

Insights

BEST LAID PLANS: CAN I START BUILDING NOW I HAVE PLANNING PERMISSION?

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A proposed development

A property developer has obtained planning permission to build a residential estate of houses, some of which will provide affordable units. The affordable units are required to discharge a planning condition. The developer wants to commence building given the state of the market and the financing of the development.

The developer is ready to proceed but ... there is an unresolved legal issue. The owners of land adjoining the development have the benefit of a restrictive covenant that forbids the construction of any buildings on the part of the developer's land earmarked for the affordable housing.

During its acquisition of the development site, the developer was duly advised of the restrictive covenant and that the affordable housing land is burdened by the covenant. The developer took a decision to keep calm and carry on. Now the developer has come to the crunch. It needs advice on this question.

We have planning permission – can't we just start?

We have planning permission; why can't we just start with construction? The answer is because the land on which you wish to build is partly burdened by an enforceable restrictive covenant. If you haven't had a solicitor's letter from the adjoining owner whose land is benefitted by the covenant, you can expect one to arrive soon.

Does that matter?

It matters because an enforceable covenant can be enforced by court action.

But there is a work around isn't there?

Yes, there is a work around; the Upper Tribunal has power to modify or discharge restrictive covenants. The grounds on which the Tribunal can modify or discharge covenants are set out in detail in the relevant statute. The developer can apply to the Tribunal to cancel or relax the covenant so as to permit the consented works. The adjoining owner can object. If terms are not agreed, there will be a hearing following which the Tribunal will make its decision.

The Tribunal has two tasks. The first is to decide if the developer can satisfy one or other of the statutory grounds. If it can, the second task is to decide whether it should exercise its discretion in favour of the developer.

What if a developer had just got on with the job and started to build in breach of a covenant and before the Tribunal has considered the outcome?

The failure to comply with a covenant in any given case might be the result of blameworthy behaviour from negligence through to outrageous dishonesty. The behaviour of the developer is relevant to the exercise by the Tribunal of its discretion. Cynical breach, proceeding to build knowingly in breach of covenant is cynical behaviour, by the developer would be a highly relevant consideration. The cynical developer must expect the Tribunal to reject its application.

So the reason why the developer can't just start is that in so doing it may deprive itself of the only work around available to solve the covenant issue.

MEET THE TEAM



Phil Spencer

London

phil.spencer@bclplaw.com

[+44 \(0\) 20 3400 3119](tel:+442034003119)

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