

PLANNING & TRANSPORTATION COMMITTEE

2 February 1995

WESTGATE MEWS, KENILWORTH GARDENS, WEST END

Joint Report of the Director of Technical and Development
Services and the Borough Secretary and Solicitor

RECOMMENDATION

It is recommended that the measures suggested in paragraph 17 a) b) c) d) and e) be approved.

INTRODUCTION

1. Following the recent construction of four detached houses at Westgate Mews, Kenilworth Gardens, West End, neighbouring residents have objected to the width of the access drive to the four houses, the effects of this access on the existing landscaping strip, and the procedures followed in dealing with an associated variation to a Legal Agreement.
2. The Director of Technical and Development Services reported on the planning aspects of the situation to the Southern Area Planning Sub-Committee on 7 September 1994 and 7 December 1994. At the latter meeting Members resolved to refer the matter to the Planning and Transportation Committee. The report to the Sub-Committee of 7 December 1994 is contained in Appendix 2 and sets out the situation at the site and the solution suggested to the Sub-Committee.

CONSIDERATIONS

3. The objectors wish the access drive to be 3.7 metres wide for its entire length, that the landscaping strip on either side of the access shall extend right up to the respective edges of this 3.7 metre wide drive, and that the development shall have no entrance pillars or walls at its access point from Kenilworth Gardens. A letter dated 31 December 1994 from the occupier of 13 Kenilworth Gardens stated to be on behalf of the residents of that road is reproduced in Appendix 3.
4. The developer applied for, and has been granted permission for, an access drive with a width of 3.7m. The drive constructed by the developer is 4.8m in width. An option open to the Council for the narrowing of the present access drive to the 3.7 metre width desired by objectors is to serve an enforcement notice. However, an enforcement notice requires a sound planning justification and this

does not appear to exist. Furthermore, any enforcement notice would need to be served on anyone with an interest in the land, including any new owners of the recently built houses who were not themselves responsible for the breach of planning control. It is most unlikely that enforcement action would be successful and we recommend against it.

5. At the present time the Council has no powers of enforcement as regards making the developer plant right up to the edge of the access drive (of whatever width), within the approximately 8 metre wide reservation through which the access drive passes. This is because the variation agreement dated 27 April 1994 specifically releases the developer from the obligation to replant within this reservation.
6. If the Council were to opt for the solution negotiated with the developer and recommended to the Southern Area Planning Sub-Committee on 7 December 1994, this would represent a satisfactory conclusion in planning terms. The developer would, however, require planning permission for the walls and pillars if they were to exceed one metre in height at any point, and if the Council were minded to grant such permission it could possibly use that opportunity to impose a condition requiring the developer to sign a further legal agreement reimposing a planting obligation on the part of the reservation area not occupied by the new access, walls, and pillars. The developers have now indicated, without prejudice, that they are willing in principle to keep the walls and pillars below one metre in height (thus obviating the need for a planning application) and also to sign a further variation agreement, if necessary, re-covenanting to plant up to the edge of the access drive. A further modification is that the access drive could be narrowed to a width of 3.7 metres for the whole of that part of its length that is within the original landscaping strip, and the planting could be extended up to the edges of the narrowed access drive. The developers have now indicated without prejudice that they have no objection to this in principle provided that the low walls and pillars can be built.
7. However, if the developers are not the landowners of plots 1 and 4 in the new development at the time when any further variation agreement is to be signed, it would be necessary to join these new landowners and their mortgagees in such further agreement. No party beyond the developers has been approached by the Council, but it is realistic to assume that even if the new owners of plots 1 and 4 were prepared voluntarily to enter into the agreement, they might well be unwilling to bear their legal costs in that connection. The developers have already indicated that they will not agree to indemnify those other owners' legal costs, but the fact remains that without a legal agreement to record the solution under covenant there will not be a satisfactory and working arrangement for the future.

8. Neighbours have been critical of the fact that they were not specifically notified of the intended variation to the original Legal Agreement in order to allow access through the existing landscaping strip. However, they were notified of the planning application for the four houses from which it was implicit that access would be taken through the landscaping strip. This variation to the existing Legal Agreement came about as a result of the recommendation of the Director of Technical and Development Services to the Development Control Sub-Committee of 9 March 1994 (when the Sub-Committee considered the application) rather than as the result of a direct approach from the applicant to vary the existing Agreement. Therefore, it is considered that there was no requirement to specifically notify neighbours of the variation.
9. The original covenant for the landscaping/planting, contained in the Section 52 Agreement dated 6 February 1989, was made in favour of the Council by, jointly, the owners of the land which is now the existing Kenilworth Gardens development, and the owners of the landscaping strip. The obligation "runs with the land" so that the owners for the time being of the Kenilworth Gardens development as well as the owners of the strip (the current developers and their successors) remain bound. By the Variation dated 27 April 1994 - a public document - the Council declared that the "reservation zone" ie approximately 8m width of the landscaping strip, was no longer to be planted. The current developer was a party to the Variation but the developers of the existing Kenilworth Gardens development and their successors were not.
10. The objectors have argued that because the release in the 1994 Variation was not made to the bound parties in the existing Kenilworth Gardens development, it is invalid or void. The Borough Solicitor does not accept that argument. He advised that the Council was and is the beneficiary of the covenants made in the Section 52 Agreement, and that the Council is free to release those wholly or partially if it wishes. By virtue of the terms of the 1994 Variation the Council no longer seeks to enforce the covenant in relation to the reservation zone, and should it attempt to do so, the 1994 Variation could be held up as a good defence against it. Put simply, the owners in the existing Kenilworth Gardens development had an obligation to maintain landscaping in the zone, and the Council has declared publicly that that obligation is terminated. Furthermore it has released the owners of the adjoining new development from the obligation to maintain landscaping in the reservation zone.
11. It is said by some of the current owners of properties in Kenilworth Gardens that they are also under an obligation to the original developer of that estate to maintain the landscaping in the reservation zone. It may be that they did enter into positive covenants with the original

developer for that purpose but that is not the point. Not only the original developer but they too can plead the terms of the 1994 Variation and in those circumstances it is inconceivable that any Court would enforce this positive covenant or find against those current owners.

12. The current owners of properties in Kenilworth Gardens adjoining the landscaping strip also claim that they have a "right" to go on the Westgate Mews land in order to maintain that landscaping strip. This is a misconception so far as concerns the 8 metre width under discussion. They only have such a right if they remain under an obligation to maintain the strip over this 8 metres.
13. We have sought to explain in paras 9 and 10 that the obligation to maintain this small part of the strip has been released so far as the Developers of Westgate Mews are concerned and for that reason could not be enforced by anyone against the adjoining owners in Kenilworth Gardens. Those owners do, of course, continue to have rights to go on the remainder of the landscaping strip outside the 8 metre wide reservation to maintain those remaining areas, because that part is still subject to an obligation that it be maintained as a landscaped 'barrier'. It is curious that anyone should want to force the Council to insist on its rights against them and so force them to trouble and expense, but that seems to be the case here. The Kenilworth Gardens owners themselves, of course, see things differently from the Council. They regard their obligation to the Council and their predecessors in title, not as a burden but as a benefit, because it ensures greater privacy and a more extensive 'barrier' than exists now with the 8 metre wide gap in the landscaping strip. What is clear is that their 'right' to maintain the 8 metre wide gap is contingent on an obligation to maintain it and such obligation has been released impliedly by the Deed of Variation dated 27/4/94 (para 5) and could not now be successfully enforced by anyone against them.
14. In summary, and at the risk of repetition, we are faced with an impasse. On the one side the Developers have built the drive a metre or so wider than permitted through an 8 metre wide 'gap' which the Council released in the landscaping strip. They are under no legal obligation to plant or maintain the former landscaping between both boundaries of the new drive and the ends of the 8 metre wide 'gap'. Enforcement action to reduce the width of the drive by the metre or so is legally possible, but very unlikely to be successful. Even if it was successful the Developers would continue free of any obligation to plant the remaining parts of the 8 metre landscaping strip and, therefore, the objectives of the Kenilworth residents would not be met. The Developers are willing to compromise, but not to do everything which the residents want.

15. On the other side the Kenilworth residents, or some of them, will only be satisfied by reduction of the road to its permitted width throughout and landscaping right up to the edge of that drive. They do not want any walls or pillars surrounding the entrance to Westgate Mews, but the Developers insist on constructing these if the solution proposed is to be carried into effect.
16. The compromise which we set out in paragraph 6, is possibly the best that can be achieved and is a satisfactory solution, even if it does not quite satisfy all aspirations. It has to be added that it is possibly also dependent on the new owners of houses in Westgate Mews agreeing to be bound by the new obligations which the Developer of those properties has agreed to accept.

CONCLUSIONS

17. It is considered that there was no requirement to specifically notify neighbours of the Variation to the Legal Agreement to provide access through the landscaping strip. It is also considered that this Variation Agreement is valid.
18. Planning enforcement proceedings are impractical and the following solution as negotiated with the developer is now recommended as a further improvement upon that reported to the Southern Area Planning Sub-Committee on 7 December 1994.
- a) That walls and pillars of an overall height of less than one metre be erected and maintained on the highway frontage in such a way as to restrict the access drive width at that point to 3.7 metres.
 - b) That the access drive remains at a width of 3.7 metres where it passes through the existing landscaping strip and then widens out to 4.8 metres wide where it passes between the four new houses.
 - c) That the areas on either side of the 3.7 metre wide part of the access drive be planted with shrubs with the exception of 0.75 metre wide crossing paths between the frontal parts of the sites/buildings at plots 1 and 4 and the planted strips. The use of Cornus Alba container grown in 3 litre pots 45-60 centimetres high planted at 0.75 centimetres is suggested. This should achieve a similar height to the existing shrub planting.
 - d) That the Section 52 planting areas will have remedial planting done to them where necessary eg where the site hut was. The use of Corylus Avellina 60-90 centimetres high planted at 1 metre high centres and Cornus Alba as before is suggested.

e) That the developers or the owners of the relevant strips of land be requested to enter into a formal variation of the Section 52 Agreement to record the foregoing and to implement the same, at no cost to Council; that failing success in joining all relevant parties, the Council seek to obtain such covenant, undertaking or written assurance as the parties may be willing to give.

19. The foregoing solution has involved considerable negotiation, involves the developers in more work than they are legally obliged at present to do, and represents a considerable improvement upon the original situation. The plan in Appendix 1 illustrates the suggested solution.

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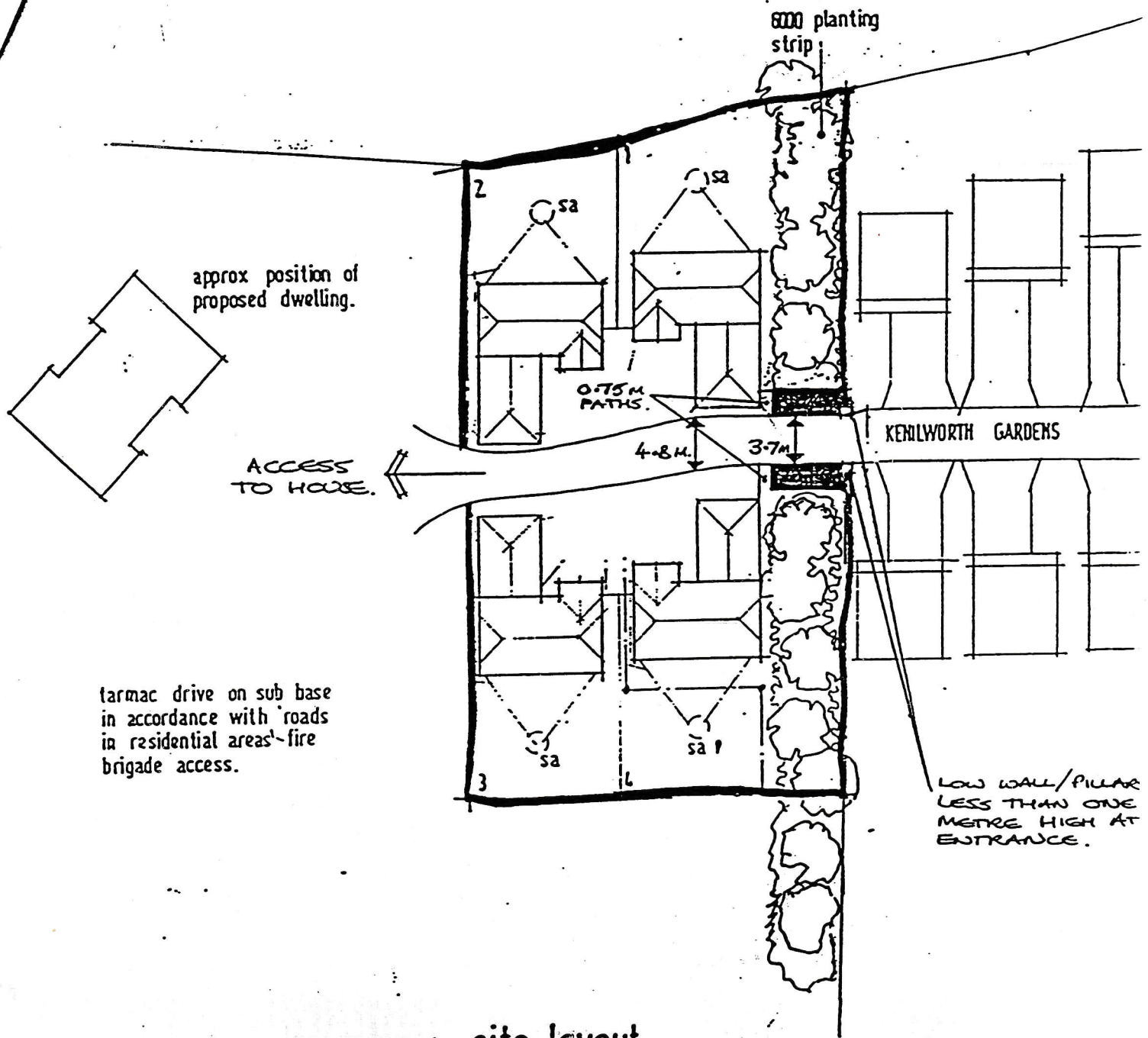
Date: 4 January 1995
Contact Officer: David Trevis Ext 2256

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c) That the access on either side of the 3.7 metre wide part of the access drive be planted with shrubs with the exception of 0.75 metre wide crossing paths between the front part of the street/buildings at plots 1 and 4 and the planned strips. The use of Cornus Alba container grown in 3 litre pots 45-60 centimetres high planted at 0.75 centimetres is suggested. This should achieve a similar height to the existing shrub planting.

d) That the Section 52 planting areas will have remedial planting done to them where necessary eg where the use of Cornus Avellana 60-90 centimetres high planted at 1 metre high centres and Cornus Alba as before is suggested.



site layout



EXISTING LANDSCAPING STRIP.
REMEDIAL PLANTING TO BE
UNDERTAKEN WHERE NECESSARY.

AREAS TO BE PLANTED WITH
SHRUBS TO EDGE OF 3.7 METRE
WIDE DRIVE.