UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 159 (LC)
LT Case Number: LP/4/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – proposed development of a detached bungalow to the rear of existing house – whether practical benefits of substantial value or advantage secured to objectors – whether a building scheme – application granted – compensation totalling £23,000 awarded – Law of Property Act 1925 s84(1)(aa)

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY

DAVID JOHN ROBINSON
and
SUSAN ROBINSON

Re: 5 Beckworth Close,
Lindfield,
Haywards Heath
West Sussex
RH16 2EJ

Before: A J Trott FRICS

Sitting at 43-45 Bedford Square, London WC1`B 3AS
on 21 May 2009

Paul Clarke, instructed by James B Bennett & Co, for the applicants
Mr Brian Scott, objector, in person

© CROWN COPYRIGHT 2009

The following cases are referred to in this decision:

Re Gerrard's Application, unreported, Lands Tribunal reference LP/45/2004
Re Burt's Application, unreported, Lands Tribunal reference LP/43/2006
Shephard v Turner [2006] 2 EGLR 73

The following case was referred to in argument:

Re Chojecki's Application, unreported, Lands Tribunal reference LP/32/2003

DECISION

Introduction

1. Mr David and Mrs Susan Robinson (the applicants) want to build a detached bungalow in the rear garden of their house at 5 Beckworth Close, Lindfield, Haywards Heath, West Sussex RH16 2EJ (the application land). They obtained planning permission to do so on appeal, on 6 October 2004. They are prevented from implementing the planning permission by a restrictive covenant contained in the Third Schedule to a conveyance of the application land dated 22 September 1943 which states:

> "2. NOT at any time to erect or suffer to be erected more than one dwellinghouse upon the said land nor any outbuildings other than a garage toolhouse conservatory summerhouse or similar building to be used in connection with the dwellinghouse erected thereon".

2. Mr and Mrs Robinson made an application under section 84 of the Law of Property Act 1925 on 15 January 2008 for the modification of this restriction to allow the construction of the bungalow for which planning permission has been obtained. They rely upon ground 84(1)(aa). There are nine objections to the application, eight of which are from the freeholders of other dwellings in Beckworth Close who have the benefit of the restrictive covenant. The other objection is from Beckworth Close Lindfield Limited, the owner of the private road serving the application land and all the other dwellings in the Close.

3. Mr Paul Clarke of counsel appeared for the applicants and called David John Robinson as a witness of fact and Martin Brian Dutt FRICS, a senior partner in the practice of ML Surveyors LLP, as an expert valuation witness. The only objector to give evidence was Brian David Scott. He had not produced a witness statement prior to the hearing but Mr Clarke very fairly agreed to his giving oral evidence. He appeared in two capacities; firstly, as the owner of 7 Beckworth Close and, secondly, as the Managing Director of Beckworth Close Lindfield Limited.

4. I made an accompanied inspection of the application land on 26 May 2009. I also viewed the application land from the rear of numbers 6 and 7 Beckworth Close and saw the other objectors' properties from the road.

FACTS

5. The application land is located at the end of Beckworth Close, an unadopted concrete road running northwards from its junction with Beckworth Lane. The cul de sac is approximately 100 metres long and has grass verges but no pavements. 5 Beckworth Close, a detached house, is situated at the end of the cul de sac with vehicular access onto a turning circle. The application land is in an established residential area although a primary school and grounds adjoin the western and northern boundaries of the property.

6. It is proposed to construct the new bungalow at the rear of 5 Beckworth Close. This would involve the demolition of the existing garage that adjoins the eastern boundary with 6 Beckworth Close. This is necessary in order to construct a new 3m wide driveway to the proposed bungalow. New planting would take place where the garage is removed and the existing mature border and hedge forming the boundary with No.6 would be retained.

7. The plans for the bungalow show three bedrooms (one en suite), a lounge, dining room, kitchen, utility room, bathroom and a single integral garage. It would be 6m high to the roof ridge. At its closest point the bungalow would be 9.5m from the boundary with No.6, 11m from the boundary with No.4 and some 11m from the existing house at No.5. A 2m high close-boarded wooden fence would be erected along the new boundary between No.5 and the new bungalow.

The case for the applicants

8. Mr Robinson said that the applicants had been encouraged to apply for planning permission for the new bungalow following the recent extensions to his neighbours' properties at Nos.4 and 6 Beckworth Close. There were also three examples of infilling in the Close since the covenants had been imposed, at 1A and 4 Beckworth Close and at 34 Beckworth Lane (a house constructed in the garden of 12 Beckworth Close). There were very limited opportunities for further infilling in the Close and the proposals would therefore not set a precedent for further development (although Mr Robinson accepted that such development might be possible at 7 and 8 Beckworth Close).

9. The applicants had taken care to minimise the impact of the bungalow upon neighbouring properties, including the erection of fences and the provision of tree and shrub screening. It would not be generally visible from the Close and so far as it would be visible from the neighbouring properties this was due to the extensions of those properties that had been recently carried out. Being one of the largest plots in the Close the bungalow could be sited within the curtilage of No.5 without causing any harmful effects upon the amenity of others.

10. The proposal would not lead to increased on-street parking or any detrimental wear and tear on the surface or structure of the road. 5 Beckworth Close would have a new hardstanding area at the front of the property to allow for more parking whilst the proposed bungalow would have exclusive use of the new driveway.

11. Mr Dutt said that there would be some short-lived disturbance to the objectors during the construction works which he estimated would last six months. He said that a payment of £1,000 to each residential objector would be adequate compensation for this and for potential future additional traffic using Beckworth Close.

12. The properties most affected by the proposal would be 4 and 6 Beckworth Close. Mr Dutt said that although No.4 would not be directly affected by additional traffic, the bungalow faced their garden which might lead to a perceived loss of privacy. He considered that additional compensation of £5,000 (making a total of £6,000) would be appropriate for this

objector. In the case of No.6, although the new bungalow would not overlook its garden, the new driveway would run along its boundary and would be noticeable to a prospective purchaser of the property. He considered that additional compensation of £10,000 (making a total of £11,000) would be appropriate in this case. The additional compensation was estimated at some 1½% to 2% of the market value.

13. Mr Dutt agreed with Mr Robinson that the plot of 2 Beckworth Close was too small to accommodate an additional dwelling. He thought that neither No.7 nor No.8 had the same width of frontage as the application land although they might be combined to release development potential at the rear.

14. Mr Clarke submitted that the fact the objectors had not filed any evidence was symptomatic that their objections were not strongly held. He relied upon the decision in *Re Gerrards' Application*, unreported, Lands Tribunal reference LP/45/2004, in which the member, N J Rose FRICS, said at paragraph 27 that:

> "The absence of any sustained objection to the present application provides strong evidence that grounds (aa) and (c) are made out."

15. Insofar as the objections were to be taken into account Mr Clarke said that very few of them made any detailed complaints. The general complaint was that there was a scheme of covenants governing the area that would be weakened if the application was allowed, thereby opening the way for further development that would increase density and change the character of the close. But there had already been substantial infilling in the Close both by new dwellings and by extensions to existing buildings. Furthermore the scope for any further infilling was limited by the size of the plots. No.2 was too small and No.7 and 8 would have to share an access, requiring cooperation between the owners. But Mr Scott, the owner of No.7, was an objector. Even if there was a possibility that one or two further dwellings might be built the effect on the character of the Close would be small.

16. Mr Clarke submitted that there was no building scheme in force and that there was no system of mutually enforceable covenants.

17. The two objectors most affected by the application, namely the owners of Nos.4 and 6 Beckworth Close, had chosen not to give evidence. Only Mr Chatfield at No.4 had raised the issue of loss of privacy and it was not clear whether this was a specific or a general objection. Certainly there was no reference in his objection to interference with his outlook or to the new bungalow overlooking his property. It was conceded that the upper floor rear windows of the new side extension might overlook the bungalow but it could not reasonably be said that there would be any loss of privacy to these windows. Any impact would be minimised by the new landscaping proposals. In theory the applicants could have built an extension at No.5 that would have had a slightly negative effect on No.4 without being in breach of the restriction. The construction of a bungalow would only have a marginally bigger impact. The owner of No.6, Mr Hooper, had not provided a witness statement and had not complained about loss of privacy or loss of a view. Mr Clarke submitted that these were not concerns to be taken into account and compared the present application with that considered by the Tribunal, N J Rose

FRICS, in *Re Burts' Application*, unreported, Lands Tribunal reference LP/43/2006, at paragraph 23:

> "I note that he [an objector] did not refer to the view from his property either in his objection to the planning application or in his witness statement and I infer that any loss of view would be immaterial to him."

18. Mr Dutt had been fair and independent in his assessment of compensation and, given the downturn in the market since his report, he could have argued for lower figures. A number of objectors had said that money would not be adequate compensation and so, Mr Clarke submitted, either no compensation should be awarded or the objectors' position should be reflected in the assessed amount.

The case for the objectors

19. There are nine objections to the application. None of the objectors made a witness statement and only Mr Scott sought permission from the Tribunal at the hearing to give oral evidence. In the majority of cases the grounds of the objection are as set out in the original notices of objection to the application. Several of them have identical wording. The grounds of objection may be summarised as:

- (i) The proposal would change the character of the area and would cause unnecessary injury;
- (ii) It would create a precedent for further development;
- (iii) There would be increased traffic noise and congestion;
- (iv) Money would not be adequate compensation;
- (v) There is a building scheme;
- (vi) Loss of privacy (No.4);
- (vii) There would be a negative impact on property values (No.10).

20. Mr Scott gave oral evidence firstly in his capacity as managing director of Beckworth Close Lindfield Limited. He said that in 2008 repairs had been undertaken to about 20% of the surface area of the Close. The road was some 50 years old and although the worst craters had now been successfully repaired the road remained fragile. It would be damaged by the movement of heavy construction vehicles. Mr Scott acknowledged that he had not raised this point in the company's notice of objection. He also said that the construction traffic associated with the various extension works undertaken on properties in the Close had aggravated existing potholes. He distinguished the application proposal from the extension works which he described as being part and parcel of normal occupation and fair and reasonable improvements.

21. Mr Scott then gave details of his objection as owner occupier of 7 Beckworth Close. He said that he had bought the property in 1994 with a view to retirement. Beckworth Close was a quiet and settled residential area. He had relied upon the benefit of the covenant and took what he described as a layman's comfort from it. Whilst improvements to existing properties were

well tolerated in the Close he considered the current proposal would set a dangerous precedent. If the application was granted he would reconsider his options since his confidence in the restriction would be shattered. He might move and would consider combining his land with that of No.8 (whose owner he said intended to move) to form a development site.

Conclusions

22. The applicants rely solely upon ground 84(1)(aa) of the 1925 Act and seek modification of the restriction so as to permit the construction of the bungalow on the application land in accordance with the planning permission granted on appeal. Ground (aa) enables the Tribunal to modify a restriction on being satisfied:

> "(aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user
>
> …
>
> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, either –
>
> (a) does not secure the person's entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
>
> (b) is contrary to the public interest;
>
> and that money would be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification."

The public interest point under (1A)(b) does not arise in this application and there is no dispute that the restriction does impede the reasonable user of the application land.

23. There is no evidence to support the assertion made by some objectors that there is a building scheme. It was not established that the restriction was intended by the common vendor to be, and is, for the benefit of all the lots that were sold. It is not possible to infer a building scheme from no more than a common vendor and the existence of common covenants. In fact the contrary intention is revealed in the Second Schedule of the 1943 conveyance which states, "Nothing herein contained shall operate …or be otherwise deemed to create a building scheme …".

24. Whilst I agree with the applicants that the objections were not supported by witness statements and were not pursued vigorously I do not accept Mr Clarke's analogy with the facts in *Re Gerrards' Application*. In that case, unlike the subject application, the objectors had been made the subject of a debarring order and the member's reference to the absence of any sustained objection to the application must be viewed in that context.

25. Nor do I accept the description of the proposed development as infilling. A better term is tandem or backland development. There are no other examples of this type of development in the Close, although there are three examples of infilling. From my site inspection I am

satisfied that it would be difficult to repeat such tandem development elsewhere in the Close. The plot of No.2 is too small and narrow while, individually, Nos.7 and 8 would be constrained in terms of access. It is possible that they could be combined but this remains speculative. I conclude that granting the application would not be the thin end of the wedge that creates a precedent for similar development in the future.

26. The proposed development would be well hidden from the Close and would not directly affect, nor be visible to, the majority of the objectors. In my opinion there would be no noticeable change in the character of the Close as a whole. Some objectors said that the proposals would cause unnecessary injury but the nature of that injury was not specified and I do not accept this assertion.

27. The impact of the proposal would, however, be potentially greater upon the adjoining properties at Nos.4 and 6. I do not think that the new bungalow would overlook or be overlooked by No.6 due to the orientation of the rooms and the siting of the bungalow behind No.5. It is accepted by the applicants that the bungalow would be visible from some windows on the upper floor of No.4. Mr Clarke suggested that this was, at least to some extent, vitiated as a consideration because those windows formed part of the recent extension to No.4. I do not accept that argument. The whole of No.4 has the benefit of the restriction and there is no reason to exclude the recently extended part of the house, such extension having been built with the benefit of planning permission. However, from my site visit and the details of the proposal in my possession I do not believe that such overlooking and changed outlook would be significant or such as, in its prevention, would amount to a practical benefit of substantial advantage to the objector.

28. The increased level of traffic in the Close will be insignificant and there is no reason to suppose that there will be more on-street parking since sufficient off-street parking has been provided for both No.5 and the new bungalow. The applicants accept, and I agree, that there will be temporary disturbance caused by the movement of construction traffic. Mr Dutt said (and was not challenged) the construction works would last for six months. It is necessary to consider whether the restriction secures to the objectors protection from the adverse consequences of such works and whether this is a practical benefit of substantial advantage to them. Such an argument was considered by the Court of Appeal in *Shephard v Turner* [2006] 2 EGLR 73 in which Carnwath LJ said at 80A:

> "'reasonable user' in this context [ground (aa)] seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short term disturbance that is inherent in any ordinary construction project. There may, however be something in the form of a particular covenant, or in the facts of a particular case, that justifies giving special weight to this factor."

I do not consider that the construction works or any other facts of the case are such as to give special weight to this factor and I therefore do not consider that the prevention of temporary construction works is a practical benefit of substantial advantage to the objectors.

29. The objectors most affected by traffic are likely to be Mr and Mrs Hooper at No.6. A new driveway would be constructed along much of the length of its boundary with No.5. There is an existing driveway and garage (to be demolished) that already extends to half this length. The new driveway would be no nearer to the house at No.6 but the extended driveway, unlike the existing one, would directly adjoin its rear garden. However, the additional traffic that would serve the bungalow is unlikely to be substantial and I am satisfied from my site visit and from an examination of the proposed development that the prevention of an increase traffic movement does not constitute a practical benefit of substantial advantage to the objectors.

30. Mr Scott argued that the Close was fragile and would be damaged by construction vehicles. But the road was repaired last year and I am not persuaded that the construction traffic would lead to a significant deterioration of the road surface. Mr Clarke submitted, and I accept, that the objectors can be compensated for any possible damage that might arise during the six months construction period and for which they would otherwise be collectively responsible (together with the other residents of the Close).

31. One of the objections, that of Mr and Mrs Underwood at No.10 Beckworth Close, stated that the proposed development would "negatively impact nearby property values". I accept Mr Dutt's view that there would be no such impact on any of the objector's properties other than Nos.4 and 6. Mr Dutt assessed the respective diminution in value of those two properties at £5,000 and £10,000 which Mr Clarke suggested was generous. Mr Dutt estimated this compensation at under 2% of the open market value of Nos.4 and 6. In this context I do not consider this amount to represent substantial value. To these sums were added a further £1,000 an amount which was offered to all the objectors, to cover what Mr Dutt called disturbance but which I think is more appropriately directed at any future repairs to the Close arising from the construction works. I accept Mr Dutt's figures which I consider fair and reasonable, and I agree with him that the impact of the proposal upon the value of No.6 is likely to be greater than upon No.4.

32. I conclude that the restriction, by impeding the proposed user, does not secure to any of the objectors any practical benefits of substantial value or advantage to them. I am also of the opinion that money would be an adequate compensation for any loss or disadvantage suffered by the objectors from the modification of the restriction. I therefore find that ground (aa) has been established.

33. Having found that I have jurisdiction to modify the restrictive covenant I must consider my discretion to do so by reference to section 84(1B) of the 1925 Act. I have taken into account the development plan (updated details of which were forwarded at my request following the hearing) and the pattern for the grant or refusal of planning permissions in the area (which include planning permission for three infill sites referred to above) as well as the period and context in which the restrictions were imposed together with all other material circumstances to which my attention was drawn. There is nothing arising out of my consideration of section 84(1B) that justifies refusing the relief sought as a matter of discretion, such relief to be by way of modification by proviso to enable the development to proceed.

The Order

34. The following order shall be made subject to the prior payment of the compensation referred to in the following paragraph:

> In the conveyance dated 22 September 1943 –
>
> Restriction 2 is modified on ground (aa) by insertion of the following:
>
> "Provided that a new detached bungalow may be constructed in accordance with the planning permission granted in appeal on 6 October 2004 in respect of planning application reference LF/03/02214/FUL dated 28 August 2003 and the plan submitted therewith as amended by revised layout plan drawing No.DMH/90036.1/1. Reference to the said planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions attached to such permission."

35. An order modifying restriction 2 in accordance with the above shall be made by the Tribunal provided, within three months of the date of this decision, the applicants shall have paid the total sum of £23,000 to the objectors made up as follows:

(i)	Mr J Hansen Lise of Ambers, Beckworth Close:	£ 1,000
(ii)	Mr G and Mrs S Chladek, 3 Beckworth Close:	£ 1,000
(iii)	Mr K J and Mrs J E Chatfield, 4 Beckworth Close:	£ 6,000
(iv)	Mr and Mrs S Hooper, 6 Beckworth Close:	£11,000
(v)	Mr B D and Mrs J O Scott, 7 Beckworth Close:	£ 1,000
(vi)	Mr N R and Mrs H A Jones, 9 Beckworth Close:	£ 1,000
(vi)	Mr A M and Mrs R Underwood, 10 Beckworth Close:	£ 1,000
(viii)	Mr L P Chopping, 11 Beckworth Close:	£ 1,000

36. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is decided. The attention of the parties is drawn to paragraph 23.4 of the Upper Tribunal (Lands Chamber) Interim Practice Directions and Guidance dated 13 May 2009.

Dated 24 August 2009

A J Trott FRICS