



**REPORT of
DIRECTOR OF PLANNING AND REGULATORY SERVICES**

to
COUNCIL (EXTRAORDINARY)
17 MAY 2018

Application Number	MLA/MAL/17/00582
Location	Land Opposite 34 Hall Road Great Totham Essex
Proposal	Application to the part relinquishing of Section 52 Agreement (MAL/408/84) dated 10/10/1984 relating to land at the rear of Seagers and Millways
Applicant	Mr M Payne - J & M Developers
Agent	Miss A Lai - Smart Planning Ltd
Target Decision Date	08 February 2018
Case Officer	Mark Woodger, TEL: 01621 875851
Parish	GREAT TOTHAM
Reason for Referral to the Committee / Council	No scheme of delegation applies.

1. INTRODUCTION

- 1.1 At the North Western Area Planning Committee on 5 February 2018 an application to vary an existing Section 52 Agreement as attached to the land was considered. After discussing the application at length Members resolved to defer consideration pending the receipt of Counsel's opinion. This has now been received. A copy of this advice and the legal advice also given to the previous Committee is attached at **APPENDIX 1** to this report.
- 1.2 The item was referred back to the North Western Area Planning Committee on 3 April 2018. In considering the application Members resolved to defer decision on the application to the Council for determination.
- 1.3 If the Council wishes to consider this advice in detail, it should do so in private session and resolve to exclude the public and press just for that purpose. The consideration of the report in all other respects should be dealt with in open session.
- 1.4 In brief Counsel has advised that the Section 52 restriction on preventing further residential development and applications for such development on this site serves no planning purpose in today's world that is very different to when the agreement was executed, the Section 52 being signed in 1984. The restriction would not be enforceable and if application was made for its discharge under Section 84 of the Law of Property Act it is likely to be granted despite any resistance by the Council.
- 1.5 Whilst Counsel advises (at paragraph 7) that the only proper outcome for the application is its refusal as the application does not relate to a Section 106 agreement,

Counsel goes on to state (at paragraph 8) that it is wholly appropriate for the Council to treat the application as a request to voluntarily discharge the restriction.

- 1.6 Members are also asked to note that the applicants have written to the Council in the form of a pre action letter with their intention, if necessary, to apply to the Upper Tribunal (Lands Chamber) for the modification of the agreement, as they consider the clause within the S.52 Agreement which this application seeks to remove is “ultra vires” that is to say beyond the powers of the LPA.
- 1.7 Accordingly Members are requested to agree with the previous recommendation, which is repeated below.

2. RECOMMENDATIONS

It is recommended that:

- (i) the Local Planning Authority resolves to refuse to determine the application for the variation of a legal agreement pursuant to Section 106A of the Town and Country Planning Act 1990;
- (ii) the Local Planning Authority resolves that the applicant’s submission is treated as a request to voluntarily vary the existing Section 52 Agreement and agree to such a variation.

3. SITE MAP

Please see overleaf.

Land Opposite 34 Hall Road Great Totham
MLA/MAL/17/00582



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 Maldon District Council 100018588 2014

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Scale: 1:4,000

Organisation: Maldon District Council

Department: Department

Comments: NW Committee 17/00582

Date: 26/01/2018

MSA Number: 100018588

4. SUMMARY

4.1 Proposal / brief overview, including any relevant background information

- 4.1.1 The applicant seeks to modify an old section 52 Agreement associated with a historic planning application which has the reference MAL/408/84. The historic planning application granted permission in outline for the removal of former derelict buildings, and the limited extension of the “Seagers Estate”. This permitted the extension by means of three bungalows and three houses, they have been built and are numbered 51 – 56 Seagers. This site is located on the eastern edge of the Great Totham with the main residential area to the west, and currently open land to the east.
- 4.1.2 The applicant wishes to remove part of the Section 52 Agreement which prevents a future planning application being made on part of the site. If the Council refuses to vary the Agreement then the landowner would have to apply to the Lands Tribunal for an order removing the restriction.
- 4.1.3 In granting planning permission for the 6 dwellings the Council placed a number of restrictions on the development by a then Section 52 Legal Agreement. A Section 52 (S52) Agreement is similar in effect to a Section 106 Agreement. The S52 legislation was repealed back in 1990, although existing section 52 Agreements are still technically enforceable. The Agreement required incorporated a restriction 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 Section 52 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. It is this area of land outlined in green which this application relates to, and it is requested that the requirements of the Section 52 are lifted.
- 4.1.4 Officers have researched the case to see what the reason was for placing the restriction on the Green Land, and this is not documented. However on the southern part of this site outlined in green, over land which measures 1.83 hectares, planning permission has been granted on appeal with reference OUT/MAL/16/00289 for the erection of 30 market and affordable housing. At paragraph 30 of the appeal decision the Inspector stated that :
- “My attention has been drawn to a Section 52 Planning Agreement dating from 1984 which places a covenant on the appeal land, preventing the erection of permanent buildings or structures on it. Procedures for the modification or discharge of planning obligations are set out in the Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992. No such application or appeal is before me and, therefore, the land would be bound by the 1984 irrespective of my decision. It would be for the decision maker in any subsequent application or appeal to determine whether the requirements of the 1984 Agreement remain valid.”*
- 4.1.5 It is therefore clear that the Inspector was aware of this restriction when determining to allow that development and did not see this matter as a ground to prevent the approval of that development. The reasoning for this is that the matter should be dealt with through a separate process.

- 4.1.6 The application site falls outside but adjacent to the settlement boundary and 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.

4.2 Conclusion

- 4.2.1 The application has been made under the terms of Section 106A of the Town and Country Planning Act 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. It would therefore be improper to use the incorrect legislation to amend the terms of a Section 52 Agreement and as such it is recommended that the Local Planning Authority (LPA) refuses to determine the application on the grounds that it has no powers to determine such an application.
- 4.2.2 The Council can however choose to vary the legal agreement voluntarily, outside of an application and it is recommended that this approach is taken by the LPA and the application that is submitted is treated as a request to vary the Section 52 agreement voluntarily.
- 4.2.3 The Council could refuse to voluntarily agree to vary the Agreement but it then opens itself up to a hearing in the Lands Tribunal and the associated legal costs.
- 4.2.4 Furthermore if the Council refuses to vary the Section 52 agreement and the applicant does not make an application to the Lands Tribunal, the Council would still be unlikely to enforce the Agreement by application for an injunction for the reasons set out below.
- 4.2.5 If the Council tried to enforce the Agreement the Court would have to consider whether the requirements of the original Section 52 are necessary, directly related to the development, and fairly and reasonably related in scale and kind to the development.
- 4.2.6 The imposition of a legal agreement which prevents individuals from submitting applications on land does not pass the test of reasonableness. What development may be found acceptable is determined by planning applications which themselves are made under the Act and not through legal agreements imposed on planning decisions. Therefore and with planning permission being granted for this development at Appeal the acceptability of development has been established and to conclude it is recommended that should the development as approved by application OUT/MAL/16/00289 be undertaken the Council would not reasonably be able to seek an injunction to enforce this legal agreement. Therefore it is recommended that the LPA resolves that the applicant should be advised that the Council would be willing to enter a deed of variation, voluntarily and at the expense of the applicant.

5. MAIN RELEVANT POLICIES

- 5.1 For the purposes of considering this application the sole consideration is to consider if the legal agreement meets the tests as set out in paragraph 204 of the National Planning Policy Framework (NPPF) 2015. This is a single issue application.

6. MAIN CONSIDERATIONS

6.1 Principle of Development

- 6.1.1 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 NPPF.

6.2 Consideration of the Issues

- 6.2.1 Firstly, as the legal agreement was agreed under the terms of Section 52 of the Town and Country Planning Act 1971 and not Section 106 of the Town and Country Planning Act 1990, it is not possible to apply for a variation of the existing Legal Agreement under the terms of Section 106A of the 1990 Act, in the way as proposed. This is acknowledged by the applicants in their letter of 7 December 2017 in support of this application. Therefore, the LPA should refuse to determine the application as Section 106A of the 1990 Act is not the appropriate procedure to amend a Section 52 agreement.

7. ANY RELEVANT SITE HISTORY

- 7.1.1 The application site has the following 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

8. CONSULTATIONS AND REPRESENTATIONS RECEIVED

8.1 Representations received from Parish / Town Councils

Name of Parish / Town Council	Comment	Officer Response
Great Totham Parish Council	<p>Strongly object.</p> <p>The previous application was contentious and outside the former development boundary. The development restriction on the land, and the transference of land to the north to the Parish was the correct planning gain. For the application to succeed the Great Totham Plan required amendment which was passed with agreement of a local referendum. To relinquish this would ignore the democratic process. It is asked what action is being taken against the landowner who has informed that agreement by applying for permission.</p> <p>The initial objection was followed up with a letter dated 20/02/18 which reiterates a number of the abovementioned points. The letter provides additional details with respect to the history of the site and the S2 agreement. The letter also highlights the recent comments of the Planning Inspector in relation to this matter which are set out at section 4.14 above. It is expressed that the S52 remains relevant as it will uphold the development boundary of the Approved Local Development Plan.</p> <p>Documentation related to a similar case in Wiltshire has also been provided.</p>	<p>The comments of the Parish Council are noted. As for the matter of current action none has been taken as this is not considered reasonable. The circumstances of the Wiltshire case do not appear to be directly comparable to this case and is therefore given little weight.</p>

8.2 Representations received from Interested Parties

8.2.1 Letters were received objecting to the application from the following and the reasons for their objections are as set out below:

- EJ and Mrs V J Osborn, 55 Seagers, Great Totham
- AK and Mrs C Hood, 51 Seagers, Great Totham
- Brenda Cox, 53 Seagers, Great Totham
- MJ and Mrs EA Saxton, 52 Seagers, Great Totham
- Mrs P Yates, 56 Seagers, Great Totham
- RP Garrod, 42 Seagers, Great Totham
- David Bruce, 41 Seagers, Great Totham
- David Barclay, 26 Hall Road, Great Totham
- Andrew Boorman, 35 Hall Road, Great Totham
- Betty and Dennis Macey, 33 Hall Road, Great Totham
- D R Barclay, 26 Hall Road, Great Totham

Objection Comment	Officer Response
Originally the development at Seagers was subject to change to the Great Totham Plan and followed a referendum. A reversal of this would be unacceptable.	Noted. This consultation took place in 1984. This application falls to be considered in light of policies which exist in 2018.
The current cricket pitch was transferred to a privately owned pitch as a result of the S.52 Agreement.	There will be no change to the cricket pitch.
The agreement limited development outside the village, which is shown in the Local Development Plan (LDP) as a small village.	Noted, never the less permission existing for 30 dwellings on this site.
Any relaxation of the S.52 will allow the landowner to develop the rest of the field as a precedent.	All application for permission will be considered on their merits as and when they may be received.
Hall Road is a charming rural country lane which would be lost by the widening of verges etc.	Noted, never the less permission existing for 30 dwellings on this site.
More development would cause additional traffic to the detriment of the area in general.	Noted, never the less permission existing for 30 dwellings on this site.
The purpose of the S.52 was to ensure that no development be allowed on this green belt land and was a promise to the people of Great Totham.	Noted, the site is no in the Green Belt which does not feature n Maldon District.
The S.52 is an opportunity to stop development on this field once and for all.	Noted, never the less the reasonableness of the 1984 S.52 is here to be discussed.

Objection Comment	Officer Response
Comments as received in respect of the application for housing on the site remain.	Noted, however this has to be considered as a stand-alone submission.
Individuals should have been notified officially about the application.	Consultation has been carried out in accordance with the Council's agreed procedure.