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Insights

BOUND TO FAIL: CAN I RELY ON MY RESTRICTIVE COVENANT TO PREVENT BUILDING ON NEIGHBOURING LAND?

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A proposed development

A developer has obtained planning permission to build some affordable housing, but the land on which it wishes to build borders my land. Several years ago, when the land was divided up from a larger plot, my land secured the benefit of a restrictive covenant that prevents the construction of any buildings on the neighbouring land. Since the neighbouring land remains bound by that covenant, surely the grant of the planning permission is an oversight? If not, I will need advice on what I can do to enforce my covenant.

Given the covenant, was planning permission granted by mistake?

The presence of a restrictive covenant is not a consideration material to the grant of planning permission. The planning authority should not take the covenant into account or seek to analyse the covenant's true meaning and legal effect.

Is my restrictive covenant worthless?

Not necessarily. It is still a valuable, enforceable right. However, it is also not the end of the story. The developer will need to address it somehow if it wishes to build legally. If you do not object to the proposed development in principle (for example because of adverse impact on your amenity), you might want to enter into commercial negotiations with the developer. The developer may well have an interest in agreeing to make a payment to you in exchange for you permitting the development, notwithstanding the covenant.

This isn't about money – I don't want the development to go ahead!

In that case, there is still one further route the developer can pursue if it has planning permission and wishes to build. The Upper Tribunal has a discretionary power to vary or discharge covenants such as these. A well-advised developer would make an application to the Upper Tribunal in advance of starting work. However, you can contest that application.

On what grounds can the developer apply to the Upper Tribunal?

The law allows the developer to argue the covenant should be varied or discharged where:

1. The covenant is obsolete;

2. The beneficiary agrees to the discharge or modification; or

3. The discharge or modification would not harm the beneficiary.

In each of the above cases, the Tribunal may also order some form of monetary compensation.

There are also two further grounds where the Tribunal must order monetary compensation, because the fact that money will be adequate compensation for any loss suffered by the beneficiary is a key factor in and of itself in determining whether the ground is proven:

4. The restriction impedes a reasonable use of the land but without securing practical benefits to the beneficiary; or

5. The restriction impedes a reasonable use of the land and doing so is contrary to the public interest.

The Tribunal must follow a two-step process. First, it must consider the ground(s) argued above by the developer to determine whether it has the right, as a matter of law, to vary or release the covenant. If the Tribunal decides it can vary or release the covenant, the second step is for it to decide if it should then do so.

This is affordable housing – will public interest always override my covenant?

It is possible the developer may succeed in arguing the public interest ground and the Tribunal will decide it can amend or discharge the covenant. However, this second stage of the process is highly fact-specific and the developer's conduct will play a role, as will your arguments about why you wish to enforce the covenant, including why you consider this is not about money.

What happens next?

If the Tribunal does decide to vary or discharge the covenant, it will also determine an appropriate level of financial compensation you should be awarded as a result.

If the Tribunal does not elect to exercise its discretion, the covenant remains enforceable.

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