



LP/15 /2007

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification – proposed development of two pairs of semi-detached houses – affordable housing for local needs – practical benefits of substantial value or advantage – privacy – peace and tranquillity – outlook – approach – compensation – application granted – Law of Property Act 1925, ss84(1)(aa) and (c)

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

By

**ANTHONY JOHN COATES
and
HILARY COATES**

**Re: Land on the north west side of Ashes Lane,
Fenny Bentley,
Near Ashbourne,
Derbyshire DE6 1LD**

Before: A J Trott FRICS

**Sitting at Loughborough Court House, 60 Pinfold Gate,
Loughborough, Leicestershire LE11 1AZ
on 4 February 2009**

Mr Charles Allison of Messrs Horton & Moss, solicitors of Ilkeston, Derbyshire, for the applicants
Mr Jonathan Roberts of Nelsons, solicitors of Nottingham, for the objector

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The following cases are referred to in this decision:

Re Martin's Application (1988) 57 P & CR 119

Re Cordwell's Application (unreported) Lands Tribunal, LP/40/2006

Re Collins' Application (1974) 30 P & CR 527

Re Dobbin's Application (unreported) Lands Tribunal, LP/59/2004

Hampstead and Suburban Properties Limited v Diomedous [1969] 1 Ch 248

Shephard v Turner [2006] 2 EGLR 73

DECISION

Introduction

1. The applicants, Anthony John Coates and Hilary Coates, own the freehold interest in a parcel of land to the north west of Ashes Lane in the small Peak District village of Fenny Bentley, Near Ashbourne in Derbyshire. They purchased the land from Mr and Mrs Rowley on 11 June 1973. At that time the land formed part of the grounds of the Old Rectory and the first schedule of the conveyance contained covenants for the benefit or protection of that property. The applicants now wish to modify the second of these:

“(ii) No building or erections other than a single detached dwellinghouse with usual offices and outbuildings thereto shall be erected on the said property.”

2. Such modification is required to enable the applicants to develop the site with two pairs of semi-detached houses for which they obtained planning permission on 13 December 2006. Such permission was granted following the completion of an agreement under section 106 of the Town and Country Planning Act 1990 under which the applicants covenanted with the Peak District National Park Authority to develop the site for affordable housing for occupation by persons satisfying specified local qualification provisions.

3. On the 30 November 1984 the successors in title to Mr and Mrs Rowley sold another part of the grounds of the Old Rectory, known as the Coach House. The land and buildings that were sold lie between the Old Rectory and the application land and includes a parcel of land to the south of the access road to the Old Rectory. The purchasers were Mr and Mrs Sears who, together with the owners of the Old Rectory, had the benefit of the covenants contained in the 1973 conveyance.

4. On 28 September 2005 Mr and Mrs Sears entered into a deed of release with Mr and Mrs Coates for a consideration of £10,000 under which they agreed to modify the second covenant so as to allow the development for which Mr and Mrs Coates were then seeking planning permission. Mr and Mrs Sears subsequently sold the Coach House at or around late November 2007.

5. Mr Terence Anthony Dickinson purchased the Old Rectory and its remaining grounds in September 1985. He too has the benefit of the second covenant in the 1973 conveyance. Unlike Mr and Mrs Sears he was not prepared to enter into a deed of release and has objected to the current application to modify the covenants.

6. Mr Charles Allison, of Messrs Horton and Moss, solicitors of Ilkeston, Derbyshire appeared for the applicants and called Mr Anthony John Coates to give evidence of fact. He also called Mr Martin Trafford Edwin Cholerton FRICS of Gadsby Orridge and Co as an expert witness.

7. Mr Jonathan Roberts, of Nelsons, solicitors of Nottingham, appeared for the objector and called Mr Terence Anthony Dickinson to give evidence of fact.

8. I made an accompanied inspection of the application land, the Old Rectory and the surrounding area on 13 February 2009.

Location and description

9. Fenny Bentley is a small village located some 3 km north of Ashbourne. The application land is located to the north west of Ashes Lane, close to its junction with the A515. It has an area of approximately 1100 sq m and a frontage of 45m onto Ashes Lane. It is currently disused and overgrown. To the west of the application land is the Coach House, a two-storey dwelling that was converted in the mid-1980s from a former stable block belonging to the Old Rectory. At its closest point the Coach House is approximately 4m from the boundary of the application land. Further to the west lie the grounds and buildings of the Old Rectory. At its nearest point the application land is 88m from the Old Rectory building, being separated from its grounds by the curtilage of the Coach House (42m wide). The ground slopes upwards from Ashes Lane to the Old Rectory.

10. To the south of the application land is a strip of land, approximately 10m wide, that belongs to the Coach House and which separates the application land from the driveway to the Coach House and the Old Rectory. This strip of land contains a mature tree screen and there is a continuous hedge running along its boundary with the access road. The Coach House also owns an irregularly shaped parcel of land between the south of the access road and the northern and western boundaries of Nos.1 and 2 Ashes Lane. To the north of the application land is Firs Farm and directly opposite the site to the east is St Edmund's Church, a grade II* listed building. The application land, the Old Rectory, the Coach House, Firs Farm and the church are all in the Fenny Bentley conservation area.

11. To the south of the entrance to the Old Rectory are two pairs of semi-detached bungalows with stone elevations and tiled roofs. Further to the south, on the eastern side of Ashes Lane beyond the church, is a terrace of six houses, also with stone elevations and tiled roofs. Behind these houses is a small housing development in School Close adjoining the Fitz Herbert Primary School.

The statutory provisions

12. The applicants rely upon grounds (aa) and (c) of section 84(1) of the Act:

“(1) The Lands Tribunal shall ... 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 –

....

- (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

....

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

....

- (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 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 is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Lands 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.”

The case for the applicants

13. Mr Coates explained that the applicants had originally planned to build a single house on the application land. However, they had purchased a similar property to the Old Rectory in a nearby village and decided to live there instead, keeping the application land for development in due course as a retirement home. Meanwhile the planning policy had changed and that idea was no longer possible. Instead Mr Coates, who is a retired builder’s estimator, decided to develop the application land in partnership with a developer who he knew and had worked with before.

14. It would take six months to construct the two pairs of semi-detached houses which were timber framed and easy to erect on site. The frame could be constructed in a week with the elevations then clad in stone and the roofs tiled. Mr Coates said that internal work could

continue at the same time. Apart from lorries delivering materials there would be very little noise or disruption caused by the construction activities. Both pairs of semi-detached houses would be developed at the same time and would then be sold, because the applicants did not want any continued management responsibility.

15. Mr Cholerton gave expert valuation evidence. He explained that he had last made a (social) visit to the Old Rectory in 1979 but had not seen it since that time. He had not asked the objector for permission to visit the Old Rectory in connection with these proceedings. He reviewed the planning policy for the area and concluded that the proposal conformed with the development plan. He considered that any noise and or nuisance arising from the construction and subsequent use of the houses on the application land would be subject to the other covenants contained in the 1973 conveyance, none of which were affected by the present application. Mr Cholerton acknowledged that the occupancy of four houses was likely to be greater than the occupancy of one but he said that there was no reason to presume that those occupants would be noisy and anti-social.

16. The Old Rectory was secluded and private, being set in gardens described by Mr Cholerton as extending to 2 acres. It was well screened by trees, hedges and shrubs. The nearest point of the building was 105m from Ashes Lane. The Coach House now acted as a substantial buffer between the Old Rectory and the application land, which lay at a much lower level. The unkempt state of the application land was detrimental to the approach along Ashes Lane and would be replaced by four attractive semi-detached houses of traditional design and materials. He concluded that the proposed development would enhance the frontage onto Ashes Lane and would not affect the tranquillity of the Old Rectory.

17. Mr Cholerton said that he was aware that in April 2005 prospective purchasers of the Old Rectory, Mr and Mrs Wall, had withdrawn their interest, ostensibly for the reason subsequently given (in July 2005) that they had become aware of the applicants' planning application. Mr and Mrs Wall had offered to purchase the application land from the applicants but had been refused. Mr Cholerton was sceptical about the reason for Mr and Mrs Wall's withdrawal from the purchase. Firstly, he noted that the letter giving the reason was dated more than three months after the initial notification of withdrawal and "may have been written to enhance the case". Secondly, he said that purchasers did not always give truthful reasons for walking away from a purchase. He concluded that the withdrawal of Mr and Mrs Wall did not necessarily mean that the Old Rectory was worth any less.

18. In cross-examination Mr Cholerton acknowledged that he had relied upon an inaccurate version of section 84 of the Law of Property Act 1925 (as amended) that he had downloaded from the Internet. This reproduced section 84(1B) as section 84(1A), the wording of (1A) having been omitted entirely. He denied that as a consequence of this error he had failed to consider whether the covenant secured to the objector any practical benefits of substantial value or advantage to him. Whilst he had not addressed this issue directly in his report he had considered a very wide range of factors that affected value and saw nothing in the proposals that would adversely affect the Old Rectory either in terms of value or advantage.

19. He also agreed that his report had not specifically considered whether, in impeding the proposed user of the land, the restriction was contrary to the public interest. Nevertheless he had addressed the issue in general terms and had concluded in his report that the proposed use of the application land was in the public interest because, firstly, it would tidy up a plot of otherwise vacant and unused land and, secondly, it would help satisfy a local housing need.

20. Mr Allison submitted that restriction (ii) contemplated residential development. In 1972 the local planning authority had granted planning permission for a single dwelling but this had not been implemented and had lapsed. Since then planning policy had changed and now the Peak District National Park Authority would only exceptionally allow residential development in local plan settlements such as Fenny Bentley, where to do so would meet local needs for affordable housing. That was the basis upon which planning permission had been granted in 2006 subject to a section 106 agreement. There was no possibility of developing the application land by a single dwelling as envisaged by restriction (ii). That would be contrary to current planning policy.

21. It would be against the public interest to sterilise the application land where planning permission had been granted for its development by affordable housing for local people. The covenant impeded a source of housing that otherwise would not exist. The grant of planning permission, although not conclusive, was extremely important in this case. The local planning authority was the custodian of the public interest by ensuring the adequate provision of affordable housing. The social worth of that policy was self-evident. The Tribunal should look at the question of the public interest from a wide perspective and modify the covenant accordingly.

22. The applicants could no longer develop in conformity with the restriction in the covenant and in accordance with the intentions of the original covenantor (the current applicants) and covenantee. This was not a case where the applicants were trying to wriggle out of a restriction that was freely accepted by them; the modification of the covenant was the only way that the application land could be developed for residential development. Mr Allison said that the change in planning policy over the years since the covenant was imposed represented a significant change in the context in which it was created for the purposes of the Tribunal's consideration of the application under section 84(1B) of the Act.

23. Whilst the use of an inaccurate version of section 84 was regrettable the objector was wrong to say that Mr Cholerton had taken no account of the relevant issues. There were ample passages in his evidence that demonstrated his awareness of the substance of that section. In addition there were photographs, sales particulars and the benefit of the Member's site inspection from which to reach the conclusion that the objection was ill founded.

24. The applicants accepted that the proposed development represented an intensification of the residential use that was originally envisaged in the covenant. But by impeding the proposal the covenant did not secure substantial practical benefits; the Old Rectory would remain private and tranquil, undisturbed by the construction and use of four new semi-detached houses. The inherent nature and setting of the Old Rectory would not change. There might be

some noise from the application land, both during construction and subsequently, but there was no evidence that this was likely to cause disruption or irritation to the objector. Mr Allison said that it would be “trifling”. The application land was a long way away from the Old Rectory even at its closest point (88m) and well screened from it by trees, hedges and shrubs. The Coach House lay between the two plots providing a buffer that was a minimum of 42m wide. The Coach House itself would screen new house nos.1 and 2 whilst nos.3 and 4 would not substantially affect any view from, nor overlook, the Old Rectory.

25. The objector had speculated about the future occupancy of the new houses and had assumed that they would each be occupied by young families who would be more likely to cause noise and nuisance. Mr Allison said that it was wrong to assume a future problem in this respect. The applicants did not seek to modify restriction (iii) of the first schedule to the 1973 conveyance which prevented them from carrying on any noisy, offensive or dangerous trade or pursuit on the application land. The objector’s remedies in this respect were not affected by the application.

26. Mr Allison submitted that it was self-evident that money would be adequate compensation for any loss or disadvantage suffered by the objector. However, Mr Cholerton’s evidence had shown that the application would not affect the value of the Old Rectory. There was no expert evidence to support the objector’s claim of £50,000. The owners of the Coach House were very much closer to the application land and therefore more likely to be affected by the development proposals. Mr and Mrs Sears had entered into a deed of release in respect of restriction (ii) on 28 September 2005 for a consideration of £10,000. The objector suggested that this amount would have been higher but for the need for Mr and Mrs Sears to obtain a drainage easement over the application land. But Mr Coates had strenuously denied that there was any connection between the two matters and in any event the 1973 conveyance had reserved such rights in favour of the Coach House.

27. Mr Dickinson admitted in cross-examination that he had not told the prospective purchasers of the Old Rectory, Mr and Mrs Wall, that there was a planning application to redevelop the application land. Had he done so he might have allayed their fears and Mr Allison said that the Wall’s concerns were self-inflicted by the objector.

28. Mr Allison relied upon the arguments in respect of ground (aa) in support of the applicants’ alternative ground (c). He said that the proposed modification would not injure the objector and that it would not be just to award any sum by way of consideration under either head (i) or (ii) of section 84(1) of the Act.

The case for the objector

29. Mr Dickinson said that he was aware of the restrictive covenants when he purchased the Old Rectory in 1985. He believed that they had been imposed to protect the character of the Old Rectory and that of the village generally. This part of Fenny Bentley was picturesque, unspoilt and historic and he had been able to acquire a property that was rare, tranquil and

relaxing. It was perfect from his point of view, with open countryside on three sides of the property and a long driveway approach that added charm and value.

30. He had legitimate fears about the effect of the proposals upon the privacy and enjoyment of the Old Rectory. The development of the application land by affordable housing would change the aspect of this historic part of the village. The new houses would be a “complete eyesore” and would “wreck the view” as he turned right into Ashes Lane from the A515. He would have to drive past them every day.

31. He would be able to see the tops of the new houses from the kitchen of the Old Rectory which faced east and looked over the attractive and peaceful lower garden. They would also be visible from the bedrooms above. The development would devalue the Old Rectory and would ruin the character of the house and its grounds. It was not in the public interest to build houses on the application land when there were plenty of affordable houses in Ashbourne. The building works would be a nuisance and were likely to cause an obstruction. Once the houses were completed there would be a greatly increased potential for nuisance as there would be four families living there and parking spaces for eight cars. Restriction (iii) (no noisy trade or pursuit) was far more likely to be breached if restriction (ii) was modified. Mr Dickinson denied that he was being oversensitive about the proposals and argued that they would destroy the enjoyment of his property.

32. Compensation was not the issue in this case and Mr Dickinson had already refused an offer of £5,000. When he had tried to sell the Old Rectory in 2005 Mr and Mrs Wall had been deterred by the applicants’ proposals. They had tried but failed to purchase the application land and had then withdrawn completely from the sale; they had not made a reduced offer.

33. Under cross-examination Mr Dickinson acknowledged that the Coach House would obscure a substantial part of the development and that the seclusion of his grounds would be more or less unaffected once he was in his driveway. He agreed that, if properly used, the location of the parking spaces was such that they would be hidden from the Old Rectory. His property would not be overlooked and would not lose any light. He could not see the existing bungalows in Ashes Lane from his house and was not affected by noise either from there or from Firs Farm. The proposed houses were a better design than those further up Ashes Lane, but were not suitable for the conservation area. He had not objected to the planning application for the proposed development because he had not been told about it.

34. Mr Roberts submitted that neither Mr Coates nor Mr Cholerton had produced evidence to show that covenant (ii), in impeding the proposed user, did not secure to Mr Dickinson any practical benefits of substantial value or advantage to him. Mr Cholerton failed to address the point in terms at all because he had relied upon an incorrect version of section 84(1A) that he had downloaded from the Internet. This version omitted the wording of that section altogether and Mr Cholerton had not referred to the correct version when forming his expert opinion. During cross-examination Mr Cholerton said that when undertaking a valuation he would take account of some “500 matters” and that those would include any practical benefits that the objector derived from the covenant. Mr Roberts submitted that Mr Cholerton was clutching at

straws and that the observations he had made in his expert report on this issue were comments based upon the general area and not supported by a site visit to the Old Rectory.

35. Mr Cholerton had not visited the site in recent years and had not asked to do so, saying that such a request would not have gone down well. Mr Roberts said that had such a request been made, through respective solicitors, it would have been granted. Mr Cholerton had relied upon memories of visits that he had made to the Old Rectory, the last of which was in 1979. Nor had Mr Coates seen the Old Rectory. Mr Roberts submitted that the applicants had failed to address the question of practical benefits and consequently their evidence on this issue should be disregarded. Mr Dickinson's evidence should be preferred together with the member's own site inspection.

36. Mr Roberts said that the preservation of the covenant was far more important to the objector than money was. Mr Dickinson had explained the practical benefits of substantial advantage to him in his evidence, especially the tranquillity, privacy, peacefulness and character of the Old Rectory and its approach, all of which would be damaged by the proposal. Whilst the effect on the view from the Old Rectory and its grounds was a matter of speculation, Mr Dickinson's opinion was that he would see the tops of the new houses and that his view would be altered.

37. The applicants argued that the proposed user, for which they had planning permission, and which would help satisfy the local demand for affordable housing, was in the public interest. But that was not the test required by section 84(1A)(b) of the Act which authorised the Tribunal to modify a restriction where it was satisfied that, in impeding a reasonable user, that restriction was contrary to the public interest. Restrictive covenants and planning were separate systems of control and the existence of a planning permission was not determinative, as per Fox LJ in *Re Martin's Application* (1988) 57 P & CR 119 at 124-125 and per this Tribunal, A J Trott FRICS, in *Re Cordwell's Application* (unreported) LP/40/2006, at paragraph 65. The legal test for the application of section 84(1A)(b) was set out by the President of the Tribunal in *Re Collins' Application* (1974) 30 P & CR 527 at 531 and adopted more recently by the Tribunal, A J Trott FRICS, in *Re Dobbin's Application* (unreported) LP/59/2004 at paragraph 44. Those authorities indicated that for an application to succeed under the ground of public interest, such interest would have to be so important and immediate as to justify the serious interference with private rights and the sanctity of contract. The mere existence of a planning permission in this case did not justify such interference.

38. The applicants had entered freely into the covenant in 1973 and it was still reasonable to limit the number of houses on the application land. The subsequent change in planning policy meant that planning permission had been granted for four houses. This intensification of use would be accompanied by a four-fold increase in the likelihood of noisy activities on the application land. Mr Roberts supported this conclusion by the fact that the proposal was for affordable housing that was likely to be occupied by young families, a conclusion that he said although speculative was not unrealistic. It was therefore more likely that covenant (iii) would be breached due to noisy pursuits on the application land that would be or become a nuisance or annoyance to the objector. Furthermore, the six months construction period associated with

the development of the new houses would also be likely to be noisy and in breach of covenant (iii). Mr Roberts submitted that the applicants and subsequent occupiers would find it difficult to comply with this covenant and that this should weigh with the Tribunal when considering its discretion to modify covenant (ii) under section 84(1B) of the Act.

39. Mr Roberts noted that the withdrawal of Mr and Mrs Wall from the purchase of the Old Rectory in 2005 was explicitly said by them to have been due to the prospect of the development of the application land. This was a clear example of the proposal causing injury to the objector.

Conclusions

40. The objector accepts that the continued existence of restriction (ii) impedes the reasonable user of the application land for development. However, he does not accept that either ground of section 84(1A) has been established. I turn first to subsection 84(1A)(b) under which the Tribunal may authorise the modification of a restriction if it is satisfied that the restriction, in impeding the user, is contrary to the public interest.

41. The applicants emphasised that the proposal was in the public interest. The planning officer in his report to the planning committee on the applicants' planning application noted that, although there was a low level of affordable housing need in Fenny Bentley itself (as at December 2000) the village had previously been identified as the most appropriate location for affordable housing needs arising in the adjoining parishes of Tissington and Thorpe. A survey undertaken in 2006 by the Clerk to Fenny Bentley Parish Council showed that six people had expressed an interest in obtaining affordable housing in the village. However, section 84(1A)(b) is not, as Mr Roberts correctly points out, concerned with whether the proposed user is in the public interest but whether, in impeding that user, the restriction is contrary to it. I do not accept that it is. The local housing need that exists is not such, in my opinion, as to justify what the President of the Tribunal described in *Re Collins' Application* as "... the serious interference with private rights and the sanctity of contract." The grant of planning permission in itself is not sufficient to render the restriction entered into by the applicants as original covenants contrary to the public interest.

42. Section 84(1A)(a) authorises the modification of restriction (ii) if the Tribunal is satisfied that, by impeding the proposed user, the restriction does not secure to the objector any practical benefits of substantial value or advantage to him. I consider firstly under this issue the weight to be given to Mr Cholerton's evidence. It is a matter of concern that Mr Cholerton, appearing as an expert, did not know, when he wrote his report, the correct wording of section 84 of the Act. He relied upon an Internet version in which section 84(1A) had been replaced by section 84(1B). This led Mr Cholerton to misstate the issues in this application.

43. Mr Cholerton does not address the question of whether the restriction secures to the objector substantial practical benefits because he did not realise the requirement to consider it. He denies that he misunderstood the Act and that he has failed to consider the question of

practical benefits, arguing that in preparing his report he had to consider the advantages and disadvantages of the Old Rectory that would affect its value in the context of the current application. I do not accept that such a general overview can be substituted for a proper and detailed analysis of the specific statutory requirement to consider whether the restrictions secured to the objector substantial practical benefits. Mr Cholerton also relies upon his knowledge of the Old Rectory gained from social visits to the property between 1967 and 1979. The last such visit was 30 years ago and Mr Cholerton did not ask the objector whether he could visit the Old Rectory in connection with this application, believing that such a request would be refused.

44. I find Mr Cholerton's evidence to be unsatisfactory in three respects. Firstly, he has failed to demonstrate an accurate or adequate knowledge of the wording of section 84(1A) (despite having received a copy of the application in which reference to the wording of section 84(1A)(a) and (b) appears in paragraph 13.2 under the heading "Ground (aa)"). Secondly, he acknowledged in cross-examination that he had "been made aware" of his mistake and yet he did not seek to amend his report either before or at the hearing (during examination in chief). Thirdly, he relies upon his previous site visits, the last of which was 30 years ago, and did not consider it necessary to ask to see the Old Rectory in connection with this application. For these reasons the credibility of Mr Cholerton's evidence is undermined and I attached little weight to it.

45. From Mr Dickinson's evidence and from my own site inspection of the Old Rectory and the surrounding area I find that the objector enjoys the amenity of a large, peaceful property set in extensive and well maintained grounds. It is private and tranquil and enjoys distant views of high ground to the east. It is situated on sloping ground and is well above the level of Ashes Lane, the access from which is via a long approach road. The key issue in this case is whether the amenity of the Old Rectory is a practical benefit of substantial value or advantage that is secured by restriction (ii). Mr Dickinson argues that it is of substantial advantage and relies, in particular, upon five arguments:

- (i) the prejudicial effect of the proposed development upon the appearance of this part of the Fenny Bentley conservation area and, especially, its impact upon the objector as he goes to and from his property;
- (ii) the impact upon the view from the Old Rectory and its grounds, in particular the lower garden to the east of the house;
- (iii) the adverse effect of increased occupation of the application land beyond that of the single house contemplated under restriction (ii);
- (iv) the increased risk that restriction (iii) will be breached; and
- (v) the noise and disturbance caused during the construction works.

I deal with each of these arguments in turn.

46. The application land is currently overgrown and unkept. The proposal has planning permission and comprises two pairs of semi-detached houses. I do not accept Mr Dickinson's description of them as "a complete eyesore". They are in keeping with the vernacular architecture of the area and I consider the semi-detached layout and staggered building line to be an appropriate design in the conservation area. They are in keeping with the semi-detached bungalows to the south and, as the planning officer's report remarks, they help with the transition from the smaller and more traditional housing at the junction of Ashes Lane and the A515 and the larger, more modern terraced houses beyond the church. Mr Dickinson accepted that the proposed houses were of better design than the buildings further along Ashes Lane. Nor do I agree with the objector that the new houses "wreck the view" as he goes to and from his driveway from the A515. Restriction (ii) does not secure the application land free from development and I do not consider that visually the proposed housing detracts from the amenity of the entrance to the Old Rectory.

47. Mr Dickinson argues that the new development will be visible from the Old Rectory and its grounds. In my opinion the upper parts of the northernmost pair of the semi-detached houses will be visible from seven rooms in the Old Rectory. The view of the new houses from the grounds is limited by existing vegetation, especially the 3m high evergreen hedge along the boundary with the Coach House. The views from the Old Rectory are dominated by the high ground to the east and the property stands well above the level of Ashes Lane (probably at least 10 metres) and is over 100 metres away from it. The Coach House will effectively hide two of the new houses. The application land is partially masked from the Old Rectory by existing trees and shrubs even at the height of winter. Although some of these trees appeared to be on the application land and may be lost to the development, I am satisfied that the new houses will be significantly less visible during the spring and summer. The development will not obstruct any view from the Old Rectory and will not overlook it and I conclude that the new houses will not adversely impact upon the visual amenity of the Old Rectory.

48. The objector believes that to modify restriction (ii) as proposed would increase the intensification of domestic use of the application land by four times compared with the anticipated single dwelling at the time the restriction was imposed. Mr Dickinson assumes that all the new houses would be occupied by young families but that is speculation on his part. However, I consider it reasonable to assume that there will be a greater level of activity on the application land than was originally envisaged. But it does not follow that such an increase will prejudice the amenity currently enjoyed by the objector. The curtilage of the application land is 42 metres from the nearest point of the boundary of the Old Rectory and 88 metres from the house itself. The house and grounds of the Coach House surrounds the application land on the two sides facing the Old Rectory land and it will act as a buffer against the activities undertaken in the new houses. Mr Dickinson confirmed that he has not had problems of noise from either the bungalows at 1 to 2 Ashes Lane (which are closer than the application land) or from Firs Farm. I am satisfied that the concomitant activities associated with the four new dwellings will not adversely affect the enjoyment or amenity of the Old Rectory.

49. The objector argues that the construction of four houses rather than one will have a second effect in terms of noisy activities. Mr Roberts submits that the modification of restriction (ii) would make it more likely that restriction (iii) would be breached. Restriction (iii) states:

“No noisy or offensive or dangerous trade or pursuit shall be carried on on the property hereby conveyed nor any trade or pursuit which may be or become in any way a nuisance, annoyance or danger to the Vendors or their successors in title or which may tend to depreciate the value of the adjoining land of the Vendors.”

50. Mr Roberts accepts that restriction (ii), which is the only covenant subject to this application, does not secure the practical benefit of preventing noisy or offensive pursuits (which Mr Roberts argues includes leisure or sporting activities such as holding a barbecue or playing cricket in the back garden of one or more of the new houses). Restriction (iii) will remain in force. However, if the Tribunal is satisfied that one or both of grounds (aa) and (c) are established then it must, before deciding, as a matter of discretion, whether to grant or dismiss the application, take into account the specific matters set out in section 84(1B). The last of these, and the one that Mr Roberts apparently relies upon in this context, is that the Tribunal shall take account of “any other material circumstances”. Mr Roberts submits that the increased likelihood of restriction (iii) being breached if restriction (ii) is modified is such a material circumstance and one that the Tribunal should take into account when exercising its discretion under section 84.

51. I have already determined that by impeding the proposed user restriction (ii) does not secure to the objector practical benefits of substantial advantage in terms of protecting his amenity from the effects of increased domestic activity on the application land. Mr Roberts’ argument effectively asks me to revisit that question in the context of restriction (iii).

52. I consider it unlikely that there would be a qualitative difference between the type of pursuits carried out in the four proposed houses and those carried out in a single dwelling. In *Hampstead and Suburban Properties Limited v Diomedous* [1969] 1 Ch 248 Megarry J said at 258:

“I have no doubt that what is a nuisance or annoyance will continue to be determined by the courts according to robust and common sense standards.”

Applying those standards to the present application I find that the suggestion that an increase in normal domestic activity on the application land will lead to an increased risk of breaches of restriction (iii) is unsubstantiated. It is based upon Mr Dickinson’s subjective views about the proposals which I consider to be oversensitive in the context of the application and the setting of the Old Rectory. Mr Dickinson still has a remedy for any breach of restriction (iii) that might occur since its modification or discharge is not part of this application.

53. Finally, the objector argues that, if the application is allowed, he will suffer from noise and disturbance during the construction works. He says that restriction (ii) secures to him protection from the adverse consequences of such works and that this is a practical benefit of

substantial advantage. 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 the particular covenant, or in the facts of the particular case, that justifies giving special weight to this factor.”

He went on to say at 80D:

“However, we have been referred to no authority in which ordinary construction works, carried out with reasonable care, have been held to involve a breach of such a covenant [providing protection against acts causing nuisance or annoyance]. ... I do not think that such a covenant is to be equated with a covenant providing specific protection from construction disturbance.”

54. I do not consider that the construction works, which Mr Coates explained (and was not challenged) would last six months, or any other facts of this case, are such as to justify giving special weight to this factor.

55. I therefore conclude that restriction (ii) does not secure to the objector any practical benefits of substantial value or advantage to him. I must now consider whether money would be an adequate compensation for any loss or disadvantage (if any) suffered by the objector from the modification of that restriction. Mr Dickinson says that money per se would not be adequate compensation. He offered no expert valuation evidence and concentrated upon practical benefits of substantial advantage rather than value. He has rejected an offer of £5,000 from the applicants. He does, however, rely upon the effect of the proposed development on Mr and Mrs Wall who in 2005 were prospective purchasers of the Old Rectory but who withdrew their interest when they became aware of the proposals for the application land.

56. The applicants say that it would not be just to award any compensation because (i) the objector will not suffer any loss or disadvantage and (ii) the imposition of the restriction, at the time it was imposed, had no effect in reducing the consideration then received for the land affected by it. I agree with the applicants on both points. The withdrawal of Mr and Mrs Wall from the purchase of the Old Rectory does not affect my conclusion. I accept Mr Allison’s argument that the failure of the objector to disclose the planning application on the application land may have influenced Mr and Mrs Wall’s decision and I also accept Mr Cholerton’s evidence (on this limited point) that their withdrawal does not necessarily indicate that the property was worth less and that purchasers are not always candid about the reasons for not proceeding with a purchase. I therefore award no compensation.

57. It follows from my conclusion about ground (aa) that I also find that ground (c) has been established since I do not consider that the modification of restriction (ii) will injure the objector.

58. Being satisfied that both grounds (aa) and (c) have been established I therefore have jurisdiction to modify restriction (ii). That being so I must now consider whether it is appropriate for me to exercise my discretion under such jurisdiction. In reaching my determination I am obliged to take account of section 84(1B) of the Act. The proposals are in accord with the development plan and have received planning permission. There are no patterns for the grant or refusal of planning permission in the Fenny Bentley area to which evidence has been directed. The period at which and context in which the covenant was created have been fully considered as have all other material circumstances including the effect of the proposed modification on restriction (iii) and the fact that the applicants are the original covenantors. 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 proposed development to proceed.

The Order

59. The applicants say that the modification to restriction (ii) should be in the same form as that agreed in the deed of release entered into with the owners of the Coach House in September 2005. However, that was before planning permission was granted for the development of the application land. Under Section 84(1C) of the Act I have the power to add such further provisions restricting the user of, or the building on, the application land as appear to me to be reasonable in view of the relaxation of the existing provisions and as may be accepted by the applicants. I may refuse to modify the covenant without such addition.

60. The following order will accordingly be made:

In the First Schedule to the conveyance dated 11 June 1973 –

Restriction (ii) is modified on grounds (aa) and (c) by insertion of the following at the end of the existing wording:

“Provided that the erection of two pairs of semi-detached houses may be constructed in accordance with planning permission DDD 1001469 issued on 13 December 2006 by the Peak District National Park Authority and in compliance with the conditions attached thereto.”

61. Reference to planning permission DDD 1001469 shall include any subsequent planning permission that is the renewal of that planning permission and any matters approved in satisfaction of the conditions attached to such permission.

62. An order modifying restriction (ii) 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 signified their acceptance of the proposed modification in writing to the Tribunal.

63. 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 22.4 of the Lands Tribunal's Practice Directions of 11 May 2006.

Dated 10 March 2009

A J Trott FRICS