

PART A	
Report of: Head of Development Management	
Date of committee:	29th November 2017
Site address:	Land to rear of 2-16 (evens), Southwold Road
Reference Number:	n/a
Description of Development:	Variation of Section 52 agreement dated 7th July 1989 pursuant to planning permission ref. 9/851/88 to discharge clause 2(b) requiring the granting of an easement for the use of land by local residents.
	Southwold Road (Block E) Freehold Limited
Date Received:	22nd December 2016
13 week date (major):	n/a
Ward:	Tudor

1.0 Site and surroundings

- 1.1 The site is located to the rear of nos. 2-16 (evens), Southwold Road. It comprises a rectangular area of land measuring 28m long by 5.4m wide and is tarmaced. It adjoins a block of 6 flats (18-22a (evens), Southwold Road). Nos. 2-16 (evens), Southwold Road form a terrace of 8 Victorian properties. The block of flats forms part of a larger development of flats on the former Home Office Stores Site.

2.0 Proposed development

- 2.1 To vary a Section 52 agreement dated 7th July 1989 forming part of the planning permission granted under ref. 9/851/88 for the development of the former Home Office Stores Site to provide 105 dwellings. The request is to discharge clause 2(b) of the agreement. Clause 2(b) is linked with clause 2(a) and the wording of these clauses states:

2(a) No dwelling to be constructed as part of Block E as shown on Plan A shall first be occupied until such time as that part of the Land shown edged and hatched brown on the plan shall have been made up to the satisfaction of the Director of Technical Services for the time being of the Council to provide a rear access, turning and parking area to the rear of numbers 2 to 16 (inclusive even numbers only) Southwold Road Watford and further shall

erect a lockable swing gate between the points marked A-B on Plan A permitting vehicular access to the said land shown edged and hatched brown on the plan.

2(b) The Owner shall by grant of formal easement or otherwise grant to the owners and occupiers of numbers 2 to 16 (inclusive even numbers only) aforesaid free passage to and over and use of with or without motor vehicles the said land shown edged and hatched brown on Plan A for such purposes as are consistent with the provisions of clause 2(a) hereof.

2.2 The land referred to as 'edged and hatched brown on Plan A' is the rectangular area of land to the rear of nos. 2-16 (evens), Southwold Road. As such, clause 2(a) has been fulfilled. The applicant wishes to discharge clause 2(b) which requires the granting of an easement or otherwise to allow local residents to use this land for access and the parking and turning of vehicles.

3.0 Relevant planning history

3.1 The following planning history is relevant to this application:

9/778/87G – Outline planning permission for demolition of existing buildings and redevelopment for residential purposes granted on 11th July 1988.

9/851/88 – Approval of details for 105 dwellings in 2 and 3 storey blocks of flats, houses, gardens, amenity areas and parking granted on 7th July 1989. This approval was accompanied by a Section 52 agreement of the same date.

4.0 Background information

4.1 Section 106 of the Town and Country Planning Act 1990 allows a planning obligation to be made by agreement or unilaterally to control the development or use of land or to secure financial payments relating to the development of land. Section 106A provides for the modification or discharge of a planning obligation made under Section 106. Where an application to the local planning authority to modify or discharge a planning obligation is refused, Section 106B provides an appeal procedure.

4.2 Section 52 is the equivalent provision to Section 106 under the preceding Town and Country Planning Act 1971. Section 52 does not, however, provide for the modification or discharge of planning agreements made under this section. Furthermore, the provisions of sections 106A and 106B do not apply retrospectively to agreements made under Section 52.

- 4.3 In light of the above, advice from the Council's legal department was that the applicant should seek the discharge of clause 2(b) by application to the Upper Tribunal (Lands Chamber), formerly the Lands Tribunal under Section 84 of the Law of Property Act 1925. An application was subsequently made by the applicant to the Upper Tribunal but this was not able to be considered, as a request to discharge an easement (or an agreement to enter into easements) does not fall within the jurisdiction of the Upper Tribunal.
- 4.4 In light of the above, the applicant has requested the Council consider their request for clause 2(b) to be discharged, notwithstanding that there is no formal procedure for this. In the event of this request being refused, the applicant would have no right of appeal but could seek judicial review of the decision.

5.0 Consultations

5.1 Neighbour consultations

Letters were sent to nos. 2-16 (evens), Southwold Road. Four letters have been received from nos. 2, 4, 6 and 14, Southwold Road, making the following comments:

- We have regularly used the area for car parking over the past 15+ years.
- The rear access, turning and parking was given to nos. 2-16 as part of the planning permission.
- Previous issues with the owner of the land illegally installing bollards and locking out residents.
- Significant parking issues on Southwold Road during the daytime and night-time. Issues have increased dramatically since 1989.
- Deed of covenant was granted for the sole use of residents in nos. 2-16 (evens), Southwold Road when planning permission was granted. Council took on the deed of covenant to enforce it on behalf of the residents.
- No grounds under the Law of Property Act 1925 to change the covenant.
- Current owner purchased the land knowing there was a covenant in place.
- Property was advertised and purchased on the basis it had use of the land for parking.
- Clause is not obsolete.

Although all of the responses refer to a deed of covenant being granted at the time planning permission was granted, there is no legal evidence of this (see Appraisal below). It would appear that the wording of clause 2(b) has been interpreted as having granted an easement. This is not, in fact, the case.

5.2 **Statutory publicity**

No statutory advertisement was required for this request.

5.3 **Technical consultations**

No technical consultation was required for this request.

6.0 **Appraisal**

6.1 Advice from the Council's legal department is as follows:

6.1.1 Enforcement of the covenant

The provision in the planning agreement was an agreement to create an easement and as it was specifically enforceable, gave rise to an equitable easement and consequently was registrable as a Land Charge under S.2 of the Land Charges Act 1972 as a Class D (iii) land charge. There is no evidence that any such registration took place – either under the name of the original owner, Dialect Properties Ltd., or the subsequent owners, Southwold Road (Block E) Freeholder Company Ltd from the date of the Agreement to the current time. The effect of non-registration is that, when the land was sold, the equitable easement was void against the purchaser. The effect of this is that, from the title aspect, we cannot enforce the agreement (for the easement) against the present owner.

As previously mentioned, the wording of the covenant is largely positive in nature ie. to grant easements etc. so this would not generally be enforceable; whilst there might be some argument in saying that the covenant does contain an element of restrictive nature because the grant of the rights restricts building on the land, the Council has no adjoining land having the benefit of this restriction and so on the face of it would not be enforceable.

However, under S52(2) of the TCP Act 1971, a S.52 Agreement may be enforced against the original covenantor in contract and against successors in title to the original covenantor. Contractual enforcement is dependant either upon consideration having flowed from the authority as covenantee to support the promise of the covenantor, (in practice this means the grant of planning permission).

Enforcement against successors in title is secured by subsection (2) which overcomes the limitations of privity of contract, and the limitations of existing restrictive covenant law, referred to above, by placing the local authority in the same position as a landowner entitled to enforce a restrictive covenant against an adjoining landowner. A broad interpretation of the subsection would give the authority the necessary status to enforce all the terms of the agreement against a successor,

without having to import the further rules governing the enforcement of restrictive covenants, such as the requirement that the covenant should actually be capable of benefitting adjoining land.

An agreement may be enforced by way of an action for an injunction. In Avon County Council v. Millard (1985) the Court of Appeal reversed the ruling of the High Court that a local authority must first exhaust the enforcement remedies in s.87 (power to issue enforcement notice in relation to breach of planning control). There was nothing in S.52 to suggest that the ordinary civil remedies for breach of contract should not be available, and since a local authority would not normally suffer financial loss, an injunction rather than damages would normally be the only remedy. A positive covenant is enforceable by specific performance, similar in effect to a mandatory injunction

There are various equitable defences to the grant of an injunction. One of the most common is that there has been too much delay. The court may refuse to exercise its discretion to award specific performance if the claimant has been guilty of unreasonable delay in commencing proceedings after the Defendant refused to perform the contract, or refused to do so. The delay must be such as to be evidence of abandonment of the contract, or otherwise make it unjust to the Defendant to order specific performance.

6.1.2 Application for modification or discharge of s.52 Agreement

Whilst a S.106 Agreement may be modified or discharged by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable, an agreement under S.52 of the TCP Act 1971 can only be modified by the Lands Tribunal. The relevant power is under the Law of Property Act 1925 s.84 on the application of any person interested in freehold land affected by any restriction arising under a covenant, to discharge (wholly or partially) or modify any such restriction.

6.1.3 As referred to above, an application has been made to the Upper Tribunal but they have confirmed they have no jurisdiction in this case. However, it is informative to consider the grounds on which an order may be made by the Upper Tribunal under s.84 of the Law of Property Act 1925. An order may be made where the Tribunal is satisfied:

- (a) That by reason of changes in the character of the property of the neighbourhood...the restriction ought to be deemed obsolete; or
- (b) That the continued existence of the restriction would impede (some reasonable user) of the land for public or private purposes..., or;
- (c) That the persons entitled to the benefit of the restriction have agreed,

either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

- (d) That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

6.1.4 S.(1A) allows the Tribunal to proceed on ground (c) in any case where it is satisfied that the restriction, in impeding some reasonable user of the land, either –

- (a) Does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
- (b) Is contrary to public interest;

And that money will be an adequate compensation for loss or disadvantage which any such person will suffer from the discharge or modification.

6.1.5 In determining whether the restriction ought to be discharged or modified, the Tribunal is further required to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas, as well as the period at which, and the context in which, the restriction was created or imposed, and any other material circumstances.

6.1.6 The relevant issues in considering this request are as follows:

- a) Enforceability of clause 2(b)
- b) Consideration of Tribunal criteria
- c) Planning considerations

6.1.7 a) Enforceability of clause 2(b)

Clause 2(b) provides “ The Owner shall by grant of formal easement or otherwise grant to the owners and occupiers of numbers 2 to 16 (inclusive of even numbers only) aforesaid free passage”. There is no evidence that any such easement was ever granted. Copies of the title deeds for each of the properties have been sourced from the Land Registry and none show any easement relating to this land. Although the land was formed in accordance with the requirements of clause 2(a), and the residents were allowed to use the land, neither the then owners nor the residents pursued the granting of a formal easement.

6.1.8 In terms of enforcing clause 2(b), the Council could seek an injunction against the current owner.

6.1.9 b) Consideration of Tribunal criteria

The 4 grounds which have to be considered by the Tribunal for making an order to

discharge a restriction are informative in this case:

- a) That by reason of changes in the character of the property or the neighbourhood...the restriction ought to be deemed obsolete – The area is still being used for car parking.
- b) The restriction would impede some reasonable use of the land – The only purpose of the land is to provide car parking for the owners/occupiers of nos. 2-16, Southwold Road. No other use is being impeded.
- c) Persons entitled to the benefit have expressly or by implication (through their acts or omissions) agreed to the discharge – It is evident that no owner has sought to get an easement registered to their property, therefore, by implication, it could be argued that they have consented by omission. However, several owners have objected to the request to discharge the clause and clearly do not give their express consent.
- d) Discharge will not injure entitled persons – There is some limited evidence of the parking area being used (site visits by officers) but no formal survey evidence. The land is also very substandard as a parking area. However, the owners of 4 of the properties have confirmed in writing that they have for many years and continue to use the land for car parking.

6.1.10 Under ground (c), the discharge may proceed where the restriction does not secure any benefits of substantial value or advantage – Although cars are undoubtedly parked on-street by residents in front of the properties, 4 of the owners have confirmed in writing that they have for many years and continue to use the land for parking. This is a clear benefit of value to them.

6.1.11 On this basis, using the Upper Tribunal criteria as a guide, there would appear to be no clear justification to discharge clause 2(b). There is no evidence of a formal easement having been granted and this does not appear to have been pursued by any of the former or current owners of nos. 2-16 (evens), Southwold Road. However, several of the owners have objected to the applicant's request to discharge this clause, which they clearly consider to be of benefit to them. Also, no other lawful use of the land is being impeded.

6.1.12 c) Planning considerations

At the time of the original planning application in 1988, the former Home Office Stores occupied the whole of the site. There was no area of land available for or used by local residents for the parking of cars. It is evident that the area of land in question was created as a planning benefit, to provide a parking area for the

residents of nos. 2-16 (evens), Southwold Road, secured through the s.52 Agreement. This was a relevant planning benefit and the s.52 Agreement was the correct mechanism to secure this. However, the dimensions of the land are wholly inadequate as a parking area for cars. The standard length of a parking space is 4.8m. In order to allow cars to enter and exit safely a 6m manoeuvring area in front of the spaces is required. This gives a total of length of 10.8m. The area of land is only 5.4m wide so is inadequate as a parking area. The width of 5.4m is only sufficient to allow cars to enter and parallel park, having then to reverse out. With parallel parking spaces needing to be 6m long, the length of the land at 28m would only be sufficient to park 4 cars.

- 6.1.13 The surrounding roads currently experience high levels of on-street parking congestion, particularly during the evening/night-time period, and this was presumably the case in 1989 when the planning permission was granted. Therefore, the planning justification for the use remains.

7.0 Conclusion

- 7.1 The area of land in question continues to be used by the owners/occupiers of nos. 2-16 (evens), Southwold Road for the parking of cars and this appears to have been taking place for many years, since the original formation of the land pursuant to the s.52 agreement. Several owners/occupiers have objected to the discharge of clause 2(b) of the s.52 agreement. Southwold Road and the surrounding roads experience high levels of parking congestion, particularly during the evening/night-time period, and the loss of this area of land would only exacerbate these problems. For this reason, it is considered that the request to discharge clause 2(b) of the s.52 agreement should be refused.

8.0 Human Rights implications

- 8.1 The refusal of the applicant's request to discharge clause 2(b) of the s.52 agreement will have an impact on the human rights of the applicant to use their land. However, this is considered justified in order to protect the human rights of the owners/occupiers of nos. 2-16 (evens), Southwold Road to use the land in accordance with the original planning permission.

9.0 Recommendation

That the request to discharge clause 2(b) of the Section 52 Agreement dated 7th July 1989 be refused for the following reason:

1. The area of land in question provides off-street parking facilities for the owners/occupiers of nos. 2-16 (evens), Southwold Road. This provision has existed since the area of land was formed pursuant to the s.52 agreement. Southwold Road and the surrounding roads experience high levels of parking congestion, particularly during the evening/night-time period, and the loss of this area of land would exacerbate these problems. This would be detrimental to the amenities currently enjoyed by the owners/occupiers of nos. 2-16 (evens), Southwold Road and to the wider highway network in the locality.

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