



**REPORT of
DIRECTOR OF SERVICE DELIVERY**

to
**NORTH WESTERN AREA PLANNING COMMITTEE
18 MAY 2022**

Application Number	22/00048/MLA
Location	Land Opposite 34 Hall Road, Great Totham, Essex
Proposal	Variation of Section 52 Agreement (mal/408/84) dated 10/10/84 relating to land at the rear of Seagers and Millways
Applicant	Smart Planning Limited
Agent	
Target Decision Date	08/03/2022
Case Officer	Hannah Bowles
Parish	MALDON NORTH
Reason for Referral to the Committee / Council	No scheme of delegation applies.

1. **RECOMMENDATION**

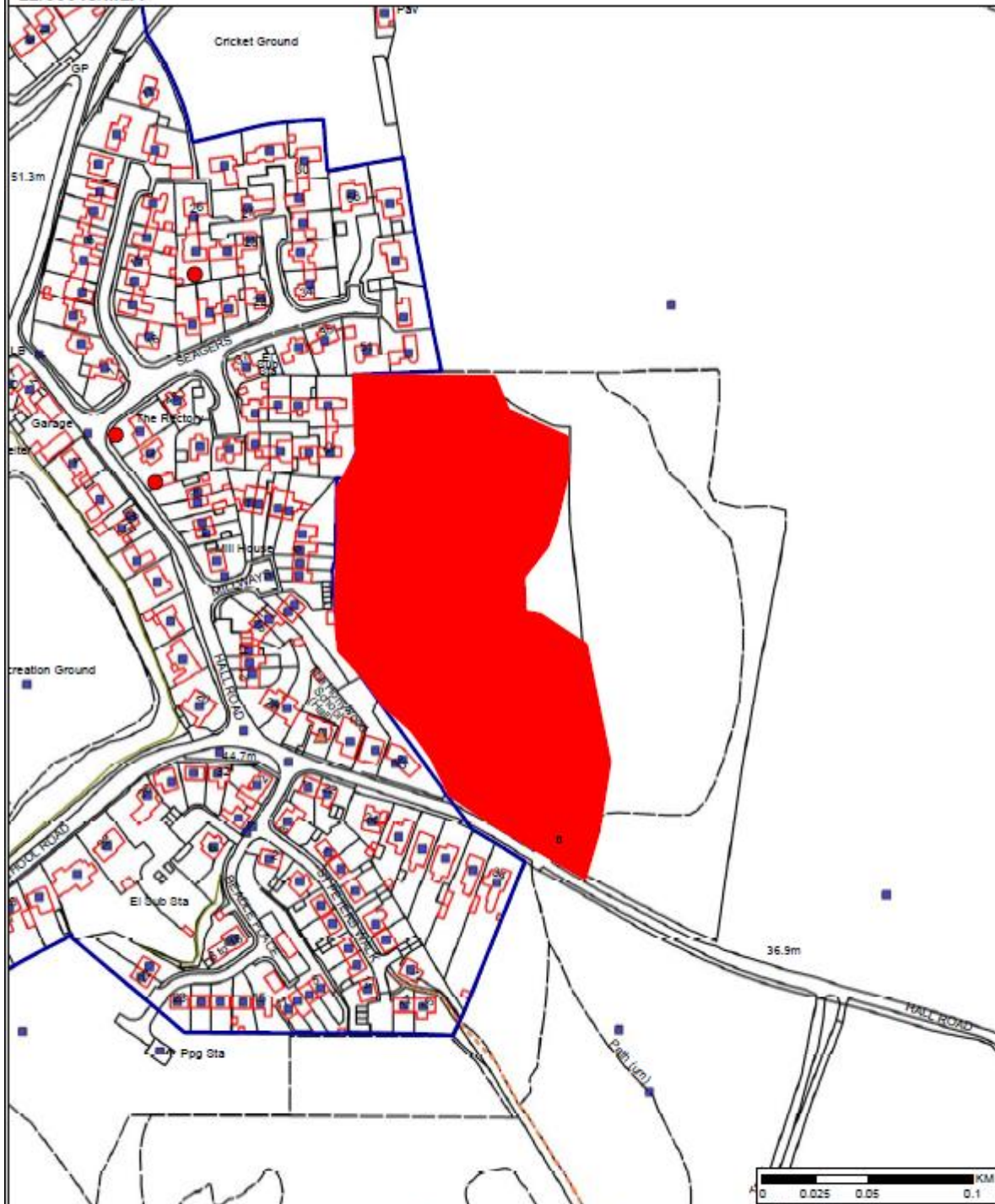
REFUSE for the reasons as detailed in Section 8 of this report.

2. **SITE MAP**

Please see below.

Land Opposite 34 Hall Road - Great Totham

22/00048/MLA



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Maldon District Council 100018588 2014



MALDON DISTRICT COUNCIL

www.maldon.gov.uk

Scale: 1:2,500

Organisation: Maldon District Council

Department: Planning Services

Comments: NW Committee

Date: 09/05/2022

MSA Number: 100018588

3. SUMMARY

3.1 Proposal / brief overview, including any relevant background information

- 3.1.1 The application site is located to the north of Hall Road, outside but adjacent to the settlement boundary of Great Totham. The site is approximately 1.84 hectares in size and is located on the eastern edge of the village of Great Totham. The site is undeveloped and is currently in a natural state, laid to grass with vegetation covering parts of the site and around the boundaries. The site was formerly used as a gravel pit which has since been back filled and is undulated in appearance.
- 3.1.2 There is open and undeveloped countryside to the east of the site, the southern boundary of the site fronts Hall Road, the western boundary abuts the settlement boundary and the rear garden of several properties, along with the majority of the northern boundary.
- 3.1.3 The application seeks to vary a Section 52 (S52) legal agreement of the Town and Country Planning Act (TCPA) 1971 (now repealed) associated with a historic planning application referenced MAL/408/84. The application is similar to a previous application to vary the same legal agreement, originally made in 2017 and determined in 2018. The S52 agreement, whilst relating to the development approved in 1984 and since built (6 dwellings), affects additional associated land within its defined boundary. Planning permission was granted on appeal in 2017 for a housing development on part of this associated land subject to a legal agreement under S106 of the TCPA 1990. The original S52 legal agreement was in conflict with the 2017 approval and as such, following the refusal of the Council on the 17 May 2018 to determine the said application to vary the S52 agreement, an appeal by the owner to the Lands Tribunal was, on the 5 June 2020 successful in relinquishing the requirement of the agreement to prevent, amongst other things, the owner of the land not to erect, or permit to be erected, or apply for planning permission to erect, any permanent buildings or structures at any time on the land edged green on the S52 legal agreement plan. To be clear, this variation relates only to the land the subject of planning permission 20/00428/FUL, which is the same land the subject of the lands Tribunal decision. The site is located on the eastern edge of Great Totham with the main residential area to the west, and currently open land to the east. The land is best described as a former gravel pit, historically landfilled, rising to the north over an undulating surface with scattered trees, generally low-level scrub vegetation and rough grassland

3.2 Conclusion

- 3.2.1 This is a detailed matter and considers the relevance of the obligations as set out in 1984 and their relevance at this time being guided by the definitions of the same as in the National Planning Policy Framework 2021(NPPF). Notwithstanding, a legal decision by the Land Tribunal has been made on 5 June 2020 and is a material consideration in this application and is considered the main determinant in this case. Taking in to account the previous decision of the Land Tribunal regarding the same matter it is not considered it would be reasonable for the Council to frustrate the development and the Council should voluntarily vary the existing Section 52 Agreement relating solely to the area edged red on planning permission MAL/FUL/20/0428.

4. MAIN RELEVANT POLICIES

Members' attention is drawn to the list of background papers attached to the agenda.

- 4.1 This application does not concern the application of Development Plan Policies as set out in the Maldon District Local Development Plan 2017 (MDLDP). Development of the land has been approved subject to Local Plan Policies and other material considerations. For the purposes of considering this application, it is to be considered whether the legal agreement meets the tests as set out in the (NPPF) 2021.
- 4.2 Notwithstanding, a legal decision by the Land Tribunal has been made on 5 June 2020 and is a material consideration in this application and is considered the main determinant in this case.

5. **MAIN CONSIDERATIONS**

5.1 **Main Consideration**

- 5.1.1 In granting planning permission for the 6 dwellings in 1984, the Council placed a number of restrictions on the development by a then Section 52 Legal Agreement. A S52 agreement is similar in effect to a Section 106 Agreement. The S52 legislation was repealed back in 1990, although existing S52 Agreements are still technically enforceable. The agreement incorporated restrictions and required certain actions, firstly the transference of part of the site to an amenity use. This has been done and there is a recreation amenity space on this land located off Maldon Road. As mentioned, the S52 agreement also prohibits the landowner from asking for planning permission and erecting any buildings on land coloured green on the plan as attached to the agreement.
- 5.1.2 There is no formal application process for this type of procedure. The original application submitted to the Council by the applicant to vary the legal agreement was made under the terms of Section 106A of the Town and Country Planning Act (TCPA) 1990 (as amended). It is clear that this legislation applies only to agreements made pursuant to Section 106 of the 1990 Act and not planning obligations agreed under Section 52 of the 1971 Act. The Council can however choose to vary the legal agreement voluntarily, outside of an application.
- 5.1.3 The applicant wishes to relinquish the requirements of the S52 agreement, which prevents a future planning application being made on part of the site, insofar as it relates to the land to which the recent 2021 full planning permission (reference 20/00428/FUL) relates.
- 5.1.4 Previously an application to relinquish the requirements of the S52 Agreement was submitted to the Council on the 26 April 2017. The application was reported to this committee sitting on the 3 April 2018 where consideration was deferred pending a legal opinion. The application was reported to Full Council on 17 May 2018. The legal opinion stated, amongst its consideration: *“the Section 52 restriction ...serves no planning purpose in today’s world ...The Restriction would not be enforceable and if application was made for its dischargeit is likely to be granted despite any resistance by the Council”*. The decision of Full Council was to ‘Refuse to Determine the application’ on the grounds that *‘The application was submitted with reference to Section 106A of the Town and Country Planning Act 1990, but such legislation is not the appropriate mechanism to amend an obligation agreed pursuant to Section 52 of the Town and County Planning Act 1971’*. The informative following the decision stated, *‘Notwithstanding the above, the Local Planning Authority has treated the application as a request to vary the Section 52 agreement. After consideration it was decided that as the site affected remains outside the development boundary as defined by the Maldon District Local Development Plan, the agreement still has a planning purposes in terms of restricting residential development’*.

5.1.5 The matter of relinquishing the requirements of the S52 agreement was the subject of an appeal to the Lands Tribunal on 25 June 2018 under Section 84 of the Law of Property Act 1925. The appeal was successful on the 5 February 2020. The summary of the matters relating to the S52 covenants attached to the legal agreement, at Paragraph 29 states:

“In my judgement, the appropriate application of the Tribunal’s discretion in this application is to modify the covenant to the extent that this would permit the application as granted by the Planning Inspector on appeal, conditional upon the provision of affordable housing as specified in the section 106 agreement which the applicants have entered into, and remove the restriction on applying for planning permission.”

5.1.6 Paragraph 29 referred to above confirms the modification relates only to the site the subject of the planning approval, and not any other land. Subsequent to this decision, a new full planning application was made, in the same terms as the original outline planning application but including all the details that were reserved under the appeal scheme. Full Planning permission, subject to an updated S106 legal agreement which included the securing of affordable housing, was granted on the 22 September 2021 reference 20/00428/FUL.

5.1.7 The Council could again refuse to voluntarily agree to vary the Agreement on the basis that it relates to a different application to that which was successfully appealed to the land tribunal. However, given that the applications are substantially the same (the latter application being the ‘Full’ form of the ‘outline’ application), the Council might be seen as acting unreasonably given a residential development, in light of the S52 legal agreement, has been granted, and the Council itself, subsequently approving a full application of a similar kind recently without regard to the S52 legal agreement. Should an application be submitted for any other part of the S52 land, it would be assessed on its merits in the usual way and having regard to any material considerations. The legal prohibition against submitting a planning application and erecting buildings on the land, is obviously found to be redundant by virtue of the decision of the Planning Inspector (through powers vested by the TCPA 1990, and all related legal precedents, case law and subordinate legislation), and the powers vested through the Lands Tribunal Act.

5.1.8 As outlined briefly above the S52 agreement has already been successfully appealed and its modification agreed. However, the modification allowed by the Lands Tribunal related solely to the 2017 outline application, and this permission has since expired. A new planning permission of a similar kind to the expired permission has been approved, with a different reference number to that which is on the current S52 agreement. It is considered, taking in to account the above history and the recent planning decision that a decision of the Council to not voluntarily vary the existing Section 52 Agreement relating solely to the area edged red on planning permission MAL/FUL/20/0428 could be seen as unreasonable behaviour.

6. **ANY RELEVANT SITE HISTORY**

- **FUL/MAL/09/00219** - Erection of two box stable block with tack room. Refused: 08.05.2009.
- **FUL/MAL/09/00600** - Erection of new stable block containing two stables and tack room, with grazing land. Refused: 14.09.2009.
- **FUL/MAL/11/00278** – Installation of a 'Nissen hut' within a secure compound for a temporary period of 12 months. Refused: 26.05.2011.

- **OUT/MAL/13/00786** - Erection of 50 no. market and affordable housing units, and a community pocket park, accessed from existing Hall Road access point. Refused: 03.07.2014 – Dismissed on Appeal: 29 June 2015.
- **OUT/MAL/16/00289** – Erection of 30 market and affordable housing units accessed via Hall Road. Refused 03 October 2016 – Allowed on Appeal: 14 February 2017
- **FUL/MAL/20/00428** – Erection of 30 dwellings with associated access and landscaping – Approved 22 September 2021

7. **CONSULTATIONS AND REPRESENTATIONS RECEIVED**

7.1 **Representations received from Parish / Town Councils**

Name of Parish / Town Council	Comment	Officer Response
Great Totham Parish Council.	The Council objects to the variation. The legal (S52) Agreement remains relevant and should remain in place. No variation should be permitted, and the terms of the Agreement should be rigorously upheld.	The comments of the Town Council are noted, and are considered in the body of the report.

7.2 **Internal Consultees**

Name of Internal Consultee	Comment	Officer Response
Lead Legal Specialist	I have reviewed the information you have provided with the current application and the legal advice provided in 2018 relation to the above application. Having considered all the above I would recommend the application is approved. The application is substantially on the same basis as previously and the previous legal advice still applies.	Noted.

7.3 **Representations received from Interested Parties**

- 7.3.1 Three letters were received objecting to the application and the reasons for their objections are as set out below:

<p>The title reads: . accessed from the existing Hall Road access at the site – but the plan that was approved and the copy of the plan attached to the document indicates that the access point has moved, to the detriment of the owners of the properties of 32 and 34 Hall Road.</p>	<p>The application relates to a change of planning reference only, all other material considerations being equal, and not the planning approval and matters that led to that decision.</p>
<p>If you grant the applicants wishes it would seem to be counter to the Tribunal Judgement for Case No: LP/6/2018 where the partial relinquishing of the S 52 was granted to enable the facilitation of the development of only 30 dwellings that had already been granted full planning permission on a parcel of the land. The reason for my supposition is that the tribunal applicants have previously confirmed their acceptance of the proposed modification as outlined. The present landowners Lynton Homes, had purchased the land with full planning permission, but also knowing the restriction on the remainder of the land, therefore, by implication they have also accepted the judgement by Peter D McCrea FRICS. Nothing has changed in the interim except that Lynton Homes now wish to dispose of the land and it is now under offer after being marketed by Nicholas Percival, Colchester. It would suggest that the application by Smart Planning is nothing more than a move to facilitate the sale of the land and is not a "mere formality" as they suggest in their application. The prospective buyers should undertake the land purchase under the same conditions as Lynton Homes. In addition, I do not think it is the place of planning officers to help facilitate a commercial transaction unless there is going to be strong and demonstrable benefits to the local community that will gain support from residents. It is after all a well-known precedent that variations on land covenants are not granted simply for financial gain or expediency.</p>	<p>The application only relates to the partial discharge of the requirements of the S52 agreement. This is set out in the report and confirms only the land the subject of the planning approval and as such is in full compliance with the Tribunal decision. The only change effectively would be the replacement of the planning references.</p>
<p>The S52 was discharged on the actual development site by the HM Courts and Tribunal Service following an appeal but remained on the rest of the site and beyond, the inspector made the point that the S52 should remain on all land covered by it, except for the actual</p>	<p>The application only relates to the partial discharge of the requirements of the S52 agreement. This is set out in the report and confirms only the land the subject of the planning approval and as such is in full compliance with the Tribunal decision. The only change</p>

<p>development site, I quote the inspectors comments, "I do not consider it appropriate to permit a blanket discharge, nor to relax the covenant in relation to any wider than the land required for the development proposed". This information can be found in the attached H M Courts & Tribunal information from Smart Planning, page 10, paragraph 28, I would ask what has changed since then, if the inspector did not consider it appropriate at that time, for whatever reason, why should it be appropriate now?</p>	<p>effectively is the replacement of the planning references.</p>
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8. RECOMENDATION

1. The Local Planning Authority resolves that the applicant's submission is treated as a request to voluntarily vary the existing Section 52 Agreement relating solely to the area edged red on planning permission MAL/FUL/20/0428.