

Report to Overview and Scrutiny Committee



SCRUTINY

Date of meeting: 28 February 2011

Subject: Restrictive Covenant – 35 Denny Avenue, Waltham Abbey



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Committee Secretary: Adrian Hendry

Recommendations/Decisions Required:

That following the determination of the Planning Inspectorate, the Overview and Scrutiny Committee consider the decision of the Housing Portfolio Holder to vary the restrictive covenant at 35 Denny Avenue, Waltham Abbey to grant permission for either its current use or as privately rented shared accommodation.

Report:

1. At its meeting on 15 April 2010 (minute 96 refers, extract attached), the Overview and Scrutiny Committee considered the call-in of a decision by the Housing Portfolio Holder approving a variation of the restrictive covenant placed on the sale of 35 Denny Avenue, Waltham Abbey in order to grant permission for either its current use or as privately rented shared accommodation, subject to conditions ensuring that the occupiers of the accommodation do not cause any management problems, nuisance or anti-social behaviour. The option of releasing the restrictive covenant was ruled out as a variation would allow the Council to maintain control and deal with any issues that may arise. A copy of the original Portfolio Holder report is attached at Appendix One which includes a plan of the site.

2. It was noted at the meeting that the property had been extended to have seven bedrooms and it was understood that there were nine unrelated occupants. Planning consent for the change of use had recently been refused and an enforcement notice had been served. The varying of the restrictive covenant would only have been effective should planning consent be granted. The Committee were advised that Planning consent and varying the restrictive covenant are two separate matters and it is quite possible for two different Directorates to reach different conclusions.

3. As the owner of the property could still appeal against the non-granting of planning permission it was considered that the decision on the varying of the restrictive covenant could be deferred until the planning issues had been resolved.

4. The Committee agreed the following:

(i) That the decision be referred back to the Housing Portfolio Holder for further consideration and review once any Planning appeal had been determined by the Secretary of State; and

(ii) That the Housing Portfolio Holder would bring the issue back to the Overview and Scrutiny Committee along with appropriate legal advice, prior to making the final decision.

5. The Council has received a letter from the owner's solicitor explaining that on appeal, their client has been granted planning permission for the change of use of the property asking that the matter be reported to the Council's Overview and Scrutiny Committee again, hence the need for this report. A copy of the Planning Inspectorate's Appeal Decision allowing the appeal for a change of use to Housing in Multiple Occupation (HMO) at 35 Denny Avenue, Waltham Abbey is attached at Appendix Two.

Legal Issues

6. The Director of Support Services will arrange for a Legal representative to be present at the meeting. The Legal representative advises that there are two ways in which the freehold owner of the property could challenge the covenant imposed on the property. Firstly, as to whether the covenant should have been imposed on the sale alleging that it did not protect the public interest and secondly, if the Council does agree his request, he could apply for the release of the covenant to the Upper Tribunal on the grounds set out below.

7. The Housing Act 1985 allows the Council to impose covenants and conditions "as are reasonable in the circumstances" when it sells a council house. It has been held in the case of *R v Braintree ex p Halls* that "Local authorities must use the powers conferred on them in the public interest in a way that Parliament intended, and not for a collateral purpose." In that case the local authority agreed to the release of the covenant for a payment of money. It was clear that the reason for the imposition of the covenant in that case was not necessary for the purposes of the management of the estate but so that for the opportunity to share in any increase of the value of the land.

8. In this case the Council is not claiming any fee (apart from a standard administrative charge) for the release of the covenant but must decide whether the covenant was imposed for the public interest or whether the nature of the building and the estate are such that it was not necessary to have imposed the covenant, or other less restrictive covenants would have been more appropriate.

9. If the Council do not agree to the covenants being lifted the owners of the property may apply to the Upper Tribunal for the covenant to be released. The Upper Tribunal has the power under the Law of Property Act 1925 (s84) on application by the freeholder to discharge or modify any restrictive covenants affecting freehold land if any of the following certain conditions are satisfied:

- a. The restriction is obsolete due to changes in the character of the property or neighbourhood or other circumstances; or
- b. The restriction impedes some reasonable use of the land and either the persons entitled to the benefit of the covenant get no practical benefit from it, or the restriction is contrary to public interest and in either case money will be adequate compensation to the persons entitled to the benefit if the covenant is discharged or modified; or
- c. All persons entitled to the benefit of the covenant have expressly or impliedly consented to the discharge; or
- d. The discharge will not adversely affect the persons entitled to the benefit of the covenant.

10. The Upper Tribunal may, if it agrees to release the covenant, either award a sum to make up for the loss or disadvantage suffered by the person with the benefit of the covenant in consequence of the discharge or modification. When determining an application under 9a. above the Upper Tribunal will look planning permissions granted or refused in the area.

Issues Raised

11. On 15th April 2010 the Overview and Scrutiny Committee heard concerns that the covenants were imposed for the benefit and protection of the neighbours. If the covenant was relaxed it could lead to, high noise levels because of the potential number of occupants, and problems with parking as multi-occupation of the property could mean more cars parked in the roadway. There was further concern that the application for planning permission which had been refused was the subject of an appeal.

Planning Decision

12. The planning application is a separate regulatory matter and should be decided upon using planning law. Once the planning decision has been made it is possible to look at the decision as evidence however, the decision must be made taking account of the provisions of the Housing Act 1985 namely was the covenant reasonable in the circumstances.

13. The property now has planning permission to use it for this purpose. The problem of parking is the subject of conditions relating to parking. These are:

- Before 17th April 2011 a parking scheme and timetable for implementation is submitted to the planning authority.
- If the authority refuse or fail to make a decision within 11 months of that date then an appeal can be made to the Secretary of State for approval
- The approved parking scheme must then be completed in accordance with the approved timetable.
- The parking arrangement contained in the parking scheme shall be retained free of obstruction and shall not be used at any time thereafter except for the parking of motor vehicles.

Relevance of Covenants

14. The Committee must decide whether the covenants should have been imposed on the property for the purpose of good estate management or other covenants could have been imposed that would have achieved the same outcome from estate management terms and not have prevented the use of the premises. Further, even if it were correct to have imposed covenants at the time of sale, the Committee should consider whether S84 of the Law of Property Act 1925 allows the covenants to be discharged and, if so, whether the Council would receive compensation and the likely liability for costs before the Upper Tribunal.

15. This property has been used for some time as a house in multiple occupation albeit to a lesser extent. There have been no complaints about its current use. The Committee will be asked to decide whether there is a likelihood that its use as privately rented accommodation would be likely to cause a nuisance from noise in excess to that by a larger family to such an extent that it is necessary for the good estate management to prevent this use.

16. The car parking issue has been addressed in the planning decision and there is good evidence that the Planning Inspector considers that the problem can be addressed.

17. The only ground on whether the original imposition of the covenant could be considered reasonable therefore appears to be on the ground of nuisance. This can be addressed in the variation of the original covenant mentioned in the Portfolio Holder's consent.

18. If the Housing Portfolio Holder upon further consideration does not agree to the variation, the freehold owner may apply to the Upper Tribunal for a release of the covenant. The Tribunal will take account of all the circumstances and would be able to reconsider the terms of the Deed of Variation. The Council may not be able to prove any financial loss and

if not would not receive compensation. If the Upper Tribunal considers that some agreement should have been reached then costs could be an issue.

Consultation undertaken:

19. The Environmental and Street Scene Directorate have been consulted and advise that there have been no complaints about noise or any issues of anti-social behaviour logged over the last 12 months in relation to the property. In addition, the council's Private Sector Housing Team confirm that the property complies with the Housing Act 2004 (Part 1) provisions regarding the rating system and the Management of Houses in Multiple Occupation Regulations 2006 and all the correct certifications are in place.

Resource implications:

Budget provision: Potential costs to the Council if the owner proceeds to the Upper Tribunal and his case was successful

Personnel: N/A

Land: Use of former Council property for multiple occupation.

Community Plan/BVPP reference: N/A

Relevant statutory powers: Housing Act 1985

Background papers: Attached as appendices

Environmental/Human Rights Act/Crime and Disorder Act Implications: Possible risk of nuisance in Denny Avenue, Waltham Abbey

Key Decision reference: (if required) N/A