

20 November 2015

FROM:

Delwyn Jones
Planning Solicitor
Resources Department
Tel Ext 37737

TO:

Ross Leal Planning Officer

**CONSULTATION ON DISCHARGE OR VARIATION OF PLANNING OBLIGATION S52
AGREEMENT DATED 19 APRIL 1984 COPY ATTACHED BETWEEN ADC[1]
NICHOLAS CO LIMITED [2]
ADDRESS 43 ROCK GARDENS BOGNOR REGIS
REF BR/211/15/PO**

GENERAL

Thank you for your recent consultation memo now returned together with the file on which alone this advice is based.

I refer you to Counsels Advice dated 11 October 2006 and my summary of that dated 16 October 2006 by way of general background.

COPY DEED

I enclose a copy of the deed which shows it is dated 19 April 1984 so the pre 9 November 1992 rules apply to it

**PLANNING OBLIGATION/S52 AGREEMENT MADE PRE 9 NOVEMBER 1992 AND
S84 LPA 1925**

Due to date of the deed this applies.

Procedure

You have these alternatives :-

- (1) grant the application via a deed per EPL Vol 2 para 106.70 which would be the orthodox way of proceeding
- (2) grant via S106A and rely on estoppel to effectively ensure we do not enforce it in future which would be practical and effective in my view
- (3) refuse and see if they appeal and under which procedure. Strictly an appeal should be under S84 LPA 1925 to Lands Tribunal so we can defend as invalid any appeal to PINS.

Criteria

Strictly the tests are those identified in S84 LPA 1925 and S106A and “useful purpose” does not apply to cases pre 9/11/1992 but for practical purposes I think you can use “useful purpose”.

The Determination in this Case.

It may be that County Highways no longer back this age restriction but it may still serve a useful purpose if there is evidence to show (judged by you as a planner) that there is another planning ground for keeping the age restriction eg lack of amenity open space, adverse affect on amenity from mixed age groups, discharge or variation will mean a loss of affordable housing for a sector of the population.

I suggest in this case that there are useful purposes , and so grounds to refuse, identified in the evidence and past decisions namely:-

[a] previous applications in 2006 and 2009 refs BR/289/06 and BR/144/09 were refused on the basis that there was a demand and a need for such age restricted accommodation locally ,

[b] there was policy support for refusal –GEN 7 and DEV 22 Local Plan for ADC

[c] there will be a potential parking impact identified by WSCC Highways in the 2009 application if not the 2006 application

[d] there may be potential noise and disturbance and harm to residential amenity

so you have planning grounds to refuse.

The applicants make points which are answerable and do not override the above reasons to refuse :-

[a] the flat on the 5th floor is unsuitable for over 65s –ANSWER - there is a lift which will need to be maintained under the landlords obligations

[b] There is confusion over whether this flat –No n43 is age restricted ANSWER – the lease should make this clear. The applicants own evidence suggests it is age restricted by the lease see letter from Coastal Management Ltd to Meek dated 22 September. This letter suggests No 43 should not be restricted , but then refers to “errors” which may have caused it to be on one interpretation !

Finally, you will need to use your planning judgement to answer the question ---“between 2009 and now have there been any changes ?” I know of none.

CONCLUSION

You will advise me of your decision. This being a case where pre 9 November 1992 rules apply a Deed of Variation will be needed , if you do decide to grant the application. I can draft this.

FURTHER EVIDENCE

I rely on you to show me any new or further evidence which may change the tenor of this advice.

Ref/Igdr/legprec/pl/podisch

NOTES

Amendments

Sub-s (5): inserted by the Law of Property (Miscellaneous Provisions) Act 1989, s 1(8), Sch 1, para 5.

Sub-s (1): **Person** See the note to s 1 ante.

Sub-s (1): **Commencement of this Act** This Act came into operation on 1 January 1926 by virtue of s 209(2) (repealed). See the note "Commencement" to s 209 post. Sub-ss (1)–(4) (apart from the words from "and where" to "each of them" in sub-s (1) above, which are new) reproduce the Conveyancing Act 1881, s 60 (repealed).

Sub-s (2): **Covenant implied** Covenants are implied by virtue of ss 48(2), 76(1) (repealed), 77(1) ante, this section and ss 117(2), 118(3), 119 post. This section also applies to a covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994, Pt I post; see s 8(2) of that Act.

Sub-s (3): **Contrary intention** This section is applicable to trustees (see the Trustee Act 1925, s 18, Vol 48, title Trusts and Settlements), and if, therefore, in their case, as in any other, it is desired to prevent the covenants made with them jointly being also several, a contrary intention must be expressed.

The clearest possible words should be used where it is intended to exclude this section.

Sub-s (4): **31st December 1881** Is the day before the Conveyancing Act 1881, s 60, came into operation.

Additional information See the Introductory Note(s) to this Act.

Law of Property (Miscellaneous Provisions) Act 1989 See this title post.

Definitions

"conveyance": s 205(1)(ii)

82 Covenants and agreements entered into by a person with himself and another or others [161]

(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before such commencement.

NOTES

Sub-s (1): **Person** See the note to s 1 ante.

Sub-s (2): **Before or after the commencement of this Act** This Act came into operation on 1 January 1926 by virtue of s 209(2) (repealed); see the note "Commencement" to s 209 post.

Sub-s (2): **Covenants implied** See ss 48(2), 76(1) (repealed), 77(1), 81(1) ante and ss 117(2), 118(3), 119 post for the covenants of title and indemnity which are implied on the part of any person conveying or expressed to convey in any of the capacities therein specified.

Additional information See the Introductory Note(s) to this Act.

Cases relating to this section

Bonsor v Musicians' Union [1954] Ch 479, [1954] 1 All ER 822, CA; partly revsd on another point at [1956] AC 104, [1955] 3 All ER 518, HL (sub-s (1))

Ellis v Kerr [1910] 1 Ch 529, 79 LJ Ch 291 (sub-s (1))

Napier v Williams [1911] 1 Ch 361, 80 LJ Ch 298 (sub-s (1))

"the court": s 203(3)

83 Construction of implied covenants

[162]

In the construction of a covenant or proviso, or other provision, implied in a deed or assent by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

NOTES

Covenant ... implied Covenants are implied by virtue of ss 48(2), 76(1) (repealed), 77(1), 81(1) ante and ss 117(2), 118(3), 119 post. This section also applies to a covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994, Pt I post; see s 8(2) of that Act.

Deed or assent The Conveyancing Act 1881, s 64 (repealed), which this section replaced, did not mention assents.

Singular or plural; masculine gender Cf s 61 ante and the Interpretation Act 1978, s 6, Vol 41, title Statutes.

Additional information See the Introductory Note(s) to this Act.

[84 Power to discharge or modify restrictive covenants affecting land [163]

(1) The Lands 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—

- (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or
- (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; or
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
- (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

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 Lands 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 Lands 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.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify a restriction without some such addition.

(2) The court shall have power on the application of any person interested—

- (a) to declare whether or not in any particular case any freehold land is, or would in any given event be, affected by a restriction imposed by any instrument; or
- (b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is, or would in any given event be, enforceable and if so by whom.

Neither subsections (7) and (11) of this section nor, unless the contrary is expressed, any later enactment providing for this section not to apply to any restrictions shall affect the operation of this subsection or the operation for purposes of this subsection of any other provisions of this section.

(3) The Lands Tribunal shall, before making any order under this section, direct such enquiries, if any, to be made of any government department or local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries, notices or other proceedings previously made, given or taken, the Lands Tribunal may think fit.

(3A) On an application to the Lands Tribunal under this section the Lands Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but rules under the Lands Tribunal Act 1949 shall make provision whereby, in cases in which there arises on such an application

the admission of persons to oppose) any such question as is referred to in subsection (2)(a) or (b) of this section, the proceedings on the application can and, if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, or by means of a case stated by the Lands Tribunal, or otherwise, as may be provided by those rules or by rules of court.

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

(6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or the Lands Tribunal, and the court or the Lands Tribunal may act on such evidence of that instrument as it may think sufficient.

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.

(8) This section applies whether the land affected by the restrictions is registered or not ...

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Lands Tribunal under this section, and staying the proceedings in the meantime.

(11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor (subject to subsection (11A) below) to restrictions created or imposed—

- (a) for naval, military or air force purposes,
- [(b) for civil aviation purposes under the powers of the Air Navigation Act 1920, of section 19 or 23 of the Civil Aviation Act 1949 or of section 30 or 41 of the Civil Aviation Act 1982].

(11A) Subsection (11) of this section—

- (a) shall exclude the application of this section to a restriction falling within subsection (11)(a), and not created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown; and
- (b) shall exclude the application of this section to a restriction falling within subsection (11)(b), or created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown or any public or international authority.

(12) Where a term of more than forty years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of twenty-five years of the term, apply to restrictions, affecting such leasehold land in like manner as it would have applied had the land been

ARUN DISTRICT COUNCIL

**IN THE MATTER OF PLANNING CONDITIONS AND PLANNING
OBLIGATIONS RESTRICTING OCCUPATION OF DWELLINGS TO
PERSONS OF STATE RETIREMENT AGE OR OVER ("THE
RESTRICTIONS") AND**

**IN THE MATTER OF VARIOUS APPLICATIONS TO REMOVE OR VARY
SUCH CONDITIONS/PLANNING OBLIGATIONS UNDER S106A TOWN AND
COUNTRY PLANNING ACT 1990.**

ADVICE

1. I am asked to advise urgently upon the following matters;
 - (i) What is the correct criteria for the LPA to employ when considering the applications at enclosures i-iii all of which relate to planning obligations which were made post 9 November 1992?
 - (ii) Are the LPA confined only to considering the matters applicable when the obligations were originally made?
 - (iii) If the answer to ii) above is "No" please confirm that the LPA can consider further criteria in addition to those when the planning obligations were made?
 - (iv) If the answer to ii) above is "No" please identify the criteria which the LPA have to consider. IS appreciates that the description of criteria to be considered may not be exhaustive and may differ from one application to another. Do these issues fall within the

usually understood definition of “material considerations” within the context of Town and Country planning in general?

- (v) Are the criteria identified in the Head of Planning Services Memo of 26th September appropriate and relevant criteria having regard to the meaning of “useful purpose” and/or “material consideration”? If so what additional criteria can be considered-examples will suffice the question possibly not being capable of a final answer as each case will be decided on its own merits?
- (vi) What criteria apply to discharge or modification of planning obligations made pre 9 November 1992?
- (vii) What criteria apply to discharge or modifications of Planning Agreements made under section 52 of the Town and Country planning Act 1971 or indeed predecessor legislation?
- (viii) What rights of appeal apply to each of the three cases described above?
- (ix) Do Human Rights or Age Discrimination issues impact on this matter?
- (x) Generally.

Background

2.0 I shall set out the general background to this matter. Planning permission was granted (BR/95/00) for 14 sheltered flats in a 3 storey block at 119 Victoria Drive, Bognor Regis subject to a section 106 Agreement that the flats should only be occupied by persons of state pensionable age (“the first permission”). The first

permission was granted on 15th August 2000. A later revision to this permission (BR/9/01) to include an additional flat at second floor level and minor amendments was approved on 19th June 2001 subject to the same section 106 Agreement ("the second permission"). Applications have now been made in relation to 2 flats at 119 Victoria Drive to modify the planning obligation and to lower the age restriction to 50. The reasoning behind the applications is that the majority of retirement flats have an age restriction of 50 and that the current restriction gives the impression that the properties are warden assisted which they are not.

- 2.1. The Officers Reports in relation to both of these permissions refer to 3 policies in 2 Local Plans current at the time-Arun District Local Plan EVT7, HSG5 and Arun District Local Plan Second Review Revised Deposit Draft GEN7. As I understand it these are general policies and do not specifically relate to the provision of accommodation for the elderly. I am referred to 2 policies in the current local plan namely DEV 21 and 22;

"DEV 21 Accommodation Restricted to occupation by the Elderly

Within the built up area, planning permission will be granted for the erection of new dwellings restricted to occupation by persons of 60 years of age or over. When such a person is sharing with a partner or spouse, that partner or spouse may be 55 years of age or over. Where reduced parking standards are considered appropriate, planning permission will only be granted subject to a legal agreement restricting occupancy of the units to persons complying with these criteria.

Reason

To protect the character of the area and the amenities of the neighbouring occupiers

DEV22 Relaxation of restrictions relating to occupation by the elderly

The amendment of conditions, planning agreements or planning obligations relating to units of accommodation for persons over state pensionable age will not be agreed unless the development remains in accordance with other policies in this plan and in particular;

- (i) adequate parking, amenity space and public open space to the standards required by unrestricted accommodation is provided; and*
- (ii) in cases where only a proportion of the units are to be de-restricted, a satisfactory environment is maintained for those units that remain restricted under the terms of the legal agreement or condition.*

Reason

To protect the character of the area and the amenities of neighbouring occupiers.

2.2 The section 106 Agreement Schedule 3 restricts the following;

"Not to permit any unit of residential accommodation forming part of the Development [except any unit occupied by a house manager and his or her spouse] to be occupied by a person or persons other than;

[a] a single resident who has attained the age of sixty years unless the survivor of those persons mentioned in [b];

[b] joint residents, one of whom has attained the age of sixty years .

Unless otherwise agreed in writing by the Council"

2.3 The rationale behind the age restriction is that persons in this age category do not rely on the private car so much and do not need as much amenity space as those for example with young children.

2.4 My instructing solicitor helpfully refers me to policy changes set out in national guidance on transport and car parking in PPG 13. PPG 13- Transport was

produced on March 27th 2001 after the first permission was granted but before the second permission.

2.5 He also draws attention to the current policies relating to reduced parking standards on town centre developments generally. In particular he draws attention to the advice in PPG13 at paragraphs 12-17 and 49-56.

2.6.1 He sets out a number of other possible justifications for the restrictions at present;

- i) The provision of affordable housing in that the imposition of these covenants will reduce the value of these properties.
- ii) The promotion of mixed communities in town centres.
- iii) The promotion of sustainable development by way of promoting town centre development without reliance on cars. Often, although not in all cases, developments affected by the restrictions are located in town centres. Policies DEV 21 and 22 refer to this eg DEV 21 "Within the built up area..."
- iv) Reduced amenity space being available to developments affected by these restrictions.
- v) Sheltered housing with the usual justification for that ie accommodation for a sector of the population with special needs which may not be compatible with the population at large owing to different lifestyle and routines. Accommodating the age groups together may adversely affect the amenities of either group or both. (IS appreciates that this may contradict ii above)
- vi) PPG 3 –Housing and the need for more efficient use of land by higher density and more intensive use of land and consequent lack or reduced car parking amenity spaces as part of developments.

2.6.2 Whilst this Advice is specifically directed to the two applications which have to be determined by 19th October 2006, I am advised that there are many more such applications for modification/discharge within the District generally which if granted would significantly reduce the amounts of flats with restrictions and I shall give general advice in relation to those applications. It is suggested that provided there is enough evidence for this, it may be of itself a material consideration. The flats with restrictions are divided into two categories;

- (i) developments of flats exclusively for the elderly which have age restrictions on all flats eg McCarthy and Stone and other specialist sheltered housing providers which tends to be the case in more recent developments
- (ii) mixed developments with some flats with age restrictions and other open market which tend to have been approved in the 1970-90s.

These restrictions may have been granted on the basis of reduced car parking /and or reduced provision of amenity space. My instructing solicitor sets out the position generally rather than specifically in relation to these circumstances and this Advice is necessarily general in relation to other possible applications.

Those restrictions further fall into two groups

- (i) those made under section 106 of the Town and Country planning Act 1990 and
- (ii) those made under section 52 of the Town and Country Planning Act 1971.

2..6.3 Further some potential Applicants have alleged that these restrictions breach Article 8 of the European Convention of Human Rights and/or the new Age Discrimination legislation.

2.6.4. The Head of Legal Services has identified that a possible reason for refusal on the following lines;

The whole development was assessed and granted planning permission on the basis that the development would be occupied by persons of retirement age. To remove this restriction in a piecemeal fashion flat by flat would result in development that did not make adequate provision for off-site facilities such as children's playspace and amenity areas needed to serve general family unit accommodation. The partial conversion of the flatted schemes would also lead to conditions of noise and general disturbance that would adversely affect the residential amenities of the remaining elderly occupiers who had purchased the accommodation specifically to provide themselves with a particular environment.

Legal Background

3.1 Section 106A of the *Town and Country Planning Act 1990 as amended* provides for modification/discharge of planning obligations either by agreement or by way of an appeal to the Secretary of State under section 106B. When such an application is made, a local planning authority may determine that;

- (a) *the planning obligation shall continue without modification*
- (b) *if the obligation no longer serves a useful purpose, that it shall be discharged*
- (c) *if the obligation continues to serve a useful purpose, but would continue to serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications. (s 106A(6))*

3.2.3 The scope of this section was considered by the High Court in *R (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 and it was concluded that the section does not require that the obligation should continue to serve its original purpose, what matters is that the obligation should serve a useful purpose. The Planning Encyclopedia notes at 106/8 that it is not a “useful planning purpose” which must be met. However Circular 5/2005 entitled Planning Obligations advises at A20;

“The Secretary of State considers that the expression “no longer serves any useful purpose” should be understood in land use planning terms.”

Furthermore A33 advises that;

“The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992..... The procedures in these Regulations apply only to planning obligations entered into under section 106 or section 299A of the Town and Country Planning Act 1990, as substituted and inserted by section 12 of the Planning and Compensation Act 1991. They do not apply to agreements entered into under other powers, including section 106 as originally enacted.”

The accompanying Regulations confirm this.

3.2.4 PPG13 Transport was issued on 27th March 2001. Paragraphs 12-17 set out the advice in relation to housing and cross refers to the advice in PPG3 which was issued in March 2000. In essence the advice set out in both encourages development to be located in sustainable locations and discourages the use of the car. This advice represented a shift of direction in Government thinking. Paragraphs 49-56 further advises that parking provision should generally be reduced in new developments to reduce the reliance on the private car.

3.2.5 Some of the potential Applicants have alleged that the restrictions breach Article 8 of the European Convention of Human Rights and/or the new Age Discrimination legislation. Article 8 provides a “right to a home/private life”. Any restrictions have to be judged against this right and be proportionate. The Employment Equality (Age) Regulations 2006 came into force on 1st October 2006 but do not apply in this case as they relate to employment as the title of the Regulations suggests. However they are an indication of Government thinking.

3.2.6 Applications to remove restrictive covenants may be made to the Lands Tribunal under section 84 of the Law of Property Act 1925. Until the introduction of section 106A and B this was the procedure which applied to planning obligations. The section provides that such restrictions may be partially or wholly modified by the Tribunal if satisfied-

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the lands tribunal may deem material, the restriction ought to be deemed obsolete; or

(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; or.....

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

Analysis

4.0 I shall give advice primarily directed to the facts of these two applications but it is also of general relevance in relation to other similar applications obviously with the usual caveat that the specific facts need to be considered in each case. The views expressed below are inevitably “on balance views” as there is little case law on this matter.

1. In my view the LPA is able to take into account all of the criteria set out in paragraph 2.6.1 supra in determining the applications referred to in this Advice which relate to the specific applications to remove planning obligations set out in paragraph 2.0 which were made post-1992. The term “Useful purpose” in section 106A (6) should be broadly interpreted. Whilst it is unclear from the case law and Government advice whether “useful purpose” should mean useful planning purpose it will make little difference as material considerations for planning purposes has been very widely interpreted by the Courts and this is a similar provision. However the LPA must give proper reasons for refusing applications to discharge/modify and therefore the considerations which are taken into account must be supported evidentially and/or in policy terms. Although of interest little turns on it but I note that the advice on sustainability contained in PPG13 which referred back to PPG3 was issued prior to the determination of the permissions and it is reasonable to assume that the LPA took it into account in determining the applications.
- 2 It follows that the LPA is not confined to consideration of the matters which were applicable when the obligations were made and can consider further criteria as I set out above.

- 3 The further criteria set out in paragraph 2.6.1 of this Advice may be material but as I have indicated there needs to be clear evidence that the removal of the restriction will have a clear adverse impact on those matters.
- 4 The Head of Planning Services has set out a reason for refusal referred to in paragraph X of this Advice. It relates to piecemeal change and can constitute a reason for refusal in addition to the other matters identified in paragraph 2.6.1.
- 5 The criteria which apply to discharge/modification of planning obligations made pre-November 1992 (which include applications to discharge/modify planning agreements made earlier under any legislation) are set out in section 84 referred to in paragraph 3.2.6 supra. The only procedure for removal of those agreements is by way of an application to the Lands Tribunal.
- 6 In my view the rationale behind these restrictions is proportionate in terms of the Human Rights Convention and the Age Discrimination legislation does not apply for the reasons set out in paragraph 3.2.5 of this Advice.

Those instructing should not hesitate to contact me if I can be of any further assistance. I would be pleased to advise further by telephone.

Anne Williams
6 Pump Court
Temple
London EC4Y7AR

October 11th 2006

4th July 2007

FROM:
Delwyn Jones
Planning Solicitor
Ext. 37737

TO:
Howard Cheadle
Head of Planning

c.c. Juan Baez, Planning Appeals Officer

Ref: BR/282/06/PO-DJ/jc

Priory Court, Cambell Road, Bognor Regis
Jurisdiction to hear Appeal against refusal to amend Planning Obligation/Section 52 Agreement

1. Your Question

I return the papers on which you endorse your questions. I address the questions below.

2. Answers in a nutshell

We have previously discussed the different regimes which apply to applications and appeals for discharging or varying planning obligations/Section 52 Agreements.

In brief the Tribunal with jurisdiction and legal powers to hear the Appeal will vary dependent on the date of the Planning Obligation/Section 52 Agreement.

If the Section 52 Agreement pre-dates changes introduced by the Planning and Compensation Act 1991 the correct Tribunal for determining the Appeal is the Lands Tribunal. This is essentially a Court who has jurisdiction over land disputes and compensation issues. Section 106A sub-section 10 Town and Country Planning Act 1990 provides that the Lands Tribunal has no jurisdiction to determine disputes concerning the discharge of planning obligations. However, this only applies after 25th October 1991 and 9th November 1992.

These dates are when the reforms introduced by the Planning and Compensation Act 1991 came into force.

There are numerous authorities and references which confirm this, I refer in particular to Circular 5/2005 paragraph A33.

I attach Counsel's opinion which we took on the matter.

3. The present decision

The present decision as appears from the note attached related to the discharge or variation of a Section 52 Planning Agreement dated 7th October 1988 (wrongly referred to as "1998" by the Planning Inspectorate in their letter).

Continued...../

.../Continued.....

Consequently, Juan and I wrote to the Inspectorate raising a fundamental objection to the Inspectorate saying that they would deal with the Appeal. The point was a very simple one namely that the Inspectorate had no jurisdiction because of the date of the Agreement. The Agreement clearly pre-dated the reforms and consequently only the Lands Tribunal had jurisdiction.

The letter confirms that the Inspectorate considered the position and now agrees with us.

4. Implications for future

1. In my opinion there is no problem for us to continue using the same forms as we do for ordinary applications whether the agreement or the planning obligation pre or post dates the reforms. This helps because of consistency and the issues are more or less the same, i.e. "useful purpose" or whether the agreement still confers some benefits or is not obsolete.
2. The Counsel's opinion attached confirms this.
3. The crucial issue is what happens on appeal.
4. If, as in the present case, the appellant mistakenly apply to the Planning Inspectorate to hear the Appeal in the case of a planning agreement which pre-dates the reforms then we should raise a fundamental point on jurisdiction. This is a good tactical point as the costs of going to the Lands Tribunal may be more significant than a Planning Inspectors Appeal. Further, it is an essential legal point as if the wrong tribunal determines the appeal the determination will be ultra vires and null and void.

5. All Issues covered

I believe that this is a sufficient explanation of your questions. Juan Baez has the full file with correspondence between me and the Planning Inspectorate which lead to the successful determination. I have kept records for future reference. The matter may need raising with your Officers in case the point arises again.

6. Future Appeals

There are no time limits. Consequently, it is always open for the present appellant to decide to appeal to the Lands Tribunal now he has received this determination. If he does so then we will be dealing with the matter on the basis of Section 84 Law of Property Act 1925. However, stated above the issues are not dissimilar to those under Section 106A Town and Country Planning 1990. The Lands Tribunal does not deal with matters informally and usually requires oral hearings where parties are represented by barristers. If need be that is a matter we can discuss in future. Clearly we have already got a barrister with background on the issue having regard to Anne Williams' evidence attached.

Delwyn Jones

Enc.



The Planning Inspectorate

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ARUN DISTRICT COUNCIL RESOURCES DEPT
29 JUN 2007
ACTION... PO

Delwyn Jones
Planning Solicitor
Arun District Council
Arun Civic Offices
Maltravers Road
Littlehampton
West Sussex
BN17 5LF

Your Ref: BR/282/06/PO
Our Ref: APP/C3810/A/07/2044521/NWF
Date: 28 June 2007

Dear Mr Jones

Town and Country Planning Act 1990

Appeal by D G & B R Vincent

Site at Flat No.s 2, 3, 4, 5, 6, 7, 9 + 10 Priory Court, Campbell Road, Bognor
Regis, PO21 1NW

Further to your letter of 7 June regarding this appeal. I enclose a copy of the response we received from A R Brown Solicitors on behalf of the appellants.

We have carefully considered the views of both parties and concluded that this appeal cannot be entertained. Please find enclosed a copy of our letter to the solicitors formally turning this appeal away.

Yours sincerely



Dave Flower

211B(BPR)

You can now use the Internet to submit documents, to see information and to check the progress of this case through the Planning Portal. The address of our search page is -

<http://www.pcs.planningportal.gov.uk/pcsportal/casesearch.asp>

You can access this case by putting the above reference number into the 'Case Ref' field of the 'Search' page and clicking on the search button



INVESTOR IN PEOPLE





The Planning Inspectorate

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A R Brown Solicitors
Rivoli Chambers
77/79 Chapel Road
Worthing
BN11 1HU

Your Ref: BRV/sjc/VINCENT
Our Ref: APP/C3810/A/07/2044521/NWF
Date: 28 June 2007

Dear Sirs

Town and Country Planning Act 1990

Appeal by D G & B R Vincent

Site at Flat No.s 2, 3, 4, 5, 6, 7, 9 + 10 Priory Court, Campbell Road, Bognor Regis, PO21 1NW

I refer to your letter of 19 June in response to the Council's letter of 7 June. We have carefully considered the views of both parties.

I would first emphasize that although a number of points/matters have been raised the only issue before us is whether the appeal lodged in respect of the application made by your clients on 4 September 2006 can be accepted. We consider that the LPA's reference to paragraph A33 of Circular 5/2005 is relevant. This paragraph confirms that the procedures of the 'The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (SI 1992/2832)' apply only to planning obligations entered into under Section 106 or Section 299A of the Town and Country Planning Act 1990, as substituted and inserted by Section 12 of the Planning and Compensation Act 1991. They do not apply to agreements entered into under other powers, including Section 106 as originally enacted. As you know the relevant Agreement relating to your clients' application was dated 7 October 1998 and was made under Section 52.

The LPA has argued that the existing Section 106 became effective from 25 October 1991. I would refer you to Statutory Instrument 1991 No. 2272 (C.68) which confirms that this is the situation. It was only from that date that the right of appeal was introduced with regard to the modification/discharge of planning obligations. The aforementioned SI 1991 No 2272 is the Commencement Order which confirms that the existing Section 106 came into force with effect from 25 October 1991. As a consequence we can only accept modification/discharge appeals relating to obligations signed after 25 October 1991.



ENVIRONMENT AGENCY



I therefore confirm that we have no alternative but to turn your clients' appeal away as we have no power to accept it. I realise that this advice will not be welcomed by your clients. It is unfortunate that this matter could not be resolved earlier but it has now fallen to us to decide whether the appeal can be entertained and in our judgement we have no option but to formally turn it away.

A copy of this letter has been forwarded to the local planning authority.

Yours faithfully



Dave Flower

211B(BPR)

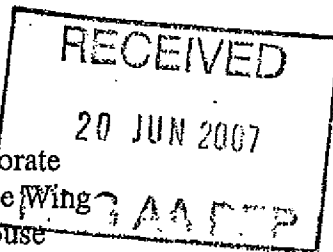
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Planning Inspectorate
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2 The Square, Temple Quay
BRISTOL BS1 6PN

Your Ref APP/C3810/A/07/2044521/MWS

Our Ref BRV/sjc/VINCENT/

Date 19 June 2007

Dear Sirs

Re: Flats 2-10 Priory Court, Campbell Road, Bognor Regis, West Sussex

We write on behalf of the Appellants in response to a letter sent to you by Arun District Council dated 7th June 2007.

We note the Local Authority's comments with regard to jurisdiction.

On behalf of the Appellants we are forwarding to you a copy of correspondence between this firm and the Local Authority prior to the Appellant's application on 4th September 2006. You will note that in respect of our enquiries in November 2003 and again in August 2006 that the Council stated on both occasions in their letters of 25th February 2004 and 18th August 2006 that a planning application would be required. In particular, you should note in the letter of 18th August 2006 the Council provided application forms and these were the forms submitted by the Appellant on 4th September 2006.

The Appellants have followed the directions given by the Planning Authority with regard to the submission of a planning application. We find it surprising therefore that the Council should therefore now argue that there is no jurisdiction for your office to deal with an appeal in respect of the Council's refusal of this application.

We note the Council make reference to the Lands Tribunal. It is not clear whether this is a reference to the original application or the determining of an appeal in respect of the Council's rejection of the application.

In this respect information we believe has already been provided by the Appellant to the extent that the Lands Tribunal have confirmed that they have no jurisdiction to deal with an appeal in respect of the Council's refusal.

/cont.

If it is the Council's contention that the application that has been rejected should never have been dealt with and should in fact have been sent to the Lands Tribunal we would challenge this both in the light of the enclosed correspondence and also the fact that the Council have already approved a similar application relating solely to Flat 12.

We trust that this information will be of assistance in dealing with the comments made by the Local Authority.

If we can assist further then please do not hesitate to contact us.

Yours faithfully

A R BROWN & CO

DATED

19th April

1984

ARUN DISTRICT COUNCIL

- and -

L. NICHOLAS (DEVELOPMENTS) LIMITED

A G R E E M E N T

pursuant to Section 52 of the Town and
Country Planning Act, 1971 in respect
of the Development of land at Rock Gardens
Bognor Regis West Sussex.
(Application NO. BR/1078/83)

Stamp 50p



THIS AGREEMENT is made the Nineteenth day of April
One thousand nine hundred and eighty-four BETWEEN ARUN DISTRICT
COUNCIL of Council Offices Littlehampton West Sussex BN17 5EP
(hereinafter called "the Council") of the one part and L. NICHOLAS
(DEVELOPMENTS) LIMITED whose registered office is at 12 North
Pallant Chichester West Sussex PO19 1TH (hereinafter called "the
Applicant") of the other part—

W H E R E A S:

- (1) The Council is the local planning authority for the purposes of the Town and Country Planning Act 1971 for the area within which the property the subject of this agreement is situated—
- (2) The Council is also the owner in fee simple in possession free from incumbrances of the property situate and known as Rock Gardens Bognor Regis in the County of West Sussex (hereinafter referred to as "the Property") and has agreed to sell the Property to the Applicant—
- (3) An application (Reference No. BR/1078/83) dated the 14th day of December 1983 has been made to the Council by the Applicant for permission to develop the Property by the erection of 67 flats together with garages parking spaces and accesses (hereinafter referred to as "the Development") and the Council is satisfied that the Development is such as may be approved under the said Act subject to the covenants hereinafter contained—

NOW THIS DEED WITNESSETH as follows:-

1. THIS Agreement is made in pursuance of Section 52 of the Town and Country Planning Act 1971 and Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 and in consideration of the covenants by the Applicant hereinafter contained—
2. THE Council hereby approves the Development (Reference No. BR/1078/83) subject to the conditions set out in the Notice of Approval of even date—
3. THE Applicant hereby covenants with the Council and the Council in its capacity as owner of the Property hereby approves and confirms such covenants to the intent that they shall take effect pursuant to the provisions of the above-mentioned Acts as follows:-

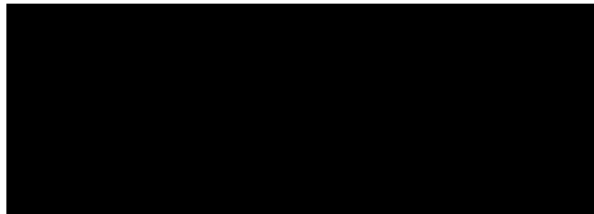
(a) That the Applicant will restrict the occupation of twenty-one of the flats comprised in the Development such flats to be selected by the Applicant in its unfettered discretion to occupation by a person who at the date such occupation commences is aged at least 65 years or in the case of occupation by two persons living as a family one of whom has attained the said age_____

(b) That the Applicant will impose in each of the leases whereby the said twenty-one flats shall be demised a covenant binding upon the lessee from time to time during the term of the lease restricting the occupation of such flat to occupation in the manner set out in sub-clause 3(a) of this clause_____

4. THE expressions "the Council" and "the Applicant" shall include their respective successors in title and assigns_____

IN WITNESS whereof the Council and the Applicant have set their respective Common Seals the day and year first hereinbefore written_____

(THE COMMON SEAL of the
(ARUN DISTRICT COUNCIL was
(hereunto affixed in the
(presence of:-



7076/84

(THE COMMON SEAL of L. NICHOLAS
(DEVELOPMENTS) LIMITED was
(hereunto affixed in the
(presence of:-

