

S NOTARO WINDOWS LTD

**APPLICATION TO VARY SECTION 52 AGREEMENT RELATING TO PLANNING PERMISSION 23/74/0011 TO ALLOW DEVELOPMENT TO PROCEED WITHOUT CARRYING OUT THE HIGHWAY WORKS AT LAND ADJACENT TO CREEDWELL ORCHARD, MILVERTON**

Grid Reference: 312387.125572

Variation of S52/S106 Condition

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**RECOMMENDATION AND REASON(S)**

Recommended Decision: That the Section 52 agreement relating to application 23/74/0011 is varied through the removal of clauses (1) and (2) of Schedule I.

**PROPOSAL**

A request has been made to vary the terms of a Section 52 agreement attached to a 1974 planning permission at land off Creedwell Orchard, Milverton.

In 1975 application reference 23/74/0011 granted outline planning permission for the development of 80 dwellings on the site. Reserved matters approval was given in 1979.

In 2007, Taunton Deane Borough Council issued a Certificate of Lawfulness confirming that the 1975 planning permission had implemented, development having been commenced within the time periods specified within the planning permission. Accordingly, the development can now be lawfully recommenced and carried out.

Attached to the 1975 permission was a Section 52 agreement that sought to ensure that childrens play facilities were provided on site and that various highway works were undertaken prior to occupation of any of the dwellings. Those highway works are described in Schedule I of the agreement as follows:

- (1) The widening of Creedwell Close on its Eastern side in accordance with the details on Plan B attached [to the agreement] to a width of 5.5metres carriageway with footpath of 1.8 metres width; Plan B shows the new line of the edge of the widened highway coloured blue. Plan A shows coloured green the general location of the part of the highway to be widened.*
- (2) The widening of Creedwell Close on its Northern and Southern sides in accordance with the details on Plan C attached [to the agreement] to a width of 5.5 metres carriageway with two foopaths of 1.8 metres each in width. Plan C shows the new lines of the edges of the widened highway coloured blue. Plan A shows coloured yellow the general location of the part of the to be widened.*
- (3) The construction of the main spine road on the land [to be developed] to a width of 5.5 metres carriageway with two footpaths each of 1.8 metres width*

*in accordance with the details shown on plan D attached [to the agreement] to at least base course level before any house is occupied.*

This request is now made to remove the requirement to undertake the road widening works from the agreement – i.e. to delete clauses (1) and (2) above.

In support of their request, the applicants have prepared a transport statement suggesting that, in line with current guidance, the existing highway network is capable of providing a suitable and safe means of access to the site. In a little more detail, reference is made to highway width and visibility splay guidance in Manual for Streets and Manual for Streets 2, the current government guidance on highway design for residential areas. It is suggested by the applicants' transport consultant that the existing width of Creedwell Orchard of around 4.9m is sufficient to allow a car to pass a refuse vehicle (Manual for Streets recommending a minimum of 4.8m for a car and lorry to pass, and having observed a refuse vehicle passing parked cars on the road). It is also suggested that given the observed traffic speeds on Silver Street, the existing visibility splays at the junction of Creedwell Orchard and Silver Street are adequate in terms of highway safety.

## **SITE DESCRIPTION AND HISTORY**

The development site to which the S52 agreement relates is a rising (steeply in places) agricultural field that slopes up from north to south. To the north, it bounds Bartletts Lane and a handful of residential developments served from this lane and Burgage Lane that links it to Rosebank Road and then onto Silver Street. To the west is the existing development of Creedwell Orchard and Creedwell Close a mix of 1 and two storey dwellings and flats. To the east are further, more sparsely arranged dwellings. The field is partly open to its southern boundary and partly hedged from an adjoining agricultural field.

The vehicular access to that site is from Creedwell Orchard, an estate road that serves the dwellings to the west and it is to this road that the Section 52 agreement required widening works to be undertaken. It is understood that access at the southern end is now unavailable and this is why it is argued that no widening works are required here (a single point of access instead being proposed). At the northern end, the road is around 4.9m wide and has two footways. Access to the site is through an area of land currently containing 3 garages.

Some of the planning history has been alluded to above, but is provided in detail below:

1975 outline planning permission granted (ref 23/74/0011) for the development of 80 dwellings.

1979 reserved matters approved (ref. 23/78/0025) pursuant to the 1975 outline permission for the development of 80 dwellings.

1979 Outline planning permission refused (ref. 23/78/0026) for the renewal of the 1975 permission for residential development. Permission was refused for reasons of being a substantial and disproportionate increase in the population of Milverton and the north-western part of the Borough that would prejudice the proper

development of other settlements in the area; that the proposal would have an adverse effect upon the visual and other amenities of the Milverton conservation area and village; and that the site comprises good quality agricultural land where development would not take place except in strong extenuating circumstances.

1991 Full planning permission refused (ref. 23/91/0026) for the erection of 42 dwellings on the site. Permission was refused because the site was outside the settlement limits, was in an elevated and prominent position, would detract from the character, environment and harm the visual amenity of the area and outstanding heritage settlement, is outside areas identified for development and sufficient land is available for development elsewhere within the district.

In 2001, at the Taunton Deane Local Plan Inquiry, the Council argued that the site should not be allocated for residential development. The inspector agreed with that position and decided not to allocate the site.

2007 Certificate of Lawfulness for a proposed development issued (ref. 23/06/0045) on the basis that the Council was satisfied that on the balance of probabilities that the proposed development was commenced prior to 6<sup>th</sup> August 1981. This certificate confirms that the 1975 outline planning permission (and associated 1979 reserved matters) were implemented in accordance with the permission and, therefore, can be lawfully recommenced.

## **CONSULTATION AND REPRESENTATION RESPONSES**

### **Consultees**

*SCC - TRANSPORT DEVELOPMENT GROUP* - The application seeks to vary the Section 52 Agreement which relates to Planning Permission 23/74/0011 to allow development to proceed without carrying out widening works on land adjacent to Creedwell Orchard.

The Highway Authority's task is to assess the information provided both by the developers and objectors and come to a view on whether or not 1) The local highway network, Creedwell Orchard and its junction with Fore Street, has sufficient capacity to deal with the traffic generated by existing and proposed developments and 2) whether or not the existing roads are of a suitable standard bearing in mind the current guidance to deal with the type and volume of traffic generated by existing and proposed developments.

#### **1. Traffic Capacity**

The developer has submitted a report which assesses the development impact. It has used its own traffic counts to evaluate the levels of development traffic. It concludes that the expected total traffic can be readily absorbed into the local highway network.

The Save Milverton Action Group (SMAG) has also commented on the report making valid points about the inadequacies of the developer's report and suggesting that incorrect peak hours have been used which results in a significant under estimation of the traffic flows. I have also received a copy of a letter from

Pinsent Masons on behalf of SMAG which at Section 4 also comments upon the inaccuracies of the developer's report.

The Highway Authority has carefully considered all representations and makes the following comments:

Current trip traffic on Creedwell Orchard is surveyed at around 40 movements in the am peak and 35 in the pm peak, figures which are consistent with the number of dwellings at present. From the TRICS calculations it can be seen that the proposed development would roughly double the number of movements associated with the road at those times. The technical note has not demonstrated that the traditional am and pm hours are the busiest on the surrounding network. There is evidence from other submissions (opposing the proposal) that later morning and earlier afternoon are significantly busier. A maximum 80 movements per hour are recorded along Creedwell Orchard. In the absolute worst case based upon evidence from all parties and SCC, hourly movements could increase from around 80 to about 130. In practice it is unlikely that this figure would be reached because the peak time for housing development should not coincide with the network peak. Some on-street parking is present and this currently results in a small amount of interference to traffic when vehicles are travelling in both directions. The increase in traffic would increase with the frequency of which this occurs. There is nothing to suggest however that queuing back onto Silver Street or Fore Street would be a regular occurrence. Estimating the traffic impact due to the narrowing of the road due to on-street parking is comparable to considering the capacity of a single track country lane with passing places in that there are narrow stretches with wider passing places at either end and at intervals along it. The best evidence available suggests that the capacity of such a road is generally well above 200 vehicles an hour. A previously proposed widening would not have allowed two vehicles to pass alongside parked vehicles but it would have increased the ease with which this could occur. The result of not carrying out the widening will be slightly greater delay at the busiest times but I consider it extremely unlikely however that the traffic impact would be severe. It should be pointed out that the proposal for a single access would ensure that the development traffic is on the existing network for the shortest possible time. Current policy would suggest that engineering based mitigation should be a last resort. It's worth considering requiring the developer to find alternative methods of mitigation. This could include additional infrastructure (support for alternative modes) or the widening of travel plan measures to the surrounding community in order to partially offset the traffic impact.

We conclude that the submission by Entran is weak and contains flaws which have previously been pointed out by the County Council and objectors. Nonetheless this conclusion focuses on what we consider to be the likely effects of the proposal. The removal of a requirement to widen Creedwell Orchard would make it more difficult to pass parked cars. The new development would increase traffic along the road, the worst case possibly is considered to be an increase from 80 to 130 movements per hour. This would inevitably increase delay with drivers having to wait for more traffic coming in the opposite direction. We do not consider however that this is likely to exceed the capacity of the road and the impact could not be considered to be severe. It is suggested that the developer in line with current policy should investigate alternative mitigation measures which reduce the need to travel through the use of the private car. This could be done across a wider area thus serving to help offset the additional impact of not widening the road. Any new

planning permission will have to consider travel planning and parking.

## 2. Road Layout and Highway Details

The developer's report considers Creedwell Orchard and Creedwell Close and compares it with the latest guidance on the design of Estate Roads as set out in Manual for Streets and Manual for Streets 2. It comments and concludes that the existing road geometry accords with the prevailing highway design criteria and is therefore suitable to cater for the existing and proposed development traffic. Pinsent Masons on behalf of SMAG challenges the developer's report and comments amongst other things on the 6m dimension of the new Estate Road shown on Figure 2. The Highway Authority has carefully considered the various representations and makes the following comments:

Road geometry and in particular road widths have come full circle. It is true that the existing road widths were at one time superceded. However the current Manual for Streets guidelines clearly show that 4.8m is an acceptable road width to cater for mixed traffic including some delivery and service vehicles. It is true to say that 5.5m width will allow 2 large vehicles to pass each other. This however is likely to be a rare occurrence. In respect of the proposed 6m wide Estate Road, the dimensions of any new internal estate road will be dealt with either at Reserved Matters stage or under any new Planning Application. The road width will depend upon the potential traffic and the expected levels of on-street parking.

The Highway Authority concludes that in respect of the Highway Network that Creedwell Orchard and Creedwell Close are acceptable to serve the development.

In conclusion the Highway Authority does not object to the application to vary the Section 52 Agreement.

### *MILVERTON PARISH COUNCIL – Initial comments (21st May 2012):*

“The Parish Council wishes to draw to your attention to the fact that it owns a small parcel of the land within the area of the Agreement and is therefore a party to it. There are also several other freehold owners as well as S Notaro.

This S52 Agreement is a Planning Obligation formed as a contract that runs with the land and which is enforceable both jointly and severally on all of the original owners and all subsequent owners. S Notaro as a subsequent part owner is unilaterally seeking a variation.

...[Quoting extracts from the Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992]...

The Parish Council wishes to inform you that it has had no communication from S Notaro regarding any variation to this agreement or its terms and therefore advises Taunton Deane Borough Council that it believes that is acting *ultra vires* by consulting over any unilateral application for amendment....

Furthermore S Notaro as the applicant specifically mentions in their letter requesting variation that a new planning application pertaining to the site in question will be

forthcoming which will directly provide for one of the requirements of the S52 agreement. Milverton Parish Council has serious concerns regarding the appropriateness of determining this request for variation prior to sight of the forthcoming planning application. We are of the opinion that the existing S52 agreement would be a significant material consideration in determining any future application on that site.

Can you please detail what steps are being taken to ensure that there is no possibility of any decision on this application or subsequent related application for variation altering the grounds on which any subsequent planning application will be judged?"

Subsequent detailed comments (18th August 2012):

Notwithstanding the Parish Council's view that it is a party to the S52 agreement and therefore needs to consent to this change, I will set out some other concerns for the Committee's consideration.

### 1. Procedure

Your letter indicated that this application would be carried out under the Town And Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992. However, in discussion with the Clerk you indicated that there no legal procedures to cover the variation of S52 agreement. As a result you had felt the fairest way would be to use the nearest equivalent procedures ie the 1992 Regulations. The Parish Council feels that this was a reasonable way to proceed under the circumstances.

However, having decided to embark on a legal process it is incumbent on the public authority to ensure that the procedures laid out are adhered to as closely as possible. The 1992 Regulations **require** the applicant to notify all parties affected by the proposed change, in writing, at least three months before submitting their application. This did not happen and so it is possible that owners with an interest in this matter may be unaware of the changes proposed.

Whilst the Parish Council acknowledges the difficulty presented to Taunton Deane by a lack of relevant legislation, this should not lead to the authority using a pick and mix approach to deciding this matter. If you are going to 'piggy back' on a procedure it must surely be followed to the letter or else it becomes a pointless exercise? The process is therefore flawed and should be repeated with all relevant parties being given the opportunity to be engaged.

The Parish Council wonders if this can be explained by the fact that both the applicants and Taunton Deane share the view that the S52 can simply be amended by Taunton Deane granting consent in writing? This view would seem to be totally at odds with a consultation under the 1992 Regulations and the Parish Council would like to understand this apparent anomaly. It is presumed that you discussed this interpretation and process with your legal colleagues and Councillors would therefore

be grateful for a copy of the internal advice you received together together with any

relevant correspondence or commitments made to the applicant about how this would be handled.

Under the circumstances the Parish Council takes the view that Taunton Deane has engaged in a flawed process to resolve this matter and **objects** to the variation being sought under the current circumstances.

## 2. Prematurity

The Parish Council is well aware that the applicant intends to submit a new planning application on the Creedwell site. The Parish Council also takes the view that the chances of the 'extant' permission being build out are zero, not least because a full set of plans no longer exists and Taunton Deane deem the ones available insufficient to establish the plot layout (Letter T Meeres to Richard Buxton cc Milverton Parish Council 24 January 2011 Para 15).

Development on this Creedwell site is contentious. Until the advent of the Core Strategy and, despite various attempts to get it included, it has never featured in any Taunton Deane development plan. The last attempt through the Development Plan system was in 2004 when the Inspector roundly rejected the site as unsustainable. This plan led system has been circumvented by claiming (and convincing) Taunton Deane that the 1979 consent had indeed been properly started. Using the Certificate of Lawful Use gained as a justification Mr Notaro now states that he intends to apply for a new consent to build 72 houses. However, as it is based on the 'extant' permission dating back decades he is arguing that modern policies do not apply. The Parish Council understands that Taunton Deane has already conceded key points and for example there will be no requirement to provide Affordable Housing.

The Parish Council is not against some development on this site as long as it is well designed and proportionate in scale. There is therefore concern about a proposal to build 72 houses which would increase the village by over 10% and consequently considerable worry about traffic and parking in particular.

It would seem that Taunton Deane feels it has little or no ability within the planning system to control development on this site but the S52 still remains a valid document to help deliver appropriate traffic management and play area provision. An agreement now to remove the traffic provisions, based on a 2 day survey and in advance of any detailed plans from the applicant would appear to be totally premature and relinquish the last vestige of control that Taunton Deane as Planning Authority has over development of this site.

The Parish Council has noted with dismay that developers are openly challenging Local Plan policies on the basis that they may win at appeal because there is not an adequate housing supply in the area. Therefore if this agreement were lifted there would be nothing to stop a speculative 120-150 house application using the extant permission as a lever. It is therefore the Parish Council view that a decision on the S52 at this stage is premature and that discussions about varying it should be part and parcel of an open and transparent planning application process for a known proposal.

The Parish Council therefore **objects** to the consideration of the variation at the present time.

### 3. Partiality

The final point that the Parish Council would like to make is that by acting unilaterally to change the terms of the contract, Taunton Deane is favouring Notaro over and above the other parties to it and thereby depriving Milverton Parish Council and others of their property rights through a share of the windfall that Notaro stands to make from the change to the traffic terms. Already the Parish Council has had to incur costs in this matter to preserve its property rights and the loss of any potential benefit would further impact on the charge payers of Milverton.

There is no doubt that the S52 binds all owners of land within the red line and this includes the Taunton Deane, the Parish Council, Notaro and several private individuals. Whilst the lifting of the traffic obligations might be regarded as a benefit to some, the fact is that the amendment facilitates development of the part of the site which confers a much greater benefit on Mr Notaro. This benefit will come at no cost to him and a development will proceed without any benefit to the other parties except Taunton Deane who will be handsomely rewarded when, by this change, it becomes the sole owner of legitimate access to the field and sells it as a ransom strip.

The S52 regards all owners of land within the red line as 'the developer' and they are all bound jointly and severally. By unilaterally altering the contract Taunton Deane are effectively allowing Mr Notaro to profit at the expense of his contractual partners including the Parish Council which is of course a public body. Councillors would welcome your view on the legality of one public body depriving another of a legitimate source of income whilst enriching itself.

*SOMERSET COUNTY COUNCIL RIGHTS OF WAY* – An application has been received to register the site as a Town or Village Green. The application will now duly be considered.

## **Representations**

### *WARD MEMBER – CLLR G. WREN*

- Queries the legal basis for Notaro's request and TDBC's ability to consider the application.
- It is unwise to discuss the amendments to the S52 agreement before Notaro's new proposal has been made public. The S52 includes important aspects such as traffic management and a play area. A later amendment also restricted the number of houses that could be built. Notaro has said that it can build out the extant permission, but has indicated that it intends to bring forward a different scheme, however, details of this new scheme are as yet unknown.
- I understand that the prevailing view amongst Council officers is that the existence of the extant permission means that none of the Council's current

planning policies (affordable housing, S106 contributions etc.) can be enforced. This would appear to give Notaro 'carte blanche' to build whatever it likes. This agreement therefore seems to be the only constraint on the development of this site. If TDBC were to abandon this agreement now, it would lose any control or opportunity to negotiate over the development. Under the circumstances the only sensible course of action would be to agree to consider the variation (subject to being legally able to) as part of proper negotiations over the new proposal, coupled with an undertaking to do so once the planning permission is issued and a substitute S106 is in place.

90 letters of OBJECTION have been received raising the following issues:

#### Procedural

- The legal basis of treating the request to vary the S52 as a planning application for determination by the Planning Committee is questionable. The variation of the agreement requires a deed of variation that must be entered into by all land owners. Private residents in Creedwell Close and Creedwell Orchard now own part of the affected land.
- The S52 is a covenant and proper legal requirements for all interested parties to consent cannot be set aside by clauses that suggest that the Council can unilaterally agree variation in writing.
- The effect of varying the S52 is to allow development of the site to recommence. It had previously stalled because the developer did not control the access and was not able to widen the road. Therefore, allowing the variation is akin to granting planning permission afresh and all material considerations, including the principle of the development must be reconsidered.
- No ownership certificates have been received, which would have been required if the Council were truly treating this application in the same way as a request to vary a S106 agreement.
- The application is premature and should be considered alongside the forthcoming application for the redesigned residential development.
- The decision to sell the access land makes it difficult for TDBC to objectively judge this application.
- It is not certain that the certificate of Lawfulness is legally valid. Therefore no decisions that depend upon it should be made until the situation is clarified. The application relates to a non-existent planning permission and to allow it would be tantamount to granting a new permission.
- Planning applications should relate to a specific operation for which there is a positive intention that it will be carried out. This application is purely gamesmanship, is not genuine or in good faith and should therefore be rejected.

#### Reasons for the agreement

- Rescinding the conditions of the S52 will deny the Council the control it explicitly wishes to exercise. It may compromise safety and the protection of the conservation area.
- The agreement was entered into to ensure that the development did not prejudice the free flow of traffic or the conditions of general safety along the

neighbouring highways. This request prejudices both of those things.

- The agreement is the most important safeguard on the original permission to prevent the developer avoiding current planning policy requirements.

#### Particular objections to the current proposal

- The traffic estimates used in the application are understated. The survey effort was superficial and avoids the true peak hours. Figures from the Milverton Traffic Action Group (MTAG) based on 12 hour surveys over three different years show that the true peak traffic flows are as much as 50% higher than the applicant's assessment would indicate. The peak period is between 10.00 and 12.00, not 07.30 – 09.30 and 16.30-18.30 as suggested by the applicant, due to the presence of the Doctor's surgery. An earlier afternoon peak between 15.00 and 16.00 is a direct result of the school and its significant rural catchment.
- A 12 hour survey is required to properly ascertain traffic movements, such as has been conducted by MTAG in the past and recently (12<sup>th</sup> June 2012).
- There are problems with the TRICS information upon which the Entran paper has relied. The sample data sets chosen for comparison means that the sampling is not statistically valid. The locations chosen for comparison are not comparable to Milverton as a settlement or the site, which includes a doctors surgery. The sample data sets are also, at best, 4 years old and cannot be regarded as the most up to date, in accordance with best practice guidance.
- No quality audit has been provided as recommended in Manual for Streets 2 for conservation areas.
- Creedwell Orchard is too narrow for two vehicles to pass when vehicles are parked, which is a regular occurrence.
- There is no recognition of how the entrance to Creedwell Orchard is used as a passing place. Lorries frequently have to reverse into it to allow other vehicles, sometimes including other lorries to pass.
- Only one access point to the site is now available, placing great pressure on a single point opposite the access to the surgery car park and effectively creating a crossroad on an already very narrow road.
- If it can be argued that a change in policy allows a more lenient approach to consideration of the highway network, should it not also be argued that a change in planning policy makes the development unacceptable, so the request should be refused?
- Creedwell Orchard actually joins Fore Street, not Silver Street as suggested in the application. Fore Street is even narrower than Silver Street, at only 4.5m at the junction. No mention is made of this in the submission.
- Allowing the application to proceed smacks of TDBC being prepared to facilitate the developer to proceed unfettered.
- The required visibility splays pay no regard to the gradients of the surrounding roads.

#### Comparisons to 1974

- The development would generate far more traffic than was the case in 1981 when permission was refused for only 44 dwellings on the site. Since this time, the Medical Surgery has been built in 1986 and people now expect to have at least one and very likely more cars for each family.
- There are already traffic problems in Creedwell Orchard.

## Problems with the development overall

- The Council has, for many years, considered the Creedwell Orchard site to be totally inappropriate for a lesser development than is currently proposed. The impact on the adjoining conservation area would be considerable and negative. The Council's Growth and Development Manager has already accepted that it conflicts with current, adopted, planning policy.
- The Prime Minister has already said that 'big plonking housing estates' should not be added to small villages. This should apply to this proposal.
- Additional traffic will cause grid lock within the village and make the highway very dangerous, particularly for pedestrians. Emergency services may get delayed to a critical extent. Traffic already becomes grid locked and vehicles are forced to reverse in convoy to unblock the road.
- Queuing traffic exiting and waiting to enter Creedwell Orchard will cause pollution and health problems.
- If permission is granted for 72 dwellings, as well as conflicting with the current planning policies it would have an adverse impact on the quality of life of existing residents, providing no positive improvements in the quality of the built natural or historic environment.
- The impact of the additional housing on the primary school would be considerable and negative. The school is already at capacity with three temporary classrooms.
- The size of the development is inappropriate for the size of the village. It is too much in one place and will be a visual disfigurement to a village that has grown in keeping with its community for several centuries.
- The type of housing proposed is out of character. Milverton is a heritage village with a need for sympathetic development.
- This application is more to do with satisfying people's desire to live in the rural community which is not a material planning consideration.
- Until recently residents could wander off the footpath when the land was lying fallow. It was the closest thing the village had to a village green, there is nothing to replace it within close proximity.
- There may be significant archaeological artefacts in the field.
- Milverton's position a local service centre should be considered. If the roads are overloaded even further people from the rural hinterland will not use its services, to the detriment of the village as a whole.
- If parking restrictions in the centre of Milverton are required as part of the proposal, or as a consequence, then this should be put properly in the public domain and scrutinised. TDBC have a duty to anticipate these problems.
- The Highway Authority's own publication "Estate Roads in Somerset; Design Guidance Notes" indicate that cul-de-sac developments should not exceed 100 dwellings. Creedwell Orchard already contains 109 and no evidence has been submitted as to why this should be set aside.
- The site is unsuitable for development, will cause flood risk and impact adversely on the conservation area.
- The Entran report cannot reasonably be seen as relevant for the road safety and traffic burden which the ultimately submitted development proposal is likely to impose on the road network.
- The development would hinder access needed to empty septic tanks at Weekhays, Houndsmoor Lane, which also serve Linley and The Anchorage on Burgage Lane.

### Forthcoming applications

- There has been no substantial evidence submitted that the applicant will, or indeed, can build out the extant permission. The Council should be very wary of accepting evidence to vary the S52 based on the so called 'extant' permission when the developers true intentions for the site cannot be known.
- This application should not be considered when only an indicative plan is available. The proposal may change and numbers of dwellings may increase in the future.
- The ultimate scale of development proposed by the current applicant is not known. The District Valuer's sale price, 70% above the negotiated sale price, may prompt the applicant to seek a higher housing density. In that event, the current Entran paper would be rendered valueless.

### Other matters

- The play space should have been delivered two years after commencement. As this has been shown to be the case, there would appear to be a clear breach of the original permission. Query whether the highway works should have also been completed.
- Object to the removal of the play space from the scheme.
- It beggars belief that a certificate of lawfulness was issued.

1 letter of SUPPORT has been received commenting that it will do Milverton good to have more people living in the village.

## **PLANNING POLICIES**

DM1 - TD CORE STRATEGY - GENERAL REQUIREMENTS,  
S&ENPP49 - S&ENP - Transport Requirements of New Development,

## **DETERMINING ISSUES AND CONSIDERATIONS**

This report will consider the legal basis for varying the Section 52 agreement and the material considerations that should be considered in doing so.

### The legal background, basis for variation and relevant considerations

This is not an application for planning permission, rather it is a request to vary the obligations of an extant planning permission which could, theoretically, be built out at any time. A Section 52 agreement, made pursuant to Section 52 of the Town and Country Planning Act 1971 is similar to a modern day Section 106 agreement in that it allowed the Local Planning Authority to secure obligations that could not be delivered by planning condition. However, unlike Section 106 agreements, such as have been attached to planning permissions since 1990, there is no ability to make a formal 'planning' application to vary the agreement. The request to vary the

provisions can only be made by the agreement of the Council, by exchange of letters and/or deeds of variation.

The agreement was entered into in the Council's capacity as Local Planning Authority, not as landowner, and it is, therefore, in this capacity that any variation to the agreement must be considered, based upon the planning merits of such a request. It has been suggested that third parties – those who now own former Council property on Creedwell Orchard – also have an interest in the land to which this agreement relates and, therefore, must also be party to any decision to vary the agreement. The Council has taken counsel's advice on this matter and has been firmly advised that this is not the case. The Council can, unilaterally, agree to any variation of the terms of the agreement.

The planning permission to which the request relates – referenced 23/74/0011 – was implemented within the required time period. The issue of a Certificate of Lawfulness in 2007 now confirms this as the legal position and status of the permission. It is, therefore, legally possible for the developer to recommence that development and complete 74 of the dwellings on the site (6 of the permitted 80 dwellings were to be sited on land no longer owned by the applicant and developed more recently as part of Colesmore).

Theoretically, the applicant could purchase all of the necessary land to complete the required access and road widening works, fulfilling the terms of the obligation. Therefore, it cannot be said that the development permitted cannot be completed and occupied. In this context, when considering whether to vary the obligations, the Council must consider whether those requirements still serve a useful purpose and, in its capacity as Local Planning Authority, this must be assessed in planning terms.

The particular obligations at question relate to highways matters. They were entered into because the Council were concerned to ensure that "satisfactory means of access to the land should be provided" (S52 agreement, recital (6)). In considering whether to vary the agreement as requested, therefore, the Council must consider whether a satisfactory means of access to the land can be provided without undertaking the works originally required.

It has been suggested that in addition to these highway matters, the Council should also consider the wider implications of the development because it is 'unlocking' a permission that otherwise cannot proceed. Not only, therefore, is it allowing a development considered by many local residents to be inappropriate to continue, but it is also giving the applicant a stronger 'fall back' position in the event that he wishes to make a subsequent application for a different development. However, as noted above, it is not strictly true to state that the permission is 'locked'. It is theoretically possible for the required land to be purchased and the obligations fulfilled – such is a matter of land ownership, not planning merit. There is no planning reason that the development cannot be completed. Legal advice has also been sought around this matter, with Counsel concluding that the fact that the developer's 'fall back' position may be strengthened is not a matter that should be considered in deciding whether to vary the agreement. The only matter for consideration, therefore, is the highway safety implications of the requested variation.

## The timing of the request

It has been suggested by the Ward Member and others that the request should not be considered in advance of the applicant publicising his detailed proposals for the site. It is no secret that the applicant wishes to seek permission for a different housing scheme to that for which permission already exists and public meetings/exhibitions have been held to discuss the proposals. There is concern that releasing the obligations of the Section 52 agreement will influence the shape of those proposals, particularly that it will give a fall-back position where contributions are not required to affordable housing, education and the like. It is also suggested that in preventing development proceeding, the Council is in a stronger position to influence any future development and can ensure that the 1970's scheme is not built out.

As discussed above, however, the resultant strengthening of the 'fall-back' position should not be considered. The Council, in its capacity as 'Local Planning Authority' must also act reasonably as a public body and cannot be seen to be preventing development that is already permitted and should otherwise be allowed to proceed. Whilst the developer may well seek an alternative scheme in the future, there is no reason to prevent them from completing the already permitted 1974 scheme, which he has a right to do as confirmed by the 2007 Certificate of Lawfulness.

## The issue for debate - Highway safety and the necessity of the road widening works

1970s highway guidance, and to some extent planning policy, was designed around ease of movement and the need to accommodate the ever increasing use of motor vehicles. New roads, including residential estates were designed to accommodate all necessary two-way traffic with junctions and road widths in excess of 5m provided for ease of movement. This view prevailed well into the 1990s and has resulted in the types of road layouts to which we have become accustomed in modern housing developments. The road designs were retrofitted into existing streets where they joined existing main roads/village streets in order that developments could be accessed conveniently and this was, accordingly, the requirement of the Local Planning Authority when the permission was granted in 1975.

Throughout the early part of this century, there was increasing concern about the impact that such highway design was having on the character of existing settlements and the unimaginative 'highway-led' design solutions that were appearing in new housing development at the time. This led to a radical re-think of the way that highway design should be approached in residential areas, culminating in the publication of 'Manual for Streets' in 2007. The guidance was revised in 2010 with the publication of 'Manual for Streets 2'. The new guidance suggested that, in some places, it would be more appropriate to reduce visibility requirements, to slow traffic speeds. It acknowledged that visibility splays at junctions need not be based upon the maximum speed limit, but could be based on actual vehicle speeds in the locality. It also suggested that in some situations, full two-way road capacity may not be required provided that, generally, reasonably large vehicles such as refuse lorries could pass parked or slow moving cars on the streets. Such, the guidance indicates, can be achieved with narrower 4.8m carriageways. The highway guidance and standards for residential streets are, therefore, considerably different, and less onerous, to those prevailing in 1975.

Putting the history to one side, the applicant has produced details on traffic movements within the area to assess whether, using today's guidance, the existing highway network is capable of accommodating the likely increase in traffic that would result from the development. The work has been limited to the impact on Creedwell Orchard and its junction with Fore Street because that is as far as the previously required road works extended. The applicant's transport consultants, Entran, have produced a report ("the Entran report") that indicates that there is sufficient capacity within the existing highway network to accommodate the development proposed without the need for road widening. They have also shown that the existing junction of Creedwell Orchard and Fore Street complies with Manual for Streets guidance in terms of its visibility splays.

The Save Milverton Action Group (SMAG), in association with the Milverton Traffic Action Group (MTAG) and with input from Paul Lacey, a highway consultant, has produced a counter report ("the SMAG report") that has suggested that the Entran report incorrectly identifies peak traffic in terms of its timing and volume. The Local Highway Authority agree that there are significant shortcomings in the Entran report and that its findings in terms of peak traffic are flawed. They have therefore given their guidance taking account of the SMAG report's findings.

The SMAG report, based upon observations on various dates over 4 years, places peak traffic flow at a different time to Entran. This seems most likely to be due to the presence of the doctor's surgery, public car park and Milverton's role as a small local service centre. However, likely peak flow associated with the development is more likely to accord with the typical times suggested by Entran, such that it does not occur at the same time as the peak flow elsewhere on Creedwell Orchard.

SMAG has also challenged the anticipated trip flow analysis from the development, which they consider to be higher than suggested by Entran. Again, the Local Highway Authority have also taken account of SMAG's higher estimates in reaching their view.

In short, even accepting the 'worst case' scenario put forward by SMAG, the Local Highway Authority are confident that the existing highway network is capable of accommodating the traffic likely to arise from the development without the widening works previously required.

## Conclusion

Based on the evidence supplied by Entran, together with the counter evidence provided by SMAG, the Local Highway Authority have considered the likely impact on Creedwell Orchard and its junction with Fore Street. They have concluded that the development would not have a severe impact on this part of the highway network and, therefore, no works are required to Creedwell Orchard or its junction with Fore Street in order to accommodate the development.

In light of the above, there is no reasonable planning ground to resist the variation to the Section 52 agreement that has been requested. True, it would allow development to continue (subject to purchase of the land physically required for access) but this is the developer's right, given the extant permission. Also true, it

may strengthen the applicant's fall back position in the event that a further application is submitted, although Counsel has advised that this is not a matter that should be considered in respect of this request.

With regard to the above, therefore, it is recommended that the agreement is varied through the removal of Clauses (1) and (2) of schedule I detailed in the opening paragraphs of the report.

**In preparing this report the Planning Officer has considered fully the implications and requirements of the Human Rights Act 1998.**

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