land

NOW THIS DEED WITNESSETH as follows:

1. The Owner for the purposes of Section 52 of the Town and Country Planning Act 1971 and with the intention of binding himself and all persons deriving title under him to the said land or any part thereof hereby agrees with the Council that he the Owner will restrict the development of the said land permanently to one dwelling
2. The Owner shall on effecting any sale of the said land impose the necessary restrictive covenant which shall be duly registered as a Land Charge entry having done so the Owner shall not be personally liable for any breach of the provisions of this Agreement after he shall have parted with the legal estate in the said land
3. The expression "the Council" and "the Owner" shall include their respective successors in title and assigns

IN WITNESS whereof the Council has caused its Common Seal to be hereunto affixed and the Owner has set his hand and seal the day and year first before written

THE COMMON SEAL of the COUNCIL was)
)
hereunto affixed in the presence of:-)



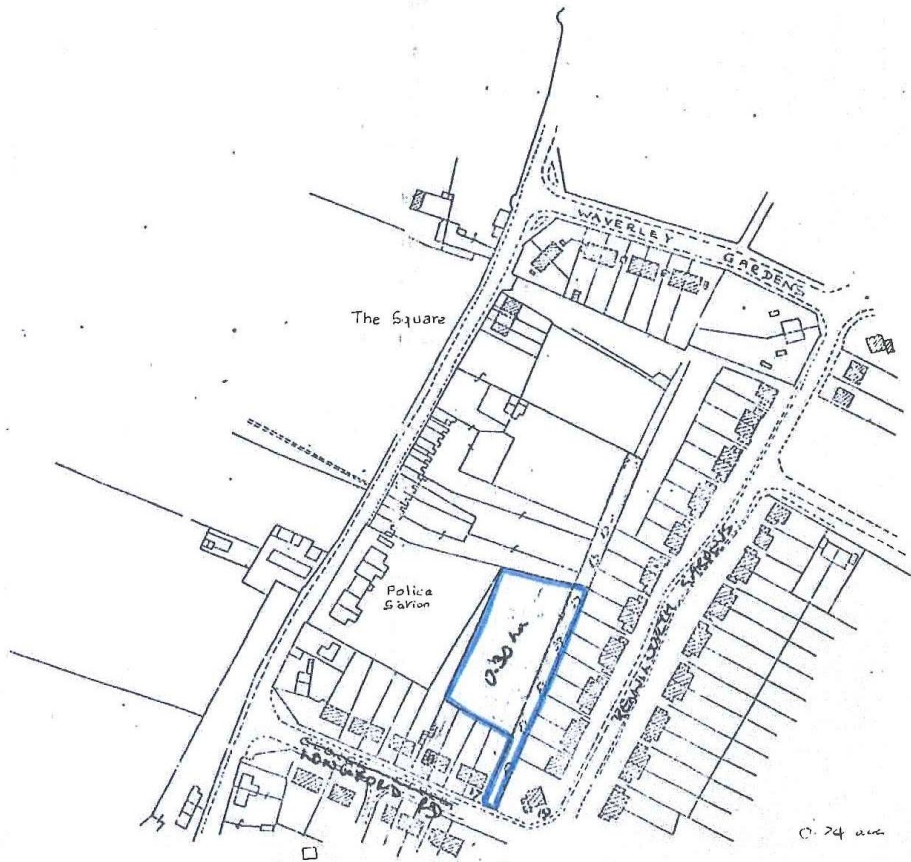
Douglas Wogan
Member

Alan Csiffary
Director of Administrative Services

05208

W/1031

Plan referred to



0.74 acres

ole *ke*

Scale 1/2500

WEST WILTSHIRE
DISTRICT COUNCIL
DEVELOPMENT
SERVICES

SIGNED SEALED AND DELIVERED by the)
OWNER in the presence of:-)

Witness Name:

Arthur Hawkins

Address

W. Bannell
10 West End
Melksham
Wilts

Occupation:

Retired Town Clerk

V. J. Hawkins

Witness Name:

W. Bannell

Address:

10 West End
Melksham
Wilts

Occupation:

Retired Town Clerk

MEMORANDUM

BY CONVEYANCE dated the 4th day of March 1980 and made between Arthur Stanley Hawkins and Violet Joan Hawkins of the one part and Leslie Clark and Carol Anne Clark of the other part a piece or parcel of land forming the larger part of the piece or parcel of land referred to as delineated and coloured pink in the plan drawn on the Conveyance of 28th November 1947 referred to in the within deed and being situate at the rear of Number 11 (formerly 28) Longford Road Melksham in the County of Wilts was conveyed to the said Leslie Clark and Carol Anne Clark for an estate in fee simple and inter alia their right to production and delivery of copies of the within deed was thereby acknowledged and the said Leslie Clark and Carol Anne Clark duly entered into a restrictive covenant limiting development of the said piece or parcel of land to one dwellinghouse.

DATED

22nd. June

1976

WEST WILTSHIRE DISTRICT COUNCIL

and

ARTHUR HAWKINS

A G R E E M E N T

under S.52, Town and Country
Planning Act 1971

A.D.Sawyer,
Chief Legal Officer,
West Wiltshire District Council,
Bradley Road,
Trowbridge, Wilts.