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**STATEMENT OF SUPPORT FOR REVOCATION OF SECTION 52 AGREEMENT  
ATTACHED TO PERMISSION W2/84/00297/0**

**LAND AT  
COMFORT WARTHA  
CONSTANTINE  
TR11 5AZ**

**ON BEHALF OF  
CROWNMARK DEVELOPMENTS**

**Our ref: 16029**

**January 2021**

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## 1. INTRODUCTION

1.1.1 This supporting statement has been prepared by Laurence Associates and accompanies an application for the revocation of a Section 52 Agreement, submitted to Cornwall Council on behalf of Crownmark Developments in respect of Land at Comfort Watha.

1.1.2 The Section 52 Legal Agreement relates to a planning consent approved in 1985 (under Council reference W2/84/00297/0) for the construction of 8 detached dwellings with the portion of land in question forming open space that was to be dedicated to the Council. Part II of the Third Schedule sets out the stipulations and provisions and is attached to this application for Council's information. The 8 dwellings were subsequently constructed to form Comfort Wartha estate and as part of the Section 52 Legal Agreement, a sum of £1,584 was paid to the Council in order to maintain the portion of open space. However, to date, no maintenance work has been carried out and consequently the Council failed to spend the money.

1.1.3 Further, Planning condition 15 of 2/06/84/00297/0 relates to details of a play area and is set out within the decision notice as follows:

*Within six (6) months of the date of this permission, details of a play area to be incorporated into public open space area, including surface treatment and the equipment to be provided thereon, shall be submitted to and approved by the Local Planning Authority. The necessary work shall be carried out within six (6) months of the substantial completion of the estate development.*

A Section 52 Legal Agreement was subsequently endorsed with respect to the provision of the outdoor play area and with regard to the payment of the sum of £1584 for the future maintenance of the open space, as well as the open space to be provided before the completion of 6 dwellings.

1.1.4 The details requested by the 1985 consent relating to play equipment have never been formally submitted nor approved by Council on the section of the land in question.

1.1.5 Permission has been recently granted on the site through the appeal allowed under appeal reference number: APP/D0840/W/20/3249081 for the construction of a single dwelling on the Play Area, Comfort Wartha, Constantine, TR11 5AZ and in accordance with the terms of the application, Ref. PA18/05642, dated 13 June 2019, and subject to the conditions listed below:

- (1) Details of the appearance, landscaping, layout and scale, (hereinafter called the reserved matters) shall be submitted to and approved in writing by the local planning authority before any development begins and the development shall be carried out as approved.
- (2) An application for approval of reserved matters must be made no later than the expiration of 3 years from the date of this decision and the development hereby approved shall commence no later than 2 years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.
- (3) The development hereby permitted shall be carried and completed in strict accordance with the recommendations set out within section 4 (interpretation of results, impact assessment and recommendations) of the submitted "Preliminary Ecological Appraisal" undertaken by Sophie Higgins, which specifies that clearance of the site should be timed to avoid the hedgehog breeding (section 4.3.1 of the submitted appraisal) and bird hibernation periods (section 4.3.2 of the submitted appraisal).

#### Procedural

1.1.6 The said appeal was submitted with a completed Deed and includes a financial contribution of £10,000.00 (index linked) to be payable prior to the occupation of the proposed dwelling, to be utilised towards the upgrade/improvement of the Constantine Recreation Ground. The Planning Inspector was satisfied that the obligations within the Deed submitted are reasonable and effective. Furthermore, the LPA confirmed that the financial contribution would be distributed on receipt of an application from

Constantine Parish Council (CPC) (the Managing Trustees for the Constantine Recreation Ground) for those funds. CPC have, in turn, confirmed that there are proposed projects to improve Constantine Recreation Ground towards which those funds could be utilised.

- 1.1.7 In conclusion, because planning permission has been granted for a new dwelling on the former designated open space area, and due to a financial contribution of £10,000.00 (index linked) is to be payable prior to the occupation of the proposed dwelling, to be utilised towards the upgrade/improvement of the Constantine Recreation Ground, it is without doubt that the Section 52 Agreement relating to the original development in 1985 no longer serves a useful purpose.
- 1.1.8 Notwithstanding that there are clear arguments to demonstrate why the obligation no longer serves a useful purpose, the Section 52 Agreement relating to the site and the area of land that was once intended to be use as children's equipped play, is not considered to have been validly executed or dated and has never taken effect. Consequently, 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. This legal opinion was sought during the appeal process and forms part of the submission of this application.

## **2. LOCATION AND DESCRIPTION OF THE SITE**

- 2.1.1 The site is in an established residential area within the village of Constantine, within a cul-de-sac development of large detached 2-storey dwellings. The site was historically been earmarked as formal open space however it has never been formally laid out or maintained as open space.
- 2.1.2 There are no heritage or ecological designations associated with the site, but it does lie near the Gweek to Constantine Area of Great Landscape Value.
- 2.1.3 As detailed above, there is an established Recreation Ground approximately 240m from the site.

### **3. PLANNING HISTORY OF THE SITE**

- 3.1.1 W2/84/00297/0 approved on 9 September 1985 the construction of 8 dwellings off Well Lane and included an area of open space, subject to this application. Planning Condition 15 of the approved consent set out that within six months of the date of the consent, details of a play area and surface treatment were to be submitted to the LPA for approval and the approved works were to be carried out within 6 months of substantial completion of the estate.
- 3.1.2 The site is also subject to a Section 52 Legal Agreement that sets out that play equipment was to be provided by the owner to the satisfaction of the LPA, prior to the completion of more than six dwellings and, as part of the S52, the land owner paid the sum of £1584 to the Council for future maintenance costs of the open space. As detailed above, in years following the consent, the required play equipment was not installed by the applicant and the land was not maintained, nor taken on by the Council.
- 3.1.3 In 1998 our client applied to build a single dwelling on the open space under planning reference W2/PA98/00074/0. Council refused consent and a subsequent appeal was dismissed by the Planning Inspectorate (Ref T/APP/Y0815/A/98/1014538/P7) as the location of the proposed dwelling was regarded as inappropriate.
- 3.1.4 In the years following the dismissed appeal, the LPA did not take steps to resolve the outstanding details in respect of play equipment provision and consequently, the owner did not take steps to maintain the land, as set out in the S52 Agreement. No enforcement action has been taken in the years since. As detailed, the Council is now in the position where they cannot reasonably enforce the provision of play equipment due to the significant timeframe that has passed.
- 3.1.5 PA18/05642 proposed an outline application (with some reserved matters – access) and, despite officer recommendation of approval, was refused by

Council's Planning Committee on 23 September 2019 (Item WPL/279) because of the loss of an area of public open space. Following the refusal of the said application, an appeal was lodged against the decision that was subsequently allowed on the 17 November 2020 which accompanies this application.

- 3.1.6 PA19/10056 sought the revocation of Section 52 agreement in respect of decision 2/06/84/00297/0 for erection of eight cottage style dwellings, however the LPA refused the application where they claimed the Section 52 Agreement still served a useful purpose in protecting against the loss of an area of public open space which has not been demonstrated to be surplus to requirements, and no suitable replacement open space has been proposed. An appeal was thereafter lodged against the decision, yet the Planning Inspectorate advised that The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 introduced the right of appeal following unsuccessful applications to modify s106 obligations signed since 25 October 1991. Since the planning obligation is dated 28 August 1985, there is no right of appeal and the submitted appeal could not be entertained.



#### 4. KEY PLANNING POLICY AND GUIDANCE

4.1.1 National Planning Practice Guidance (NPPG) provides guidance on the use of planning obligations. Paragraph 002 Reference ID: 23b-002-20190901 (dated 1<sup>st</sup> September 2019) sets out the circumstances when planning obligations can be sought by a local planning authority. It states the following:

*‘Planning obligations assist in mitigating the impact of unacceptable development to make it acceptable in planning terms. Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are necessary to make the development acceptable in planning terms. They must be:*

- *necessary to make the development acceptable in planning terms;*
- *directly related to the development; and*
- *fairly and reasonably related in scale and kind to the development.*

*These tests are set out as statutory tests in regulation 122 (as amended by the 2011 and 2019 Regulations) and as policy tests in the National Planning Policy Framework. These tests apply whether or not there is a levy charging schedule for the area.’*

4.1.2 In this instance, it is considered that the obligations set out in the Third Schedule of the Section 52 Agreement linked to permission W2/84/00297/0 no longer meet the tests for planning obligations as set out in the above guidance and furthermore there are other material considerations that indicate why the Section 52 Agreement should be discharged.

4.1.3 Section 106A of the Town and Country Planning Act 1990 allows for the modification and discharge of planning obligations and this application has been progressed against Part 1 (a) of the regulations which state that an obligation may be modified or discharged by agreement between the authority by whom the obligation is enforcement, in this case Cornwall Council, the appropriate authority and the person or persons against whom

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On behalf of  
Crownmark Developments Ltd

the obligation is enforcement, in this case the applicant, being Crownmark Developments.

## 5. EVALUATION AND CONCLUSIONS

5.1.1 The land in question was once identified to be laid out as open space as part of the previous 1985 consent.

5.1.2 The revocation of the Section 52 Legal Agreement will rectify a long-standing anomaly between the landowner and Kerrier Council, now the Unitary Authority of Cornwall Council. Moreover, the Section 52 Agreement no longer serves a useful purpose given that permission has been granted for a single dwelling on land that was once intended for open space. The permission granted through the appeal process, includes a Deed concerning a financial contribution of £10,000.00 (index linked) to be payable prior to the occupation of the proposed dwelling, to be utilised towards the upgrade/improvement of the Constantine Recreation Ground.

5.1.3 The Planning Inspector at paragraph 10 of the Appeal Decision stated that:

*'Based on the history of the appeal site and the associated factors set out above, I consider that the financial contribution included within the Deed would secure an appropriate level of replacement provision for the loss of the existing open space. I also find that the obligations within the Deed: are necessary so as to make the appeal proposal acceptable in planning terms (mitigating for the loss of the existing open space); they are directly related to the proposed development; and, fairly and reasonably related in scale and kind to the development. As such, all three tests set out in paragraph 56 of the Framework are met, and all the three statutory tests in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 are similarly met.'*

5.1.4 Continued at paragraph 11 the Planning Inspector accepted the financial contribution of £10,000 where he confirmed:

*The proposed financial contribution has been calculated using the Open Space Planning Toolkit, reproduced in Appendix 5 to the Appellant's Statement. The contribution has been based on the original development of eight houses, and then been rounded-up. The Council*

*have not challenged this calculation or the proposed sum, and there is no evidence before me to suggest that this sum would not represent an appropriate level of funding to mitigate for the loss of the existing open space.'*

- 5.1.5 Notwithstanding that there are clear arguments to demonstrate why the obligation no longer serves a useful purpose, the Section 52 Agreement relating to the site and the area of land that was once intended to be use as children's equipped play, is not considered to have been validly executed or dated and has never taken effect. Consequently, 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. This legal opinion was sought during the appeal process and forms part of the submission of this application.
- 5.1.6 Whilst the Legal opinion is clear, due to the Planning Inspector being silent on this point, it is considered sensible to progress with the Revocation Application for completeness. It is therefore respectfully requested the Council's assistance in resolving this matter without delay.