

Legal Opinion

Legal Opinion in support of an appeal against the refusal of planning application PA18/05642 for the proposed construction of single dwelling at Play Area, Comfort Wartha, Constantine TR11 5AZ



Stephens Scown LLP
Osprey House
Malpas Road
Truro
TR1 1UT

SML/WORD-28-1

Background

1. We have been instructed to provide a legal opinion (our “Opinion”) to accompany the Statement of Case submitted by the Appellant in the appeal against the refusal of planning application PA18/05642.
2. Our Opinion relates to the Section 52 Agreement (“the Agreement”), provided by the Council and attached at Appendix 1, and its enforceability in respect of the land related to the appeal (“the Land”).

Validity of Section 52 Agreement

3. The Agreement relates to a planning consent approved in 1985 (LPA reference 2/06/84/00297/0) for the construction of 8 dwellings.
4. Paragraph 3 of Part 2 of the Third Schedule to the Agreement requires the following:

3. The said Public Open Space shown on Drawing No. 8406/P/5 shall be laid out by the Owner before completion of more than six (6) of the dwellings to be erected and the Public Open Space will be provided with an adequate means of public access and in accordance with the Council’s standard Specifications for amenity areas on private residential estates (a copy of which has been furnished to the Owner and also attached to this Deed) and to the reasonable satisfaction of the Council’s Chief Technical Officer and shall thereafter dedicate the same to the Council for use as a Public Open Space whereupon the Council will take over all future liability to maintain the same
5. The Local Planning Authority has determined, in a recently refused application to discharge the Agreement (PA19/10056), that the Agreement continues to serve a useful purpose.
6. The Agreement at Appendix 1 is the copy of the Agreement that the LPA have provided and are relying upon and is the only copy that the Appellant is aware of.
7. The Agreement is drafted to take effect the day it is entered into, “*This Agreement is made the [] day of [] One thousand nine hundred and eighty-five*”. The Agreement was not dated and therefore did not take effect.
8. No seal of the company has been affixed.
9. The Agreement provides that the parties caused their common seals to be affixed the day and year first before written. It is understandable therefore that the Agreement remained undated pending the seal of the company.
10. In addition, there is no evidence on the Agreement that the parties signed or sealed the plan attached to the Agreement. It is common practise that the plan attached to planning obligations is executed by all the parties and the Agreement has therefore not been validly executed.

11. As the Agreement has not been dated or validly executed by the parties, it does not take effect as a planning obligation under S52¹.

Dedication as public open space and S52 Town and Country Planning Act 1971

12. Even where the Agreement could be found to have been formally entered into, the obligation at paragraph 3² is for the land to be “dedicated” to the Council as public open space after it has been laid out to the satisfaction of the Council.
13. The land in the Agreement has not been laid out as public open space as required by the Agreement, and has subsequently not been “dedicated” to the Council as such.
14. The Agreement does not specify a mechanism to “dedicate” the land to the Council, after it is laid out to the Council’s satisfaction, and the term “dedicate” in this context has no legal meaning (unlike for example the dedication of a highway, which confers a legal interest).
15. In practise, dedication of any land to the LPA would involve the legal transfer of the land to the LPA which clearly has not taken place. A requirement to transfer land would be a positive requirement which falls outside the scope of S52.
16. S52 of the 1971 Act provides “*A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land [...]*”. It is established law that the validity of any agreement under S52 depends solely on whether or not it was entered into for the purpose of restricting or regulating the development or use of the land³.
17. The obligation to dedicate the open space is not an obligation that restricts or regulates the development. The obligation to dedicate does not therefore meet the requirements for a planning obligation under S52 and as such is not enforceable by the LPA under S52 (2).
18. As well as S52 TCPA 1971, the Agreement has also been made under Section 33 of the Local Government (Miscellaneous Provisions) Act 1982. Section 33 provides for positive covenants in respect of works, enforceable by the LPA, however does not provide a power to enforce a positive covenant requiring the dedication or transfer of land.
19. The land subject to the Agreement can not at this point be regarded as public open space as it has neither been laid out as public open space nor “dedicated” to the Council for that purpose and the Agreement cannot require that.

¹ Town and Country Planning Act 1971

² Of Part 2 of the Third Schedule of the Agreement

³ J A Pye (Oxford) Ltd v South Gloucestershire District Council and others – [2001] All ER (D) 343 (Mar)

Lack of enforcement

20. Paragraph 3⁴ of the Agreement stipulated that the public open space was to be laid out before completion of more than six of the dwellings to be erected.
21. All eight of the dwellings in the development were completed and the public open space has never been laid out.
22. In the past 35 years, the LPA have not taken any action to enforce paragraph 3 of the Agreement, which further indicates that the Agreement was not completed, never took effect and was not enforceable under s52.

Determination of the appeal

23. In any event, if it is considered that the Agreement does take effect, the appeal can be determined on its merits prior to the discharge of the Agreement.
24. If necessary, an application to the Upper Tribunal of the Lands Chamber can be made by the Appellant to modify or discharge the Agreement following a grant of permission, on the basis that the Agreement impedes the reasonable use of the land⁵.

Opinion and conclusion

25. The Agreement is not an enforceable planning obligation for the following reasons:
 - a) The Agreement was not validly executed or dated and has never taken effect; and
 - b) The requirement to dedicate the Land to the Council as public open space has no meaning and is not enforceable under S52 of the 1971 Act.
26. In considering the application of the Agreement in determining the appeal, the Inspector should have regard to the fact that the appeal may be determined on its merits, before the Agreement is formally discharged.
27. Consideration should also be given to the Appellant's ability to apply to the Upper Tribunal and their ability to discharge S52 Agreements which impede the reasonable use of land, following a grant of planning permission.

Stephens Scown LLP

21 July 2020

⁴ Of Part 2 of the Third Schedule of the Agreement

⁵ Under section 84 of the Law of Property Act 1925 as previously determined by the Upper Tribunal in *Payne and others v Maldon District Council* [2019] UKUT 335 (LC)

Appendices:

Appendix 1 Copy of Section 52 Agreement