
Appeal Decision

Inquiry held on 21 February 2017

Site visit made on 21 February 2017

by Cullum J A Parker BA(Hons) MA MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 6th April 2017

Appeal Ref: APP/M1710/Q/16/3157060

**Nodwood House, Land of Nod, Grayshott Road, Headley Down,
Bordon, GU35 8SJ**

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (TCPA) against a refusal to discharge or modify a planning obligation.
 - The appeal is made by Mr Howard Miller against the decision of East Hampshire District Council.
 - The development to which the original planning obligation relates to is the erection of Nodwood House and the change of Alpine Lodge to offices and student accommodation in 1993. In 2002, this legal agreement was discharged with a 'new' legal agreement which included a single obligation which is the subject of this appeal. The 2002 planning obligation indicates that the property *'edged green on the said plan shall be occupied only by persons employed or last employed in agriculture in the locality or the dependants or widows or widowers of such persons.'* This obligation followed the separation of Alpine Lodge and Nodwood House into separate ownership.
 - The planning obligation, dated 23 July 2002, was made between East Hampshire District Council and Mr and Mrs R W Richards and HSBC Bank plc. (Mr Howard Miller is a successor in title to Mr and Mrs Richards and Natwest Bank succeeded HSBC Bank plc).
 - The application Ref 28299/015, dated 28 April 2016, was refused by notice dated 28 June 2016.
 - The application sought to have the planning obligation discharged.
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Decision

1. The appeal is dismissed.

Application for costs

2. Prior to the Inquiry an application for costs was made by Mr Howard Miller against East Hampshire District Council. This application is the subject of a separate Decision.

Procedural Matters

3. The appellant sought a Hearing. It was not entirely clear as to under what power such proceedings would take place in relation to S106B of the TCPA. Schedule 6 - *Determination of certain appeals by person appointed by Secretary of State*, Paragraphs 6(1) and (4) of the TCPA provides for an appointed person to hold a Local Inquiry in connection with the appeal. In such circumstances a Local Inquiry to hear the evidence of the parties was held; albeit taking the form of a Hearing rather than a typical Inquiry involving cross examination, for example. No party raised concerns proceeding in this way,
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and I do not consider that anyone has been prejudiced by this approach in this case.

4. The application form and decision notice refer to the revoking of a Section 106 (S106) agreement. The powers under S106A and S106B are to modify or discharge planning obligations. An 'obligation' is a formal legal instrument executed as a deed and authorised by S106 of the TCPA. In this case there is only one obligation, which is a negative one as it restricts the development or use of the land and which was entered into before planning permission was granted. For the avoidance of doubt, I have proceeded on the basis that the appellant is seeking the discharge of the obligation set out in Paragraph 3 of the legal agreement.

Main Issue

5. The main issue in this case is whether Paragraph 3 of the Section 106 Agreement dated 23rd July 2002, being a planning obligation, which indicates that the property *'edged green on the said plan shall be occupied only by persons employed or last employed in agriculture in the locality or the dependants or widows or widowers of such persons'*, continues to serve a useful purpose.

Reasons

6. Nodwood House is a large 5 bedroom, detached two storey house located within about 7 acres of landscaped grounds. The property is accessed off a single track lane, which itself leads off from Grayshott Road. Approximately south west of Nodwood House is the former Richards Nursery (for plants) and Alpine Lodge. Both the nursery and the lodge did not appear to be occupied at the time of my site inspection. Beyond these, further to the south west, is Cain Manor, a Tudor-style manor house with brick wall to the front. The area is characterised by sporadic and isolated areas of development, set within either wooded areas or open fields.
7. The background of how the appeal has come about is detailed within the submissions, but a short contextual summary is useful. On 11th February 1993, outline planning permission was granted for *'Change of use from dwelling to offices and student accommodation and erection of a horticultural workers dwelling, Alpine Lodge, Land of Nod, Grayshott Road, Headley Down'*. I heard at the Inquiry that this permission was implemented and any reserved matters discharged. An obligation, which restricted the occupancy of Nodwood House, was agreed at around the same time with this permission.
8. On 26th July 2002, the local planning authority (LPA) discharged the S106 agreement, subject to a new S106 with an obligation limiting the occupancy of Nodwood House to *'only by persons employed or last employed in agriculture in the locality or the dependants or widows or widowers of such persons'* (ref 28299/006/FUL). This was entered into willingly by the parties and at the Inquiry neither party raised any concerns that the S106 dated 23rd July 2002 was anything but one that had legal effect.
9. The appellant purchased Nodwood House and the nursery in October 2005. Although the appellant intended to be employed at the nursery as a horticultural activity, and would therefore be aware that the property was

subject to restrictions on occupancy¹, their personal circumstances changed in 2006. A Certificate of Lawfulness for Existing Development (LDC) was issued on 29th February 2016 (ref 28299/013), of which the supporting evidence the appellant confirmed in a statutory declaration that the '*occupancy condition imposed on Nodwood House requiring the occupant to be employed in agriculture or a dependent relative has not been satisfied since I moved into the house on 7th October 2005*'.

10. As the LDC, under Section 191 of the TCPA, has been issued, the LPA must have been provided information that satisfied them of the lawfulness at the time of the application of the use and that any breaches of a planning condition for example, could not be enforced through measures such as the issuing of an enforcement notice.
11. Nevertheless, the obligation set out in Paragraph 3 of the S106 remains. That is the subject of this appeal, where the appellant has sought its discharge under Sections 106A and 106B of the TCPA. Section 106A sets out at (6) (b) '*if the obligation no longer serves a useful purpose, that it shall be discharged*'. The interpretation of 'useful purpose' as meaning 'useful planning purpose' is well established in caselaw² and it is a reasonable basis for me to consider the discharge of the obligation sought.
12. The appellant asserts that as the LDC has been issued, it follows logically that the LPA would be unlikely to enforce the obligation. This is because there are only two options open to the LPA; either to seek damages or an injunction. The former, in the appellant's legal submission, would not occur as there are no financial damages accrued by the LPA; and the LPA conceded this at the Inquiry. The latter would be unlikely to receive a favourable outcome due in part to existence of the LDC and the possible likelihood of the Courts permitting such a remedy is unlikely as it would be inequitable. To the contrary, the LPA asserts that it is the ability to enforce the obligation that remains, irrespective of any potential outcome.
13. It is not within my remit to second-guess what the Courts may or may not do. On the basis of the facts before me, it would appear that the LPA could enforce the obligation through the Courts; whether they would or any likely outcome is not for me to speculate. The question of whether the obligation could be realistically enforced is not central to the question of whether it serves a useful purpose in this instance. This is because the basis for that line of reasoning cannot be readily disassociated from the fact that there appears little to prevent the LPA from enforcing the obligation in practical terms should it choose to.
14. Indeed, such a principle appears at paragraph 32 of the judgement of Justice Ouseley in *Renaissance Habitat Ltd v West Berkshire District Council* [2011] EWHC, which states '*there is nothing unlawful about enforcing an agreement in circumstances which would not warrant its variation or discharge*'. I understand that it is open to the LPA to seek such a remedy and the Courts may issue an injunction; the failure to follow which may lead to a contempt of court. In this respect, the view that the issuing of the LDC means that the

¹ Confirmed in oral evidence

² See *Batchelor Enterprises Ltd v North Dorset DC* [2003] EWHC and the judgement of LJ Sullivan and as referred to in *Millgate Development Limited v Wokingham Borough Council* [2011] EWCA (herein Millgate)

obligation set out in Paragraph 3 of the S106 no longer serves a useful purpose is erroneous in principle.

15. In terms of serving a useful planning purpose, the appellant pointed me to the fact that the building would be residentially occupied irrespective of whether it was someone employed in agriculture³. The paraphernalia associated with such a use would be unlikely to differ either, given that any occupier may wish to park a car, sit in the garden, and so on. However, in my mind, this misses the point as to why the obligation was sought and willingly agreed in the first place. The obligation clearly seeks to restrict occupancy to persons involved in agriculture. This was on the basis that in 1993, a persuasive case was put forward that a new dwelling in the countryside, outside of any discernible settlement, was acceptable as it would be occupied by someone employed in agriculture. This restriction has continued since then, and was reaffirmed in 2002, and then upon occupancy of the property by the appellant in 2005.
16. I take the appellant's point that the useful planning purpose does not have to be related to the development in connection with which the S106 was entered into⁴. But, in this case there does not appear to have been any significant change in national or local planning policy – or the planning purpose of recognising the intrinsic character and beauty of the countryside; although the phraseology may have altered over time. The planning purposes in 1993 appear very similar to those of today; focussing development towards sustainable locations and avoiding new isolated homes in the countryside, unless there are special circumstances such as the essential need for a rural worker to live permanently at or near their place of work.
17. These broad policy directions are pertinent today and the caselaw does not exclude reference to the original development, but rather that it does not 'have' to be the same when considering a S106B situation. In this case, I have found that planning policy circumstances appear to be broadly the same, and therefore the fact that the obligation would serve a planning purpose both then and now is one consideration to factor into determining whether a useful planning purpose is served.
18. In a similar vein, I note the references to the *Millgate* judgement, where the Court of Appeal agreed that S38(6) of the Planning and Compulsory Purchase Act 2004 did not apply to Section 106A of the TCPA. However, I consider it to be entirely logical and reasonable that, as a decision-maker considering the useful planning purpose, the adopted development plan and any material considerations could still be considered; albeit not determinative as they would be under a Section 78 planning appeal. I do not consider that such an approach is flawed when one such 'useful purpose' may well be the degree of consistency with the development plan and any material considerations.
19. The fact that I have been directed to Policies CP19 and CP29 of the *Joint Core Strategy adopted by East Hampshire District Council and South Downs National Park Authority 2014* (JCS), Policy H15 of the *East Hampshire District Local Plan: Second Review 2006* (EHDLP) and also those of the National Planning Policy Framework such as Paragraph 55, reinforce my thoughts that the

³ For ease of reading references to 'a person employed in agriculture' shall mean in this decision - *persons employed or last employed in agriculture in the locality or the dependants or widows or widowers of such persons*

⁴ As established by *Renaissance Habitat Ltd v West Berkshire District Council* [2011] EWHC, Paragraph 32

policies, whilst not determinative in themselves, provide some context as to how the obligation does or does not serve a useful purpose.

20. The appellant makes the point that these policies refer to new dwellings or conditions, and therefore are of little relevance to this case. However, it is clear upon plain reading of these policies as to the planning purpose they seek to achieve; namely to restrict or restrain development in the countryside unless it needs to be there. This is precisely the aim of the obligation, where it seeks to restrain the development in this case to occupiers employed in agriculture. The legal submission from the appellant indicates that the value of the property, due to its size and surrounding grounds, means that it is unrealistic to expect it to be within the reach of an agricultural worker to purchase. However, there is little evidence before me that demonstrates that the appellant's point is valid.
21. For example, I have not been provided with a verified valuers report from a practising valuer, including any comparison with typical or local rural wages. Nor have I been presented with any marketing evidence that demonstrates there is no demand for a property of this type by any potential agricultural worker meeting the definition set out in the obligation. At the very least it would not be unreasonable to expect some form of advertising of the property and any such interest to have been undertaken and any subsequent interest recorded.
22. I appreciate the point made by the appellant's planning agent who raised concerns over what discounted value one could put on a property that is subject to a LDC on the one hand and an obligation on the other: both of which might appear to contradict each other to a layman. I also note their concerns over whether the value of such an exercise would be limited. However, the fact remains that there is very little evidence that the market conditions have changed over time (as sought by Paragraph 205 of the Framework) that would demonstrate that the useful purpose is no longer served by the obligation.

Overall Conclusion

23. I acknowledge the appellant's case that the lawful development certificate could be seen to complicate matters, that there may be uncertainty as to the outcome or likelihood of enforcing the obligation through the Courts, and that the application of development plan policies is limited by the fact that the scheme does not seek a new dwelling.
24. I find that the obligation continues to serve a useful planning purpose; it seeks to restrict occupancy to persons employed in agriculture in order to justify the erection of a dwelling in the countryside. There is no substantive evidence before me which indicates whether in policy or practical terms this is no longer required, beyond the personal circumstances of the appellant. In the absence of such evidence and justification, I can only conclude that as it continues to serve a useful purpose, the obligation should not be discharged.
25. Accordingly, the appeal fails and the obligation remains in its present form.

Cullum J A Parker

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Advocate Leon Glenister, Barrister instructed by Legal Department
of EHDC

Witnesses:
Katherine Pang – Planning Officer
Stephen Wiltshire – DM Team Leader
Councillor Anthony Williams - (District and Parish)
Alex Kirk - Assistant Solicitor for EHDC

FOR THE APPELLANT:

Advocate Scott Stemp of Counsel instructed by Mr Howard Miller

Witnesses:
Howard Miller – Appellant
David Campion MRICS – Planning Agent