IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 335 (LC)
Case No: LP/6/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – DISCHARGE - 1.83 ha with outline planning permission for residential development – 1984 planning agreement under Town and Country Planning Act 1971 preventing erection of buildings - Tribunal's jurisdiction to discharge or modify – modification ordered limited to planning permission – section 84(1)(aa) Law of Property Act 1925

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN :

(1) MALCOLM R PAYNE **Applicants**
(2) DANIEL PAYNE
(3) RICHARD PAYNE

- and -

MALDON DISTRICT COUNCIL **Respondent**

Re: Land at Hall Road
Great Totham
Essex
CM9 8NN

Peter D McCrea FRICS

Decision on written representations

The following cases are referred to in this Decision:

Re: The University of Chester's Application [2016] UKUT 0457 (LC)

Introduction

1. This is an application under section 84 of the Law of Property Act 1925 by Malcolm, Daniel and Richard Payne ("the applicants"), the freehold owners of 1.83 hectares of land ("the application land") at Hall Road on the eastern edge of the village of Great Totham in rural Essex. The applicants wish to build thirty houses on the application land, for which outline planning permission has been granted on appeal, but are prevented from doing so by the terms of a planning agreement dated 10 October 1984, between Maldon District Council (the planning authority and objector to this application), and a previous owner of the application land, which prevents the erection of any permanent buildings or structures on it.

2. The application is unusual, in that it seeks to discharge a covenant entered into under a planning agreement made under section 52 of the (now repealed) Town and Country Planning Act 1971 ("the 1971 Act"). While the Tribunal does not have jurisdiction to determine applications to modify planning obligations made under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), where appeal lies to the Secretary of State, it retains jurisdiction to discharge or modify either wholly or partly a restriction imposed under a planning agreement made before 25 October 1991 under the 1971 Act. The different routes of appeal from planning agreements under the 1971 Act and planning obligations under the 1990 Act are explained by the learned authors of *Megarry & Wade*, 9th edition, at paragraph 31-094.

3. I have determined the application under the Tribunal's written representations procedure, with the agreement of the parties. For the applicants, I have received a submission from Mr John Dagg of counsel, supported by an expert witness report prepared by Ms Louise Cook MRTPI, and a rebuttal report from Mr Russell Forde MRTPI, both of Smart Planning Limited. For the Council, I have received a respondent's statement from Mr Simon Quelch, Senior Solicitor, supported by a witness statement from Mr Ian Harrison MRTPI, Development Management Team Leader.

The restriction on the application land

4. The application land, approximately 1.83 hectares in size, is located to the north side of Hall Road, on the eastern edge of Great Totham in Essex. Formerly a gravel pit, it is now laid to grass with vegetation covering part of its undulating surface and is currently accessed from the southern end, via a concrete hardstanding and metal gate. It borders residential development to the west, while open countryside lies to the east.

5. The land formed part of a larger parcel which was owned by a Mr Tom Martin. Upon Mr Martin's death, his executors applied for planning permission to carry out a small development of six dwellings on Seagar's estate – which itself was a residential development off Hall Road, and which lies north west of the application land. To the north of the Seagar's estate, Mr Martin had owned a cricket field. On 10 October 1984 the executors entered into a planning agreement with Maldon District Council under which planning permission was granted for the

six-dwelling development, subject to two main conditions. The first was that, prior to development, the cricket field would be donated to the Great Totham Parish Council, who had resolved to observe the wishes of the late Mr Martin that the general running of the cricket field continued in its present form. Of more relevance to this application the second condition was that, as regards the remainder of the larger parcel including the application land, the executors covenanted at clause 2(B):

> "not to erect, or permit to be erected, or apply for planning permission to erect, any permanent buildings or structures at any time…save for such use as may be permitted by Order of the Secretary of State for agricultural purposes…"

6. The applicants now apply to the Tribunal under section 84(1) of the Law of Property Act 1925 for discharge of the restriction, relying on ground (aa). The Council does not resist the discharge of the element of the restriction relating to applications for planning permission.

Planning history

7. Having had a previous application for 50 dwellings refused, on 17 March 2016 the applicants submitted a revised outline planning application (OUT/MAL/16/00289) for 30 dwellings, to include 12 affordable units. The application was determined by the Council's planning committee, at which the officer's recommendation was summarised (with my emphasis) as:

> "The principle of development is contrary to policies S2 and H1 of the adopted local plan and policies S1 and S8 of the Local Development Plan. Whilst the Council is able to demonstrate a Five Year Housing Land Supply (FYHLS) in the District, nevertheless, [any] housing planning application has to be considered on its own merits and in the context of the presumption in favour of sustainable [development] in accordance with Paragraph 49 of the NPPF. In this instance, the housing mix and provision of affordable housing meet the SHMA requirements and is a favourable consideration to this application. Although in illustrative form the layout of the development is considered acceptable as an extension to the settlement, it would not significantly harm the landscape or have any detrimental visual impact (subject to the reserved matters being acceptable), [nor] would there be any detrimental impact upon residential amenity. The consultation responses and assessment of the application demonstrate that the development would be acceptable having regard to all other material considerations subject to conditions and planning obligations where required."

8. Despite this supportive assessment, the planning committee resolved to refuse the application. The reasons given in the refusal notice dated 5 October 2016 were:

> "The application site is in a rural location outside of the defined settlement boundary for Great Totham where policies of restraint apply. The Council can demonstrate a five year housing land supply to accord with the requirements of the National Planning Policy Framework. The application site has not been

> identified by the Council for development to meet future needs for the District and does not fall within either a Garden Suburb or Strategic Allocation for growth identified within the Local Development Plan to meet the objectively assessed needs for housing in the District. The proposed development would have an intrusive visual impact upon the site and its surroundings as well as a material detrimental effect on the character and appearance of the wider countryside which is noted for its landscape value as defined as a Special Landscape Area. Further, the proposal for market and affordable housing would introduce unwelcome domestic activity to the site which would also have a detrimental impact upon the character and appearance of the edge of settlement countryside location. As such the proposal is contrary to policies S2, H1, CC6, CC7 and BE1 of the adopted Maldon District Replacement Local Plan, policies S8, H2 and D1 of the Maldon District Local Development Plan, and Government guidance as contained within the National Planning Policy Framework."

9. Perhaps unsurprisingly given this difference of opinion between the committee and its professional officers, the applicants appealed to the planning inspectorate, and on 14 March 2017 (APP/X1545/W/16/3162631) outline planning permission for 30 dwellings, including 12 affordable units, was granted on appeal. The planning inspector noted (at 30) 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."

10. In fact, the 1992 regulations apply to the modification or discharge of planning obligations made under section 106 of the 1990 Act, but not to planning agreements made under section 52 of the 1971 Act. However, presumably as a result of the Inspector's comment, on 18 May 2017 the applicant made an application (MLA/MAL/17/00582) to the Council under section 106A of the 1990 Act for the modification or discharge of the restriction imposed in the 1984 agreement. Following discussions between the applicant's agent and the Council, it was agreed that section 106A did not apply to an agreement made under section 52 of the 1971 Act. Notwithstanding that, it was agreed by the planning officer that the application would be treated as an application to modify the 1984 restriction by agreement.

11. The application to vary the agreement was listed to be heard by the Council's planning committee on 5 February 2018. The officer's recommendation was to a) refuse to determine the application pursuant to s106A, but b) treat the application as a request to voluntarily vary the existing section 52 Agreement and agree to such a variation. Sections 3.2.3 to 3.2.6 of the officer's report are of note:

"3.2.3 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.

3.2.4 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.

3.2.5 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.

3.2.6 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."

12. A decision was deferred pending the Council seeking counsel's opinion on the matter. At its meeting of 3 April 2018, the planning officer reported:

"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 from the Council"

13. The planning officer went on to reiterate his recommendation to vary the agreement as outlined above.

14. The members of the planning committee resolved to refer the decision to the full Council, which was considered at an extraordinary meeting on 17 May 2018. The officer's recommendation was repeated, with a cautionary note that the applicants had indicated their intention to apply to the Tribunal should agreement not be reached. The recommendation to vary the agreement was restated. The Council discussed the application in private session, and on 5 June 2018 the application under section 106A was refused on the basis that it was not

the appropriate mechanism to amend an agreement under section 52 of the 1971 Act. Under a paragraph described as "Informative", the refusal certificate indicated that:

> "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 [purpose] in terms of restricting residential development."

Submissions

15. For the applicants, Mr Dagg submitted that the continuance of the restriction confers no practical benefits of substantial value or advantage to the Council. To the contrary, the development of the site as permitted by the Inspector would provide needed housing, in particular affordable housing, in a sustainable location. The applicants rely upon the reasoning of the Inspector in his March 2017 decision. He considered the main issue to be the effect of the proposal on the character and appearance of the area, and did not find any harm in those respects. The Maldon Local Development Plan ("LDP") was then in its final stages of examination: it is now the approved statutory development plan, and in its approved form contains no provisions which undermine the Inspector's conclusions as to the planning balance. The Inspector had careful regard to the provisions of the NPPF, particularly in respect to housing. The planning position today is very different from that in 1984.

16. Mr Dagg asked me to note the emphasis on housing supply in the NPPF, and that Policy H1 of the approved LDP (July 2017) states at 5.2:

> "There is a significant shortage in the availability of affordable housing in the District…and increasing the supply of affordable housing is one of the key priorities for the Council and for the District…."

17. For the Council, Mr Quelch submitted that the application land is outside the development boundary for Great Totham, and development would be contrary to the LDP. The section 52 agreement therefore provides control over development in accordance with the LDP. The Planning Inspector only gave limited weight to the LDP because at the time it was only an emerging document. It has since been approved by the Secretary of State which means that greater weight should be given to it. The Inspector recognised that the agreement was still effective and would prevent implementation of the outline planning permission.

18. Mr Quelch submitted that no compensation under section 84 would be sufficient to compensate the Council or the public should the application be granted – it was doubtful whether it would be possible to award compensation bearing in mind the Council's role as a public body. The parish council had informed the Council that it considered that the removal or modification of the restrictions would not be in the interests of the public and should be resisted. The Council's view was that the restriction in the agreement continue to have a useful purpose and that the application should be refused.

Statutory context

19. Despite the unusual circumstances of this application, I am mindful that I am not determining a planning appeal and, whilst planning policy might form the background, I must determine the application under the 1925 Act. The Tribunal's jurisdiction under section 84 of the Law of Property Act 1925, in so far as material, provides:

> "(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—
>
> …
>
> (aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user…;
>
> …
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, 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 the public interest;
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.
>
> (1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas,

as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

Discussion

20. I can deal with the application fairly shortly.

21. The first question that is posed in a ground (aa) application – whether the proposed user is reasonable – is more contentious in this application that might normally be the case. My starting point is that the application land has an outline planning permission for the proposed development. This is not in itself determinative of a user being reasonable, other factors might come into play – see for instance *Re: The University of Chester's Application* [2016] UKUT 0457 (LC) - but it is a material circumstance and provides the applicants with a starting point to argue the case.

22. For the Council, Mr Harrison MRTPI provided several reasons why development would be resisted. First, the application land fell outside the settlement boundary. Secondly, the LDP is up-to-date, and accordingly planning decisions should be made in accordance with it unless material considerations dictate otherwise. He considered that, looked at in isolation from other material considerations, residential development would be contrary to Policies S8 and S2.

23. But, as Mr Forde MRTPI pointed out in response, the settlement boundary had not changed between the two local plans, and Mr Harrison gave no weight to how the development meets the pressing need for housing, particularly social housing, in the district. I agree with the Inspector that this tips the balance in favour of development.

24. In my view the intended user of the application land, based on the proposed tenure mix, is a reasonable one for the purposes of section 84(1A) of the 1925 Act. It is plain that the proposed user is impeded by the restriction.

25. Accordingly the next issue is whether the restriction secures to the Council a practical benefit, and if so whether that benefit is of substantial value or advantage. There is little if any evidence from either party on this point. In my judgment the ability of the Council to resist development by relying on the restrictions in the 1984 agreement does amount to a practical benefit, but such practical benefit is not of substantial value or advantage. I reject Mr Quelch's view that the restriction continues to serve a useful purpose in that it prevents the development as proposed. It cannot be of substantial value or advantage to the Council to resist a reasonable use of the land for a development for which outline planning permission has been granted, and which would, if permitted, go towards meeting the district's housing need.

26. I am also mindful that at each stage of advising its elected members, the Council's planning officers recommended approval of the development, and indeed of the modification of the restriction to permit the development to proceed. The Council's evidence to the Tribunal is completely at odds with that advice, and I place little weight upon it.

27. Mr Quelch accepted that any award of compensation to the Council would be doubtful. In my view no compensation award should be made because far from sustaining a loss or disadvantage as a result of the modification, the Council would benefit from the development taking place.

28. Accordingly, I find that the application under ground (aa) has been made out. However, that is only to the extent of permitting the development as proposed. 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. The only exception to that approach concerns the element of the restriction prohibiting the making of a planning application; the Council did not object to that part of the restriction being discharged, and for the reasons recorded in paragraph 11 above and comprised in the officer's recommendation to the planning committee I consider discharge is appropriate.

29. In my judgment, the appropriate application of the Tribunal's discretion in this application is to modify the covenant to the extent that 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.

Determination

30. I determine that the restriction set out in paragraph 5 above shall be modified as follows, pursuant to ground 84(1)(aa) of the Law of Property Act 1925.

31. The Agreement dated 10 October 1984 made between Maldon District Council and Mr Peter John Bygrave and Mrs Constance May Martin shall take effect as follows:

> Clause 2(B) shall be modified by deletion of the words "or apply for planning permission to erect,"
>
> A new clause 2BB shall be added:
>
> "(BB) notwithstanding clause (B), 30 dwellinghouses shall be permitted to be constructed in accordance with planning permission granted by the Planning Inspectorate on 14 March 2017 under reference APP/X1545/W/3162631, subject to the unilateral undertaking dated 17 February 2017 under section 106 of the Town and Country Planning Act 1990 entered into by Malcolm Payne, Daniel Payne and Richard Payne. Reference to that planning permission shall include 1) any subsequent planning permission that is a renewal of that permission and 2) any other matters approved in satisfaction of the conditions attached to that permission or any subsequent renewal."

32. An order modifying the restriction shall be made by the Tribunal provided that, within three months of the date of this decision, the applicants shall have confirmed their acceptance of the proposed modification.

33. This decision is final on all matters other than of the costs of the application. In the event that costs cannot be agreed, the parties may now make submissions on costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Peter D McCrea FRICS

Dated: 5 November 2019