

## Registered providers: the challenges of acquiring larger sites and associated planning and legal issues with development land

### Case study

#### Background information

As the newly appointed Development Director for White Swan Housing Group (WSHG), you are reviewing a strategic site assembly that WSHG has been working on for a mixed tenure scheme of 180 units. The scheme will be called White Swan Park.

The site comprises 4 parcels of land:

##### Parcel #1

WSHG entered into a Contract (conditional on the grant of satisfactory planning permission) in respect of parcel #1 on 21 June 2017. The longstop date is 21 June 2022.

There is no provision in the Agreement which automatically extends the Longstop Date where planning consent has been granted but the challenge period has not expired.

Parcel #2 and #3 - there are two Call Options in favour of WSHG over these parcels of land.

##### Parcel #2

The Option for this parcel was granted on 1 May 2017 for a period of 5 years. Due to the imminent expiry of the option period, your previous lawyers served notice on the landowner to extend the option period on 1 May 2022. You paid an extension fee of £50,000.

Parcel #2 is situated on a greenfield site and forms part of "Meadow Farm".

You have recently revised the layout for the scheme and part of the land within Parcel #2 will now form the main accessway leading into White Swan Park.

##### Parcel #3

The Option for this parcel was granted on 1 June 2019 for a period of 3 years.

The landowner for parcel #3 is the commercial developer Creswell Homes (CH). CH will be retaining land adjoining parcel #3 ("the Retained Land") and has submitted an application for planning consent because it intends to construct 50 Build to Rent apartments on the Retained Land.

##### Parcel #4

WSHG requires this parcel of land to complete the site assembly but is still carrying out its due diligence. You have agreed to pay overage to the Seller.

##### General

The total land and build costs will be £12m.

WSHG will fund the proposed scheme in the following ways:

- It has already raised £2.5m which will be allocated towards the land and build costs for this scheme
- Grant funding has been approved in principle via AFP 2021-2026 in the sum of £1.6m
- There will be a Stock transfer of 100 units from WSHG to Black Swan Housing (BSH) which will raise £7.9m

### Planning

#### Principle of development

- The greenfield Site is outside the defined settlement boundaries and is not allocated in the local plan (adopted 2015) for residential development. It is currently in arable use.
- The adopted local plan requires the provision of 40% affordable housing.
- A new local plan - which proposed land forming White Swan Park as a draft allocation - was submitted to the Secretary of State by the Local Planning Authority (LPA) in 2019. However, due to deliverability issues surrounding a number of the plan's largest urban extensions, the Local Plan was withdrawn from examination following a Planning Inspector's interim findings.
- The Council have since published an Annual Monitoring Report showing just a 3.3-year housing land supply.
- A new Local Development Scheme has been produced by the LPA that sets out rather sluggish timescales for the preparation and submission of a new Local Plan, with adoption estimated in 2025.
- The Parish Council has submitted a Neighbourhood Plan (NP) for examination - this proposes the site as protected 'Local Green Space', allocating alternative smaller-scale sites for housing in the town. The NP could be formally 'made' by Summer/Autumn 2022.
- Given the above context other landowners and developers are submitting planning applications for residential development, under the National Planning Policy Framework's 'tilted balance', principally triggered by a failure to demonstrate a deliverable 5-year housing land supply and before the Neighbourhood Plan gets made.
- Subject to resolving the environmental and technical issues referred to below, the Planning Consultant advises that an application be submitted as soon as possible.

### Environmental and technical considerations

- The site is well-located in proximity to local services and facilities, including a primary school, GP surgery and local shops, as well as a major local employment area, all within walking distance. It also lies on a high frequency public transport corridor, with bus services every 30-minutes, including to national rail services at a larger town nearby.
- A PRoW crosses the site, providing links through to the town centre.
- There are two options to access the site, however ownership and the extent of the adopted highway needs to be confirmed.
- One of the local ward members is particularly vocal in the local press regarding traffic congestion on one of the main junctions near to the site.
- There is a Grade II Listed Building (former farmhouse) which backs on to the site.
- A Preliminary Ecological Appraisal (PEA) shows limited ecological interest, with the exception of the site being used for foraging by bats, with flight lines following the on-site hedgerows.
- The adopted Local Plan and NPPF require biodiversity 'net gain' to be demonstrated.
- With respect to surface water drainage, there are no watercourses nearby. The opportunity to provide an infiltration-based solution needs to be understood with respect to the site's ground conditions.
- Utility searches show that the nearest foul drainage connection is via third party land.
- You therefore need to address the above issues and have a discussion with your planning and legal advisors on the options available to WSHG.

### Legal due diligence

#### Parcel #1:

- 1.1 No planning application has yet been lodged. Early informal pre-application advice was positive, but formal pre-app and proposals need to be submitted as part of the planning process, addressing the planning, environmental and technical considerations previously raised in this case study.

#### Parcel #2

- 2.1 As the site layout was recently revised, you take a look at the Report on Title for Parcel #2, which was issued to your predecessor immediately before the Option was entered into.

You notice that Parcel #2 is subject to a restrictive covenant to use the land "as agricultural land only and any building or buildings to be erected on the Property shall be ancillary to such use and purpose only".

You mention this to your development manager, who is very proactive, and he traces the owner of the estate who has the benefit of this restrictive covenant.

Initially, the current owners of the estate are reluctant to negotiate release of the restrictive covenant because the grounds to the estate adjoin Parcel #2 and therefore the change of use would impact on the use and enjoyment of that land. However, discussions have progressed well and a release of covenant is proposed for a fee of £50,000.

- 2.2 You have just received news from one of your development managers that the Option Notice for parcel #2 was sent by email and the solicitors acting for the landowner are saying that the Option Period had already expired on the date of the Notice.

The Option Period set out in the document states:

**"Option Period - means the period of 5 years from and including the date hereof"**

You are therefore faced with the prospect that the Option may have lapsed.

#### Parcel #3:

- 3.1 WSHG has also recently appointed new solicitors to the scheme as there had been concerns that the previous firm did not have the resourcing to undertake this complex matter. As part of the new appointment, the subsequent lawyers have raised a concern over the validity of the option notice, and whether it is in fact void.

- 3.2 The title overlay for the revised layout of the scheme comes back and reveals a ransom strip between Parcel #3 and Parcel #4 which is not owned by the Seller.

#### Parcel #4:

- 4.1 Some issues have come up in your searches and due diligence:

- (i) There is a foul drainage sewer running through the centre of this site.

- (ii) The colouring on the plan for the highways search shows a gap between the adopted highway and the proposed estate road.

The seller to parcel #4 has owned the land for 9 years, and the previous seller owned the land for 12 years. Neither of them were ever in occupation of the Site.

- (iii) The local search reveals the site is in a Designated Protected Area.

- (iv) The site is subject to a wayleave agreement.

- (v) The local search revealed that Parcel #4 is registered as a village green.

- (vi) The title for the Site contains a historic restriction on dealings in favour of a specified third party, with no details of the requirements to be satisfied in order to obtain consent. Your efforts to locate the beneficiary have so far proven unsuccessful.

- (vii) There is a unilateral notice on the registered title protecting an Agreement for Sale.

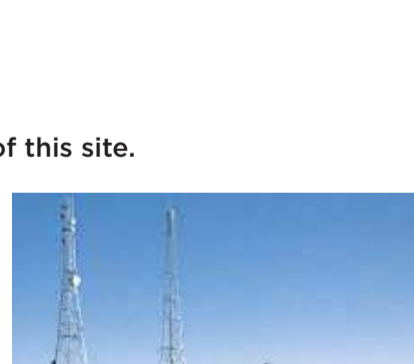
- (viii) The title reveals that a previous owner reserved rights over the site for various sports including shooting.

- (ix) The local search reveals a Tree Preservation Order.

- (x) The local search reveals a Public Right of Way through the Site.

- (xi) The Site is in an area where the Local Authority has adopted a CIL charging schedule.

- (xii) Your development surveyor returns from a site inspection and informs you there are caravans and squatters on site.



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