IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 256 (LC)
Case No: LP/15/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – ***modification – proposed development of site of former home for the blind as 40 flats – whether practical benefits of substantial value or advantage – whether restrictions obsolete – whether injury to objectors – s84(1)(a), (aa) and (c) Law of property Act 1925 – application allowed – no compensation awarded***

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

BY:

THOMAS POCKLINGTON TRUST LIMITED

Re: Former Pocklington House,
Eastbury Avenue,
Northwood,
Middlesex HA6 3LN

Before: His Honour John Behrens and Mr A J Trott FRICS

Royal Courts of Justice, Strand, London WC2A 2LL
on
19 July – 20 July 2018

Andrew Francis, instructed by Russell-Cooke Solicitors, for the applicant
The objectors in person

The following cases are referred to in this decision:

Re Millgate Developments Limited's Application [2016] UKUT 515 (LC)
Re Chandler's Application [1958] 9 P&CR 512
Re Dean's Application [2017] UKUT 203 (LC)

DECISION

Introduction

1. On 14 October 1960 the trustees of the charity then known as The Gift of Thomas Pocklington purchased some 1.49Ha of land at the junction of Eastbury Avenue and Watford Road, Northwood HA6 3LN for £6,500 from Mrs Marie Basden. The land formed part of the grounds of the vendor's house known as Harescombe which she retained after the sale together with some 2Ha of other land. The purchaser covenanted to observe and perform the restrictions contained in the Second Schedule of the conveyance for the benefit and protection of the vendor's adjoining (retained) land. The Second Schedule contained five restrictive covenants ("the 1960 restrictions"):

> "1. No trees with a girth exceeding three feet six inches at six feet from ground level are to be cut or felled without the previous consent of the Vendor or her successors in title nor shall any such trees be lopped or otherwise maimed or injured except in accordance with good arboricultural practise provided that such consent shall not be unreasonably withheld in the case of trees in a dangerous condition or which may interfere with development of the land hereby agreed to be sold pursuant to stipulation 3 hereof.
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> 2. No trees of any girth nor any bushes or shrubs growing within twelve feet of the boundary on the South-west or to the South-west of the land hereby agreed to be sold shall be cut felled lopped polled maimed or injured without the previous consent of the Vendor or her successors in title.
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> 3. Not to erect upon the land hereby agreed to be sold any building other than a Home to accommodate not more than fifty blind persons and necessary staff.
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> 4. The siting and the external plans and elevations of the Home shall first be submitted to and approved by the Vendor and no alterations shall be made thereto without the previous consent in writing of the Vendor or her successors in title.
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> 5. The Purchasers shall not at any time carry on or suffer to be carried on upon the land hereby agreed to be sold or any part thereof any trade or business or permit the same to be used for any other purpose than of a Home for the blind."

2. The Gift of Thomas Pocklington proceeded to develop Pocklington House on the acquired land. Pocklington House, which was designed to provide care and accommodation for up to 35 elderly residents with sight loss, was officially opened on 19 December 1962.

3. Mrs Basden's retained land was subsequently sold for redevelopment as detached houses. The developer was Howard James Developments Limited who completed the development in the early 1980s. The development was a cul-de-sac known as Mountview[1]. Thirteen of the houses in Mountview had the benefit of the restrictions. The remaining houses in Mountview (Nos.2 and 4 and 1-11 odd) were not built on the retained land and do not have the benefit of the restrictions. Two other

[1] Mountview is also referred to in the evidence as Mount View.

detached houses, Lansdowne and Anson Cottage, were built in 1980 on land previously occupied by Harescombe Lodge. These houses also have the benefit of the restrictions.

4. In 1989 the use of Harescombe House was changed from residential to class C2 (residential institution) and it is now Erskine Hall Care Home owned and operated by BUPA Care Homes (AKW) Limited ("BUPA"). The property has the benefit of the restrictions.

5. The Gift of Thomas Pocklington was established in 1958 and in 2000 it changed its name to the Pocklington Trust ("The Trust"). By the time of its 50th Anniversary in 2008 the Trust was considering the future of Pocklington House which was said to be reaching the end of its life. By 2012 the Trust had decided to close Pocklington House and to sell the site. By then the Trust had concluded that it could no longer provide housing for visually impaired people efficiently or effectively but instead aimed to use its assets to generate income for research into finding practical ways to improve the lives of people with sight loss and to improve public awareness of health issues affecting sight.

6. Having taken the decision to close the site the Trust decided to demolish the existing building to remove the risk of vandalism and dilapidation. The Trust gave prior notification of demolition which was approved by the local planning authority on 30 August 2013. Pocklington House was demolished later than year.

7. The Trust had pre-planning application discussions with the local planning authority in 2014 and 2015 about the prospect of redeveloping the site with three blocks of flats. These discussions led to the making of a planning application on 3 February 2016 for the redevelopment of the site to provide 40 residential dwellings in three four-storey apartment blocks with associated underground parking. This application was refused on 9 May 2016 (against the planning officer's recommendation) on the grounds that there was limited separation between Block 3 (the most westerly block) and the neighbours to the rear (especially 19 and 21 Mountview) and that the layout and extent of the development and the siting of the proposed car parking to the rear of Block 3 would result in an overbearing, overdominant and unneighbourly form of development.

8. The Trust amended the design of the proposed development in order to reduce the height of Block 3 from four storeys to three storeys and moved all three blocks further to the north away from the houses in Mountview. The number of flats remained at 40 comprising 22 one-bedroom flats, 16 two-bedroom flats and 2 three-bedroom flats. A revised planning application was made on 23 December 2016 and detailed planning permission was granted on 27 March 2017 subject to 32 conditions (reference 16/2741/FUL).

9. On 15 May 2017 the Trust applied for the discharge, or modification in the alternative, of the restrictions. The application for discharge is no longer being pursued and the application for modification, so as to enable the development for which planning permission was granted in 2017, is made on the primary ground of section 84(1)(aa) of the Law of Property Act 1925 and also on grounds (a) and (c) of that section. The application is made under both limbs of section 84(1A), i.e. that the restrictions, in impeding a reasonable user, (a) do not secure to persons entitled to the benefit of them any practical benefits substantial value or advantage to them; and (b) are contrary to the public interest.

10. There were nine admitted objections to the application, the details of which are contained in Appendix 1 hereto. The objection made by BUPA was withdrawn on 1 May 2018 leaving eight objections by the date of the hearing. None of the owners of the five properties in Mountview adjoining the application land (Nos. 19-27 odd) objected. During the course of the hearing the Tribunal was informed that BUPA and the owners of the five adjoining houses had reached a financial agreement with the Trust in relation to their right to object to the application.

11. Mr Andrew Francis of counsel appeared for the applicant. He called Mr William Laing, a Director of Laing Buisson and Mr Simon Curtis, Head of Property at Thomas Pocklington Trust, as witnesses of fact; and Mr Ruaraidh Adams-Cairns BSc (Est Man) FRICS, Director and Head of Litigation Support, Savills (UK) Limited as an expert witness.

12. Three of the objectors appeared in person: Mr David Wilmot (8 Mountview); Mr Stuart Aikman (13 Mountview) and Mr Kamlesh Dholakia (17 Mountview).

13. We made an accompanied site inspection of the application land and 6, 8, 13 and 17 Mountview on 18 July 2018. We looked towards the application land from outside the objectors' houses at 10, 14 and 15 Mountview. We also drove along Eastbury Avenue, northwards along Watford Road towards Oxhey Woods, Merchant Taylors' School and Sandy Lodge Golf Course in order to appreciate the character of the surrounding area.

Facts

14. The application land is located at the junction of Eastbury Avenue and Watford Road approximately 1.5km north-east of Northwood Underground Station. The surrounding area is predominantly residential although there is a large military establishment (Northwood Army Headquarters) to the north and Oxhey Woods local nature reserve is a short distance to the north-east. The area is also well served by golf courses (e.g. Pinner Hill, Haste Hill, Northwood, Sandy Lodge and Moor Park).

15. The application land comprises the site that was purchased by the Trust in 1960 and extends to approximately 1.49 Ha. The eastern half of the site comprises mature woodland and is the subject of a woodland tree preservation order. Pocklington House previously stood on the western half of the site. It was two/three storeys in height.

16. The application land has a frontage of 200m to Eastbury Avenue and 105m to Watford Road. The site narrows from the east and its western boundary with the neighbouring property known as Latimer Place is 51.5m long. The site slopes from east to west by a total of 11.8m. The eastern (wooded) part of the site slopes from north to south but the western (development) part of the site falls slightly in the opposite direction, away from Mountview.

17. The proposed development for which planning permission has been obtained comprises three residential apartment blocks numbered 1, 2 and 3. Blocks 1 and 2 are located at the eastern and middle parts of the development site respectively and are both four-storeys (11m) high. Each has a total of 14 flats. The top floors are set back from the main elevations so as to minimise their visual impact and the bulk of the buildings. Block 3 is to the west of the development site and is three-storeys (9m) high. It contains 12 flats. All the blocks have flat roofs. The blocks are slightly off-set from each other with Block 1 being set back 10.5m from Eastbury Avenue and Blocks 2 and 3 15.5m and 16.5m respectively. The respective distances of the blocks from the boundary of the application land with 19-27 (odd) Mountview are 25m, 20m and 18m. The proposed blocks would therefore be further from the said boundary than was Pocklington House. Block 3 is some 13m east of the boundary with Latimer Place. The blocks are approximately 8.5m apart.

18. There would be two vehicular accesses onto Eastbury Avenue. The existing access (between Blocks 1 and 2) would form the ramp to the underground car park which has spaces for 71 vehicles. A new entrance would be created in front of Block 3 and giving access to three surface car parking spaces and a cycle store.

19. A total of 26 trees would be removed from the application land including a number close to the southern boundary with Mountview and along the boundary with Latimer Place. A number of other trees and groups of trees would need to be pruned. But the southern boundary would still be formed of mature trees and hedge screens.

20. The proposed residential blocks are between 65.4m (Block 3 and 17 Mountview) and 119.1m (Block 1 and 10 Mountview) distant from the objectors' properties. The average distance (excluding the objection in respect of the land in the centre of the roundabout) is 94m. Between the objectors' properties and the application land lie trees in some of their front gardens, the two large trees in the centre of the roundabout, the heavily wooded grounds of Erskine Hall, 19-27 (odd) Mountview and the trees and hedges that will remain to the south of the proposed development. There will be no pedestrian or vehicular access to the application land from Mountview.

Statutory Provisions

21. Insofar as relevant to the present application section 84 of the Law of Property Act 1925 states:

> "84(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied-
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> > (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or

(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; or

(b) …; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say either –

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of the land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons 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 will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case falling within section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify the restriction without some such addition.

…

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes."

The case for the applicant

22. The applicant's primary case was made under section 84(1)(aa) of the 1925 Act and focussed mainly upon section 84(1A)(a). Mr Adams-Cairns therefore considered whether the restrictions protected any amenity of practical value or advantage to the objectors and concluded that they did not do so for the following reasons:

(i) Only 6 and 8 Mountview faced the application land; the other objectors' properties (10, 13, 14, 15 and 17 Mountview) had aspects which were parallel to or facing away from the application land;

(ii) The proposed development would be screened from view by:

(a) the five detached houses located adjoining the application land at the north of Mountview (Nos. 19-27 odd);

(b) the trees, hedges and fences in the objectors' own properties and/or the two large trees in the centre of the roundabout;

(c) the heavily wooded grounds of Erskine Hall; and

(d) the tree and hedge screen that would remain on the application land between the proposed development and Mountview.

(iii) The objectors' properties were a long way from the proposed development which was located further from Mountview than was the former Pocklington House. The closest house was 17 Mountview at 65.4m, a distance that was twice that recognised by the local planning authority as being adequate between the faces of single or two-storey buildings – even if there were no intervening properties or screening vegetation;

(iv) The effectiveness of the tree and hedge screen and the visual barrier formed by 19-27 (odd) Mountview was enhanced by the fact that the objectors' properties were at a lower level than the proposed development. The only view that any of the objectors would have of the proposed development would be limited to oblique and distant views between the roof lines of 19-27 (odd) Mountview;

(v) The proposed blocks of flats would not overlook the objectors' properties. In turn the outlook from those properties would not be affected by the development;

(vi) There would be no impact from noise or light pollution from the proposed development because of the distance of the three blocks of flats from the objectors' houses, the intervening houses and tree/hedge screen and because the proposed car

park was underground with an access onto Eastbury Avenue, i.e. a long way from Mountview;

(vii) The objectors' concerns reflected a fear of the unknown which would not be realised in practice and the completed development was likely to increase the value of adjoining properties; and

(viii) The restrictions did not preclude the possibility that a larger home for the visually impaired (up to 50 persons) could be built on the site which would probably be larger than the consented scheme.

23. Mr Adams-Cairns concluded that (i) the proposed development was "so distant and hidden" from the objectors' properties as "to be almost completely irrelevant"; and (ii) if the restrictions were discharged or modified there would be no loss of market value in any of the objectors' properties.

24. Mr Curtis explained the history of Pocklington House and the other housing centres developed by the Trust. He described the vision of the Trust as ensuring that people with sight loss could participate fully in society. Over the last ten years the Trust had realised that its housing provision (350 units) was inefficient and often increased the isolation and dependence of its residents. Consequently, the Trust had decided to close two of its centres, including Pocklington House, transfer two others to housing associations and to retain one (in Shepherds Bush) with a low level of support provided by an external company funded by the local authority.

25. The Trust had no further need for the application land as a home for visually impaired people and Mr Curtis said that the provision of care homes for the visually disabled was no longer considered best practice by those, such as Mr Laing, working in this field. The future emphasis of the Trust's work would be on research and the advancement of knowledge of the prevention, alleviation and cure of visual impairment. As a charity the Trust was obliged to make the best use of its resources to pursue the objects of the charity as set out in its articles of association. In order to make the best use of the Pocklington House site the Trust had been advised by Savills that it should obtain planning permission for residential development.

26. Mr Curtis rejected the objectors' criticism that the Trust was commercially motivated and only wanted to make a profit from the proposed development. He stressed that as a charity the Trust did not aim to make profits for shareholders, investors or (if it was so alleged) for the personal benefit of staff or trustees. Mr Curtis adduced the report and account of the Trust for the year ended 31 March 2017 to assist the Tribunal in understanding the Trust's responsibilities, how it was run and what it did with its income and investments.

27. Mr Laing produced a witness statement but his evidence was more akin to that of an expert asked to comment upon whether the application land remained suitable as a site for a care home and whether the Trust's move to a broader range of services and community support was more appropriate to the requirements of the 21st Century.

28. Mr Laing said that the amenities of Pocklington House were unsatisfactory by modern standards which since 2002 required a minimum of 12 m^2 of useable floor space per room with the great majority of rooms having en-suite facilities. All the rooms in Pocklington House were less than $10m^2$ and the majority did not have en-suite bathrooms. He said that the size and standard of accommodation at Pocklington House was well below general sector standards. The small room sizes meant that Pocklington House was particularly unsuitable for wheelchair users.

29. Mr Laing said that Pocklington House was built at a time when specialist provision for visually impaired people was limited, public attitudes were intolerant, and community support and infrastructure were lacking. At that time the creation of a "safe haven" for people in need was a positive factor even when weighed against the disadvantage of the semi-institutionalised setting of such a care home. But times had changed, public attitudes to disability were more accepting and infrastructure in the community was more highly developed, e.g. in terms of access to buildings and public transport. It was not surprising that the Trust's view of its mission had moved away from the focus on institutional provision to more relevant ways of supporting the visually impaired. There was no longer a requirement for a large home just for the care of visually impaired people.

30. In his closing submissions on behalf of the applicant Mr Francis acknowledged that to proceed under section 84(1A)(b) (public interest) "may be a radical step", especially in the light of the forthcoming appeal in *Re Millgate Developments Limited's Application* [2016] UKUT 515 (LC) in which section 84(1A)(b) had been established in respect of the proposed development of 23 social housing units. Mr Francis did not abandon this ground but relied upon the submissions made on the point in his skeleton argument. In summary those submissions were that the restrictions were contrary to the public interest because:

(i) The application land was no longer needed as a home for the visually impaired;

(ii) There was an established housing need in the area;

(iii) The site was a vacant and unused brownfield site;

(iv) Planning permission had been granted for residential development; and

(v) The monies released by the sale of the application land unconstrained by the restrictions would enable the Trust to pursue its charitable work in supporting the visually impaired.

31. Mr Francis reiterated that the applicant's primary case was made under section 84(1A)(a) which he said was entirely supported by the evidence. He argued this section was satisfied because the restrictions did not secure any (let alone substantial) practical benefits to the objectors for the reasons given by Mr Adams-Cairns. The objectors had called no valuation evidence and had failed to challenge that of the applicant's expert.

32. The applicant also relied upon grounds (a) and (c). Ground (a) was said to apply because:

(i) Since the restrictions were imposed there had been changes in good practice in the case of the visually impaired such that there was no longer a requirement to house them in large care homes. The original purpose of the restrictions to ensure the use of the application land for a home for the blind could no longer be achieved and the restrictions now effectively sterilised the site.

(ii) In 1960 the retained land comprised a single house (Harescombe) and grounds. Now there were 15 houses and a BUPA care home on the retained land with other flats having been constructed nearby in Eastbury Avenue. Consequently the character of the neighbourhood had changed.

(iii) Restriction 4 was obsolete because it related to a home for the blind which had now been demolished.

(iv) As a result of the multiple sub-division of the retained land into separate ownerships the requirement to obtain the consent of the Vendor or her successors in title under restrictions 1, 2 and 4 were unworkable in practice and obsolete even if they had not already lapsed.

33. Ground (c) was said to apply for the reasons given by Mr Adams-Cairns. Additionally, Mr Francis submitted that the restrictions allowed for a larger home for the blind to be built, i.e. for 50 blind persons and associated staff rather than the 35 which Pocklington House could accommodate, an increase of over 40%. Such a building if constructed would not be dis-similar to a block of flats. The construction of three blocks of flats would break up and soften the build form compared to the single Z-shaped building that was Pocklington House. The residential use of the property would be in keeping with the surrounding area and the modification of the restrictions would not injure any of the objectors.

The case for the objectors

34. Mr Wilmot, Mr Dholakia and Mr Aikman all gave evidence at the hearing. The other objectors relied upon their written objections. Mr Wilmot also spoke on behalf of Latimer Vale Limited, the owner of the land in the centre of the roundabout in Mountview, whose objection had been made by Mrs Lesley Wilmot in her capacity as a director of the company.

35. Although their evidence ranged quite widely, all three objectors focussed on what they identified as a continued demand for a care home (not necessarily a home for the blind) on the application land. In other words they rejected the applicant's case under section 84(1)(a) and 84(1A)(b). They did not consider the restrictions to be obsolete, although they suggested modifying them to permit a care home (general) rather than a home for the blind (specific). Nor did they agree that by impeding the proposed residential development the restrictions were against the public interest which they thought would be better served by the development of a new care home.

36. Mr Wilmot considered the proposed development to be excessive and unsuitable. It would lead to increased activity on the application land together with increased vehicular traffic, noise and

pollution which would damage the quiet enjoyment of his home and change the character of the neighbourhood. Once the principle of residential development had been established there would be nothing to stop a developer from applying for a greater density of development on the site. The applicant had sought to downplay the height and mass of the proposed blocks of flats. The evidence of the relative heights of those blocks and the objectors' houses and thus the sight lines between them could not be relied upon because condition 3 of the 2017 planning permission had not yet been satisfied, i.e. that no development should take place until details of the existing and proposed levels had been approved in writing by the local planning authority.

37. Mr Dholakia said the application land had been sold at under value when purchased by the Trust in 1960 for £6,500 subject to the restrictions and was "effectively a gratuitous transfer for public purposes". That being so section 84 did not apply: see section 84(7) of the 1925 Act.

38. Mr Dholakia said there was a greater public interest in using the application land for a care home (the demand for which Mr Laing said would increase in future) then there was in developing it as flats. By preventing the proposed development the restrictions were of significant value and advantage to all the objectors in what Mr Dholakia said was their "special status of being the custodians of the public interest." A care home was a desirable neighbour which might explain the very low turnover in ownership of the houses in Mountview with most house owners having been there on average between 25-30 years. If the application succeeded the principle of residential development would have been established and the restrictions as to user would then indeed be obsolete. That in turn would lead to applications for a higher, more damaging, density of development.

39. Mr Aikman purchased his house at 13 Mountview from the developer in 1981 and said he had made considerable sacrifices in order to do so. One of the attractions of the location was the character of the Oxhey Woods Area. Mr Aikman said that Mountview was at the border of those woods. In its reply to enquiries relating to 13 Mountview dated 15 September 1989 Three Rivers District Council described the Oxhey Woods Area in answer to question 7 as:

> "A residential area of extremely high visual amenity, distinct from the main area of Eastbury by reason of its low density and well-wooded character, in parts forming a natural extension of Oxhey Wood itself …"

Policy 54 limited the normal residential density in this area to two dwellings per acre "in order to preserve the essential visual amenity and character of the area." Mr Aikman did not produce the question to which reply No.7 was an answer and there was no plan showing the (then) extent of the Oxhey Woods Area nor any reference to the document (presumably a local plan) in which Policy 54 appeared.

40. Mr Aikman said the proposed development would sever Mountview's relationship with the Oxhey Woods Area to the detriment of the objectors. The restrictions "connect us to a special area of land, one noted in council policies and one of great personal value." Mr Aikman referred to *Re Chandler's Application* [1958] 9 P&CR 512 in which the Tribunal, Mr J P C Done FRICS said at 517:

> "The objectors are clearly entitled to ask for the enforcement of restrictions calculated to retain the *status quo*, and any action which would facilitate a change would deprive them of something which they value. In this connection, the injury envisaged in the section is not limited by statute to the effect on market value; it may be related to something entirely personal and, even if a general relaxation of the restrictions would in fact facilitate the sale of properties and enhance market values, if the personal convictions and wishes of the objectors are seen to be sincere and well founded, and their objections not tinged with ulterior motive, to reject them would be injurious within the terms of the section.
>
> I cannot in this case find anything unacceptable in the objectors' evidence. Any change would affect the character of the neighbourhood, they would resent it, and would be injured if it were allowed. It seems to me that the practical benefit which is secured to them is the power left in their hands to scrutinise and if necessary veto any proposals tending to alter the character of the neighbourhood and I do not think the Tribunal's discretion extends to depriving them of that measure of control when objections to a proposal are practically unanimous and appear to be reasonable."

That was the case here said Mr Aikman. He placed great value in retaining the relationship between Mountview and Oxhey Woods and said he would be injured if his personal conviction and wishes on the matter were to be rejected by allowing the application. This was not a case such as *Re Dean's Application* [2017] UKUT 0203 (LC), relied on by Mr Francis, where all that mattered was the physical relationship between the proposed development and the objectors' property. In the present application the important factor was the ability of the objectors through enforcement of the restrictions to maintain the application land as an "umbilical cord" between Mountview and Oxhey Woods.

41. The public interest in keeping the application land available for a care home outweighed that in developing the site for flats. The applicant did not hold the moral high ground in the matter and there was no public interest in the Trust simply adding to its already substantial assets as a result of changing its mode of operation.

42. All the objectors (except Latimer Vale Limited) claimed compensation in the event that the application was successful (see Appendix 1 for details). In each case the objector calculated the compensation by reference to a possible diminution in the asserted capital value of their existing property (no expert valuation evidence having been adduced) plus (in most cases) the cost of moving to an equivalent property which they claimed would be necessary if the proposed development proceeds.

Discussion

43. We think Mr Francis was right to focus the applicant's case on the "limited benefit" sub-ground of ground (aa) (i.e. section 84(1A)(a)) and on ground (c). But because the applicant also maintained its case on the "public interest" sub-ground of ground (aa) (i.e. section 84(1A)(b)) and on ground (a) the objectors, who were not legally represented, devoted most of their effort to showing that the site is still suitable for a care home, albeit one not necessarily devoted solely to the care of visually impaired

people, and that the provision of such a home would be more in the public interest than the development of 40 flats.

44. We have set out the provisions of section 84(1A) in paragraph 21 above. It is important to note that subparagraphs (a) and (b) are alternatives. If therefore the case falls within subparagraph (a) (i.e. that the restrictions do not secure to the objectors practical benefits of substantial value to them) it is not necessary to consider the public interest at all. In fact (and with great respect to Mr Francis) we did not find the reference to public interest helpful. The facts of this case are a long way from any of the decided cases on the point. The fact that the applicant is a charity does not make the development in the public interest. As Mr Francis recognised the law on public interest is likely to be considered by the Court of Appeal in the autumn. In our view the reference to public interest only served to confuse the objectors and led to their suggestion that the land should be used as a care home. Unfortunately, the question of whether a new care home could or should be built on the application land instead of flats is not to the point under ground (aa) or at all.

45. In our opinion the proposed development for which planning permission was granted in March 2017 is a reasonable user of the application land which is impeded by the restrictions. However, by impeding the proposed development we do not consider those restrictions secure any practical benefits to the objectors, let alone substantial practical benefits.

46. The proposed blocks of flats would barely be visible from any of the objectors' properties and in the case of 10 and 14 Mountview, will not be visible at all. Only 6 and 8 Mountview directly face the application land but it is obstructed from view by mature trees in the gardens and in the centre of the roundabout and by 19-27 (odd) Mountview which stand on higher ground. Even in winter the said trees will form an effective visual barrier. All of the objectors' properties are a considerable distance from the proposed development and in our opinion the objectors will not be disturbed by noise, light or activity from the residents of the new flats. The applicant has made concessions in the design of the residential blocks, reducing the height of Block 3 and constructing an underground car park. Vehicular access will be onto Eastbury Avenue and away from Mountview. The proposed blocks of flats will be further away from Mountview than was Pocklington House, itself a substantial structure.

47. In substance we agree with all but one of Mr Adams-Cairns' reasons for saying the restrictions did not secure any practical benefits to the objectors, as summarised in paragraph 22 above. We are not impressed with the suggestion that the Trust could build a larger care home for the visually impaired on the application land without breaching the restrictions. In our view this is a bad point because it contradicts the evidence of Mr Laing and Mr Curtis that such a care home would not in fact be built.

48. Mr Wilmot was concerned that in the absence of the local planning authority's approval of the ground levels for the new development it was impossible to say what visual impact the residential blocks would have. We are satisfied that any alterations to the levels and cross-sections shown on the applicant's current plans are likely to be immaterial and not such as to alter our opinion that the proposed development will have no effect on the visual amenity of the objectors.

49. Mr Aikman's objection concerned what he perceived as the potential destruction of Mountview's current relationship to the Oxhey Woods Area to which he said it was umbilically linked by the application land and the risk that Mountview would be subsumed within a wholly residential enclave. We make two observations on this argument:

(i) The application land is not part of Oxhey Woods. Mr Aikman's reliance upon an unreferenced policy mentioned in an answer to an unspecified preliminary inquiry nearly 30 years ago is misplaced and not relevant to the current application.

(ii) The application land is a brownfield site previously developed by a substantial building (Pocklington House). The western half of the site has been developed for over 56 years. The eastern half of the site is, and will remain, wooded and is protected by a tree preservation order. In so far as there is any sylvan link on the application land between Mountview and Oxhey Woods, this will be unaffected by the proposed development.

50. Mr Aikman referred to *Re Chandler's Application* in support of his view that his strong personal conviction about the importance of maintaining the integrity of the link between Mountview and Oxhey Woods was a legitimate concern which would be injured if the application was allowed. Mr Francis pointed out that *Chandler* was decided under section 84 as it was worded before the introduction of ground (aa) under the Law of Property Act 1969 and could therefore be distinguished. In any event in *Chandler* the tribunal held that the personal convictions of an objector had to be "well-founded" and "reasonable" in order for the application to cause injury and for the reasons given above we do not consider Mr Aikman's concerns to satisfy either criterion.

51. The objectors' claims for compensation are wholly misconceived and unrealistic. An order modifying a restriction may direct the applicant to pay an objector such sum by way of consideration as it thinks just to award to make up for any loss or disadvantage suffered by that person in consequence of the modification. But the incidental costs arising from an objector's decision to move from Mountview if the application succeeds cannot reasonably be considered a loss or disadvantage which is a consequence of the modification. In any event we agree with Mr Adams-Cairns that there will be no loss in value to any of the objectors' properties if the restrictions are modified to allow the proposed development.

52. The objectors rely, in the alternative, on the original purchase price of £6,500 being a disposition made either gratuitously or for a nominal consideration for public purposes. Therefore, they submit, section 84 does not apply to the restrictions (see section 84(7)). We do not accept that the Vendor disposed of the application land either gratuitously (i.e. given freely) or for a nominal consideration. £6,500 was not a nominal sum in 1960. Furthermore the disposal was not for public purposes but for charitable (private) purposes.

53. The objectors rely, in the further alternative, on section 84(1)(ii), under which compensation is taken as a sum to make up for any effect which the restriction had at the time it was imposed, in reducing the consideration then received for the land affected by it (the application land). The

objectors say the restrictions meant the price of the application land did not reflect its market value for redevelopment. In the absence of any expert valuation evidence the objectors failed to show:

(i) what the market value in the absence of the restrictions would have been;

(ii) that there was any reduction in price in reality;

(iii) what alternative (more valuable) use the land could have been put to in 1960; and

(iv) who would be entitled to such consideration, since the original covenantee, Mrs Basden, was the person who, it is alleged, received a reduced price because of the restrictions and whose retained land is now in multiple ownership.

54. The extract from Hansard for a House of Commons debate on 18 July 1960 produced by Mr Aikman is of no assistance. That debate considered the effect of the Town & Country Planning Act 1959 in amending the basis of Compulsory Purchase Compensation introduced by the Town & Country Planning Act 1947, namely that compensation should not include any element attributable to the development value of the land acquired. That context is quite different to that of the current application and the values referred to and the types of use to which development value attached have nothing to do with the circumstances of the application land at the date the restrictions were imposed.

55. Mr Dholakia said that if the application succeeded and the restrictions were modified to allow the proposed development there would be nothing to prevent the developer making a further application to discharge the restrictions under ground (a), i.e. that they were obsolete. He thought such an application was bound to succeed since the principle of residential development would have been conceded. Every application must be considered on its own merits and we can only consider the merits of the application before us on the grounds upon which it is made. We cannot second guess what may happen in the future.

Determination

56. We are satisfied that the application for modification of the restrictions should be allowed under the "limited benefit" sub-ground ((1A)(a)) of ground (aa) and that by impeding the proposed development (a reasonable user) the restrictions do not secure to the objectors any practical benefits of substantial value or advantage to them. We do not consider that the objectors will suffer any loss or damage from the modification and we make no award of compensation. We are satisfied that it is appropriate to exercise our discretion and allow the application. It is therefore not necessary for us to consider further the application under the "public interest" sub-ground ((1A)(b)) of ground (aa) or ground (c).

57. Under section 84(1)(1C) of the 1925 Act the power conferred on the Tribunal by section 84 to modify a restriction includes power to add such further provisions restricting the user or the building on the land affected as appear to us to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant. Mr Francis suggested a form of words for the

modification of the restrictions which we broadly accept subject to the minor amendment proposed by Mr Wilmot.

58. The following order shall therefore be made:

The restrictions in the Second Schedule to the conveyance dated 14 October 1960 are modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words at the end of the Second Schedule:

a. "PROVIDED that the restrictions referred to in clause 2 hereof and contained in this Second Schedule shall not prevent the land within title number HD27719 from being developed and used as 40 residential apartments in three blocks with associated underground car parking, private and communal community space, refuse and cycle storage in accordance with the planning permission granted by Three Rivers District Council on 23 March 2017 under reference: 16/2741/FUL and in accordance with the terms, details, approved plans and conditions referred to therein. 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."

59. An order modifying the restrictions shall be made by the Tribunal provided the applicant shall have signified to the Tribunal its acceptance of the proposed modification to the restrictions in the Second Schedule of the conveyance dated 14 October 1960 within two months of the date of this decision.

60. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Dated 1 August 2018

His Honour John Behrens

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)

APPENDIX 1

OBJECTOR	PROPERTY	COMPENSATION CLAIMED
1. MR NILESH SHINGADIA	6 MOUNTVIEW	£280,000
2. MR DAVID WILMOT & MRS LESLEY WILMOT	8 MOUNTVIEW	£140,000 +
3. LATIMER VALE LIMITED	CENTRE OF ROUNDABOUT MOUNTVIEW	------
4. MR PETER HIRSCH & MRS CATHRYN HIRSCH	10 MOUNTVIEW	£240,000
5. MR STUART AIKMAN & MRS JEAN AIKMAN	13 MOUNTVIEW	£422,000 (DOUBLED IF DISCHARGE RATHER THAN MODIFICATION)
6. MR MUSHTAQ FARISHTA & MRS SHAMIM FARISHTA	14 MOUNTVIEW	£360,000
7. MR NAUNIT KOTA & MRS KARISHMA KOTA	15 MOUNTVIEW	£250,000
8. MR KAMLESH DHOLAKIA & MRS NILESH DHOLAKIA	17 MOUNTVIEW	£135,000
9. BUPA CARE HOMES (AKW) LIMITED[2]	ERSKINE HALL, WATFORD ROAD	----

[2] subsequently withdrawn