

UPPER TRIBUNAL (LANDS CHAMBER)



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LP/36/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – modification – covenant restricting development to one dwelling per plot – building scheme – proposal to erect two additional dwellinghouses upon part of the rear gardens of 3 properties – whether practical benefits of substantial value or advantage secured by the restrictions – application refused – Law of Property Act 1925, section 84(1)(aa)

IN THE MATTER of an APPLICATION under
SECTION 84 of the LAW OF PROPERTY ACT 1925

BY

GR & AL DEVELOPMENTS LIMITED

Re: Land at 36, 38 & 40 Morris Road, South Nutfield, Surrey RH1 5SA

Before: P R Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS

on
26 August 2009

Daniel Hochberg, instructed by Hill Taylor Dickinson, solicitors of Liverpool, for the applicant
Graham Skeats, objector in person and, with permission of the Tribunal, for the other objectors

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The following case is referred to in this decision:

Re Bass Limited's Application (1973) 26 P & CR 156

The following cases were also referred to in argument:

Re Snaith and Dolding's Application (1995) 71 P & CR 104

Gilbert v Spoor [1983] Ch 27

Dobbin v Redpath [2007] 4 All ER 465

Re Zopats Developments' Application (1966) 18 P & CR 156

DECISION

Introduction

1. The applicant, GR & AL Developments Ltd seeks the modification of a restrictive covenant burdening land at 36, 38 and 40 Morris Road, South Nutfield, Surrey (the application land) so as to permit the construction of two detached dwellinghouses and garages within part of the existing side and rear gardens, in accordance with planning consent granted on appeal (ref: TA/2006/106) on 8 November 2006.

2. The application, relying upon ground (aa) of section 84(1) of the Law of Property Act 1925 (the Act), was made to the Tribunal on 7 August 2008, and the modification sought was to what was effectively a “one house per plot” restrictive covenant. The material restriction was imposed (in identical form) in transfers of the three properties as follows:

36 Morris Road. A conveyance dated 26 September 1957 between (1) JBR Investments Limited and (2) Colin John D’Arvall (Registered at the Land Registry under Title No: SY188844)

38 Morris Road. A conveyance dated 14 October 1957 between (1) JBR Investments Limited and (2) William Henry Horsman (Title No: SY189464)

40 Morris Road. A conveyance dated 2 September 1957 between (1) JBR Investments Limited and (2) Lawrence Edward Jenner (Title No: SY186914)

The restriction, in Part 2 of the THIRD SCHEDULE reads:

“3. No building shall at any time be erected on any plot except one private dwellinghouse (being either the dwellinghouse erected thereon under the terms of the sale to the purchaser or any dwellinghouse hereafter erected in lieu thereof) together with a garage and outhouses to be used and enjoyed therewith.”

The land benefiting from the covenant was described at the commencement of the third Schedule as:

“A scheme affecting the freehold land edged with orange on the estate plan hereinafter mentioned and known as the Morris Road Estate and hereinafter called “the Estate” whereunder

(a) the Transferors on or about the First day of January One thousand nine hundred and fifty seven being then the registered proprietors of the whole of the Estate laid out the same for development as a building estate in twenty four numbered plots shown by their respective numbers on an Estate plan prepared by the Transferors (of which the plan accompanying this Transfer is a copy) and caused a common form of Transfer (being substantially in the same form as this Transfer) to be prepared containing stipulations and conditions applicable to each of the said plots (being the stipulations and conditions set out in Part 2 of this Schedule) to be observed and performed by the owner of each plot.

(b) each of the said plots has been offered for sale and has been or is intended to be sold with the intention and upon the understanding that the purchaser of each plot should have the benefit of the stipulations and conditions binding on each of the other plots in whatever order in time such plots should be sold or transferred to the respective purchasers thereof.”

It is understood that, in terms of the current numbering, the properties with the benefit of the restriction, and the subject of the building scheme, are 15 – 41 Morris Road (odd) and 36 – 54 Morris Road (even).

3. At the date of the hearing 9 of an original 10 objectors (all of whom were admitted) remained, Mr & Mrs Wright of 15 Morris Road having formally withdrawn their objection. The objectors were:

Mrs Teresa Jenkins	44 Morris Road
Mr Timothy William Bellars & Mrs Suzanne Clare Bellars	50 Morris Road
Mr Clive Henry Townsend & Mrs Coral Townsend	37 Morris Road
Mr Graham Frank Skeats & Mrs Christina Jane Skeats	42 Morris Road
Mr Jeremy Porter	19 Morris Road
Mark David Dove	27 Morris Road
Mr Albert Frederick Morris & Mrs Jill Morris	31 Morris Road
Mr Alec James Wayland & Mrs Susan Jessie Wayland	46 Morris Road
Mr Clive O’Flynn & Mrs Anne Jennifer O’Flynn	48 Morris Road

4. Mr Daniel Hochberg of counsel appeared for the applicant and called Mr Geoffrey Ronald William Eagles, Managing Director of the applicant company as a witness of fact, and Mr James Alexander Turnbull FRICS, a partner in White & Sons, surveyors of Dorking, who gave expert evidence. Mr Graham Skeats appeared on his own behalf and for the rest of the objectors. The parties helpfully produced a brief statement of agreed facts and issues in dispute.

5. On the day before the hearing, I carried out an accompanied inspection of the application land and its immediate environs including the whole of Morris Road and part of the adjacent Kings Mead. I also viewed the application land from a number of the even numbered houses, and their rear gardens, on the north side of the upper section of Morris Road.

The application land and surrounding area

6. Morris Road is a private, unadopted residential cul-de-sac within the village of South Nutfield, Surrey. It is sub-divided into two distinct sections. The easternmost section (from its junction with The Avenue and Station Approach), was referred to by the parties as Lower Morris Road, and contains mature, predominantly detached houses. It does not fall within the

area agreed to be part of the building scheme. The estate which forms the scheme, and which was referred to as Upper Morris Road (although that is not its actual name), was constructed as an extension to Morris Road in the late 1950s and comprises a group of traditionally built semi-detached houses (some of which have been subsequently extended), and garages. At the western end of the cul-de-sac is a large turning head. At the junction between the original part of Morris Road and the estate is an access to an old, single-storey industrial unit, currently utilised for the assembly of electronic equipment, that backs onto the rear and side boundary of part of the application land. It is at lower level, only the corrugated asbestos roof being readily visible from the properties in this north-east corner of the estate. There is also pedestrian access into Kings Mead/Bower Hill Close, a more modern residential development lying to the north of Morris Road (Upper). Parts of the very long rear gardens of 48 to 54 Morris Road are understood to have been sold off to help facilitate that development which is now between 15 and 20 years old, by providing garden areas for some of the houses.

7. The application land, which extends to 0.29 acres (according to the measurements undertaken by Mr Turnbull using the Ordnance Survey Promap Digital Mapping System, and which were accepted as factually correct by the objectors), forms part of the side and rear gardens of no.36 Morris Road (reducing that plot from 0.22 to 0.06 acres), and the rearmost sections of the rear gardens of nos.38 and 40 (reducing those plots from 0.14 to 0.07 acres and 0.15 to 0.09 acres respectively). It was agreed that the plot of no.36, lying as it does on the outside of a bend at the entrance of the development, is wider than all the others on the estate, having a frontage of some 125 ft.

The proposed development

8. Plans and elevations of the proposed development of one 4 bedroom, and one 5 bedroom detached house, prepared by Julie Arnison, Architectural and Design Consultant for the applicant were made available at the hearing. The first of the two new houses, no.36A, would be located adjacent and to the right-hand side of no.36, fronting onto Morris Road and having its own driveway formed through an opening in the existing hedge which separates the road from the currently overgrown side garden. It would contain hall, cloakroom, two reception rooms, kitchen and utility at ground floor, together with 5 bedrooms (two en suite) and family bathroom at first floor. There would be an integral single garage and the total plot area would be 0.15 acre. The second house, no 38A, would be located to the rear 36 and 38 Morris Road (with its rear garden behind no.40) and would be approached off a new private driveway running from a new access at the north east corner of no. 36's existing side garden, along the northern boundary (adjacent to the industrial unit) to an attached single garage. The house is proposed to contain on the ground floor: hall, cloakroom two reception rooms, kitchen and utility and, on the first floor: four bedrooms (one en suite) and family bathroom. The plot size would be 0.14 acres, and the house would face more or less east/west. Both properties would have drainage systems connected to the main sewer that runs down Morris Road.

Applicant's case

9. The application was made under ground (aa) of the Act. It states:

“(aa) that, in a case falling within subsection (1A) below the continued existence [of the covenant] would impede some reasonable user of the land for public or private purposes, or, as the case may be, would unless modified impede such user.”

Section (1A) provides:

“(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 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.”

10. It was not suggested that the proposed modification was against the public interest. It was stated in the application that, if all the objections were withdrawn, the applicant would also be relying upon ground (b) (that the objectors had agreed, either expressly or by implication, to the modification). However, with 9 objectors remaining, that ground was not pursued.

11. Mr Eagles produced a short witness statement clarifying a number of issues relating to the proposed development, particularly in response to concerns that had been raised by some of the objectors. He said that piling works for the foundations would not be intrusive or noisy as an auger would be used for boring. Regarding storm water drainage, it was intended to install rainwater harvesting systems incorporating catch tanks to each of the properties. Only the overflow would be directed to the existing drains. This, he said, would allay Mr Skeats’ expressed fears that the development might serve to exacerbate the existing flooding problems that he experienced to the rear of his garden at no.42 (and to the rear of no.40) in times of heavy rain. However, when pressed by Mr Skeats in cross-examination, he said that the precise details had not yet been finalised. The same reply was forthcoming when questioned about the proposed treatment of foul sewage, and the fact that the residents were concerned that the existing ageing system was operating to capacity, and might become overloaded. Mr Eagles said that it was not proposed to connect into the upper Morris Road system (due to problems with levels), and that other options were being investigated, but the matter was not yet resolved.

12. Mr Eagles sought to allay fears relating to landscaping proposals by pointing out on the landscaping plan the trees that had to be removed and the new planting that was proposed. He said that it was hoped to retain much of the existing vegetation and shrubs, including some mature hawthorn hedging, and as much of the existing front hedge (onto Morris Road) as possible. However, he accepted that the front hedge would have to be very substantially reduced (to perhaps just over 1 metre in height) to facilitate the requisite sight-line requirements.

13. As to the offer to repair and reinstate the road and pavement to upper Morris Road, he said that an offer had been made to the residents as far back as 2007, but no response had been received. He clarified the applicant's current position by saying that it was intended just to repair any damage that may be caused to the roads, paths and drains by the construction works. That offer also applied to the residents of the lower part of Morris Road, and verbal assurances had been given to them. It was intended, he said, to prepare a schedule of condition prior to the principal construction works being commenced. On the subject of construction, he said that, subject to any constraints that may be created by inclement weather, the whole process could be expected to take about 12 months. As the planning consent would be lapsing soon, he said that he had agreed with the council that laying the access drive to no.38A would serve as a trigger, and he was intending for that to be commenced before 30 September 2009. That work alone would not, he said, be in breach of the existing, unmodified restrictive covenant.

14. Mr Turnbull is a chartered surveyor, and a member of the Expert Witness Institute. He has practised in the disciplines of commercial and residential valuation within the east Surrey area for 30 years. He produced a report and, immediately prior to the hearing, a supplemental statement in response to the objectors' witness statements and Mr Skeats' draft statement of facts. His main report concluded with his opinion that a modification to permit the proposed construction of two houses to the rear of 36, 38 and 40 Morris Road would not amount to a loss of benefits of substantial value or advantage to any of the objectors. Although he had not been asked to provide specific valuation advice, he felt there would be some temporary nuisance whilst the properties were being constructed, especially to nos.42 and 15 Morris Road where, in his view, compensation of £3,000 for each would be appropriate. The owner of no.15 had since accepted an offer in that sum, hence the withdrawal of that objection.

15. He said that the properties had been designed with intruding skielings (sloping areas of the ceilings in the first floor rooms) to lower their overall profile and reduce apparent built bulk. Whilst no.36A would be visible from the roadway, no.38A, at the rear of the site, would not. The topography of the land was such that the ground floor slab of 38A would be at a lower level than the properties at 36, 38 and 40, thus further reducing the impact. The landscaping scheme also provided for additional planting on the boundaries to help shield the rearmost property. Whilst it was accepted that the properties would increase the density of dwellings within Morris Road, Mr Turnbull said that the proposals would be in line with local planning policies. In his view the development would be entirely in keeping with the nature of the surroundings; whilst all the properties in Upper Morris Road were semi-detached, a large number of those in the lower section were also detached. He pointed out that a number of the properties on the estate had been extended, and one of those extensions in particular was quite intrusive (a large dormer window to a rear loft conversion). In cross-examination, he admitted that following the previous day's site visit when he had had the opportunity to inspect the application land, and particularly the proposed location of 38A, from the rear gardens of all the even numbered properties on the north side of the road, the overlooking would be more than he had initially thought. Nevertheless, he pointed out that those gardens, and the properties themselves, were already overlooked to a significant degree by the properties in Kings Mead.

16. In Mr Turnbull's view, the additional traffic that the two extra properties would create would be insignificant. Further, with the entrance being at the lowest part of the estate, vehicles would not, in fact, be passing most of the objectors' properties. Parking on the roadside would also be unlikely to create a problem, as there was sufficient on site parking in addition to the garages that would be provided.

17. He said that there was little or no likelihood of the proposed development setting a precedent, and becoming a catalyst for further applications in upper Morris Road. The only potential for additional development was on the rearmost sections of the very long gardens behind nos.42 to 52. Without demolishing a complete pair of semi-detached houses to create an access (which would not be economically viable), the only other potential access was over the turning head adjacent to 19 Kings Mead, but it was understood that there could well be a ransom strip that had been retained by the builder of that development, or there were restrictive covenants on the properties that would again prevent access being obtained at that point.

18. Whilst the existence of the restrictive covenant could be said to be a practical benefit in that it gives the beneficiaries the opportunity to control development, in the circumstances of this case, Mr Turnbull said he did not think the ability to impede the development amounted to a practical benefit of substantial value or advantage. No.15 currently has a view of the roof of the industrial unit from its front windows, but the construction of no.36A would serve to shield it. The view would simply be of another residential dwelling. He said in his report that the construction of no.38A would not, in his opinion, affect the privacy, such as it was, currently enjoyed within the rear gardens of the even numbered properties, even Mr Skeats' house at no.42. There were sufficient mature trees and shrubs, and as had been said, further planting would be undertaken as part of the development scheme. It was accepted by him, following the site visit, that those gardens would, indeed, be overlooked to some extent, but he pointed out that that was already the case, not only from adjacent properties in upper Morris Road, but also from houses in Kings Mead. The limited additional overlooking would certainly not affect values and a prospective purchaser coming to one of the houses afresh would not consider the existence of the two new houses to be untoward or intrusive. The fact that 36, 38 and 40 would all have smaller gardens than hitherto would also not be a problem, as they were still sufficient for normal modern requirements. Mr Turnbull said that no.36 is owned by the applicant, no. 38 was sold by the applicant with its present, reduced garden arrangement, and the owners of no 40 have agreed a sale of part of their rear garden to facilitate the development.

19. In his opinion, the impact upon drains (both foul and surface water) from an additional two properties would be insignificant. He also thought that the construction of no.38A would not exacerbate the current surface water problems experienced to the rear of nos. 40 & 42, due to the topography of the land, and the proposed rainwater harvesting system could, indeed, reduce the problem. New topsoil to be provided over the garden areas of the new properties once construction was complete would also facilitate storm water run-off. As to the roads, he said that whilst maintenance costs were currently shared by 24 properties, contributions in future would be made by the two new houses, and this would serve to reduce the burden on the existing owners.

Objectors' case

20. Mr Skeats said that the reason the objectors did not appoint solicitors or have professional representation was concern about costs. It had been agreed that he should act as official spokesman for them, and he presented what he described as a skeleton argument setting out their case. He said that the factual background, as set out in paras 1 – 11 of the applicant's skeleton argument was agreed, as were parts of the section relating to the planning history.

21. Firstly, it was the objectors' case that the proposed use was not reasonable. The increased density that would be created by the provision of two new houses, and the fact that they would be large detached units (whereas all the other properties in upper Morris Road are semi-detached) would materially change the underlying character and layout of the neighbourhood. The amount of overlooking that would occur as a result of the siting of no.38A would also be an unreasonable invasion of privacy. Turning to the assertion by the applicant that in impeding the proposed use, no practical benefits were secured to the objectors, Mr Skeats said it was the objectors' contention there were principally 9 areas where practical benefits were, indeed, secured. They were:

1. Not having surface water drainage connections into the existing upper Morris Road system from the two proposed properties.
2. Not having additional traffic using the upper section of Morris Road.
3. Not having the existing residential character and appearance affected by the construction of two new houses.
4. Not being overlooked or having privacy in rear gardens affected.
5. Not having the density of the area increased, and not having plot sizes reduced.
6. Not having existing views affected.
7. Not having existing flooding problems at no.42 exacerbated.
8. Not setting a precedent for further development.
9. Not suffering additional road maintenance costs.

If any or all of them do secure practical benefits, then they are considered to be of substantial value or advantage.

22. Mr Skeats said that it was the objectors' view that financial compensation would not be sufficient to make up for any such loss. The adverse impact of the proposed development would be such that the lives of the residents would be seriously affected during the development process, and forever afterwards. The objectors, many of whom have lived there in excess of 25 years, and were now retired, were not motivated by money but were more concerned to retain the peace and privacy which they currently enjoy. He confirmed that, had the applicant's proposal been for the construction of a single additional house, roughly in the position of the proposed 36A, the beneficiaries of the restriction would not have objected. One property that more or less followed the existing building line, and fronting Morris Road would have been acceptable. However, the requirement for two properties would constitute

overdevelopment, and it was particularly the siting and aspect of the second unit (at right angles to the other properties) that created the problems.

23. As to the specific points, Mr Skeats said that in connection with (1), problems had been encountered with the existing private drainage system. Root clearance work had had to be carried out in 2000, and more extensive repairs were needed and had been quoted for. The concern was that linking two additional properties into an already overloaded system would lead to further problems and expense, which was the responsibility of the residents. The additional traffic that would be created (2), especially during construction, would constitute a danger, particularly as children tend to play on the small green at the junction of the upper and lower parts of the road. The character and general rural ambience (3) of this quiet residential cul-de-sac would be materially affected and the privacy currently enjoyed within the rear gardens of nos.42-50 would be adversely affected (4). In that respect, whilst agreeing that there was some overlooking from the properties on Kings Mead, they were further away. The three first floor windows at the rear of the proposed no.38A would look directly over the rear garden or no.42, and those further along the road. Mr Skeats said that although parts of the rear gardens of some of the properties on the north side of upper Morris Road had been sold to the developers of Kings Mead, that land was to provide gardens only, and there were no residential units built upon it.

24. On (5), although it had to be accepted that planning consent had been granted on appeal, Mr Skeats said that one of the grounds for refusal of the original application stated that *“by reason of the configuration of the site and the size, scale and siting of the houses would represent over development, appearing cramped and overcrowded, and would fail to respect the character and appearance of the locality.”* These very large houses would be likely to appeal to large families, and that would have an impact in terms of additional traffic. The clearing of a number of large trees (6) including spruce, hawthorn and some mature fruit trees to facilitate the construction of 38A would remove valuable screening, particularly between nos.36 and 38 and the Kings Mead houses. It would also affect the outlook from no.42 and those further along the road.

25. Mr Skeats was personally very concerned that the change in ground levels (7) will further exacerbate the flooding problems at the rear of his property (and no.40) and with ground levels being altered, the water that currently flows from his garden to the garden of no.40 might well be trapped on his own plot, and create additional problems.

26. Notwithstanding the applicant's arguments about the impracticality of creating any further back garden developments in Morris Road (8) and the need for a number of properties to be involved if it was to occur, the fact remained that that was precisely what has happened here with 3 properties being directly affected. In the objectors' view, their position before the Lands Tribunal in respect of any future application would be severely weakened if modification was allowed in this instance. Finally, on (9), he said that there was a real risk that the Lower Morris Road Residents Association might seek to recover contributions to the maintenance and repair of their section of the road if damage was caused by the developer, and they failed to receive satisfaction from him.

27. In cross-examination, Mr Skeats accepted that the proposed new houses were not dissimilar in size and type from those in lower Morris Road, but he said that tended to be a distinctly separate community. He accepted that the matters of on-site parking and turning during construction, together with surface and foul water disposal were covered by planning conditions, and that the developer would have to comply with local planning authority requirements. However, he said it was clear from Mr Eagles' evidence that details were far from finalised.

Submissions

28. In his submissions, Mr Hochberg pointed out that consent had existed for one detached dwelling on the land (adjacent to no.36 and approximately in the position of the proposed no.36A) since 1987. That consent was renewed in 1990, and again, having lapsed, in 1998. The objectors had stated, in their response to Mr Turnbull's report, that they did not object to any of those applications as they were based upon a much less invasive plan and were considered acceptable. It was a fact, he said, that as far as the thin end of the wedge was concerned, the applicant's proposals would if anything serve to prevent any possibility of further back garden development, as access which would currently be possible (subject to planning) across the application land would be blocked.

29. Referring to the questions posed in *Re Bass Limited's Application* (1973) 26 P & CR 156, Mr Hochberg said that there could be no real argument that the proposed use was reasonable, and it was accepted that the restriction impeded that use. As to the objectors' arguments as to why impeding such use secures to them practical benefits, he said that the drainage concerns were unfounded and that, if anything, surface water disposal was likely to be improved. Additional traffic would only be travelling along the first fifty feet or so of upper Morris Road and, as to maintenance and repair, not only would the occupiers of the two new houses be obliged to contribute their due proportion of the ongoing maintenance costs of upper Morris Road, they would also have to contribute to the ongoing maintenance of the lower section. Furthermore, the developer was prepared to agree to repair, reinstate and make good all parts of Morris Road on the completion of development works if any damage had been caused.

30. The appearance of the two new properties was intended to harmonise with their surroundings, and the local planning authority's landscaping requirements would ensure that the appearance of the application land would be considerably enhanced. It was submitted that it would only be no.42 that would be overlooked by no.38A and not only was there currently good screening, but this would be enhanced by new planting. There was nothing to stop Mr Skeats adding additional planting within his own garden if he wished to further enhance the screening that was to be provided. As to the thin end of the wedge, Mr Hochberg submitted that there was no realistic prospect of any further development taking place in upper Morris Road and thus any arguments on that issue were irrelevant (see *Re Snaith and Dolding's Application* (1995) 71 P & CR 104)

31. It was the applicant's case that none of the issues raised by the objectors amounted to practical benefits of substantial value or advantage. However, it was accepted that the kinds of benefits secured to the objectors may include benefits which are not otherwise legally recognised property rights, such as the protection of a view (*Gilbert v Spoor* [1983] Ch 27), not being overlooked or preserving the character of the land. It was also accepted that the Tribunal was entitled to take into account the fact that there was a scheme of covenants affecting upper Morris Road (but not lower Morris Road), and that where a building scheme exists, that fact added strength to the objectors' objections. That was consistent with the recent decision of the Court of Appeal in *Dobbin v Redpath* [2007] 4 All ER 465, where Lawrence Collins LJ observed (para 24) that in the case of a building scheme it would be better for the tribunal to consider the matter in the terms of the "weight" to be attached to objections in the light of the special interests of the beneficiaries of covenants in a building scheme. However, in this case, the building scheme only extended to a small development over some 3.3 acres and it was not the integrity of a large estate that was under consideration.

32. Mr Hochberg submitted that the Tribunal would be well aware of the observation of Mr Erskine Symes QC in *Re Zopats Developments' Application* (1966) 18 P & CR 156 where he said: "It is, I am satisfied, a case where the prospect terrifies while the reality will prove harmless." This was a case where the same very much applies.

Conclusions

33. Following the sequence of questions in *Re Bass*, I accept that the proposed development is reasonable, and that the existence of the covenant impedes that user. As regards the nine practical benefits referred to by the objectors, I can sympathise with their concerns over the storm water drainage connections, particularly so as it was clear that the applicant had not yet resolved the situation on this or, for that matter, foul water drainage. Mr Eagles' response to the objectors concerns was, in my view, somewhat cavalier. Likewise in connection with the flooding that occurs behind nos. 40 and 42, I am not convinced that Mr Skeats' concerns have really been taken into account.

34. I do accept the applicant's arguments relating to additional traffic, and agree that any increase would be marginal. Similarly, I think that the concerns about the risk of additional on-street parking were unfounded. I am also satisfied that the proposed new houses would be in keeping with the mixed residential nature of the area as a whole, and that the marginal increase in density would not materially affect any of the objectors' properties. I am also persuaded by the applicant's arguments relating to thin end of the wedge, and agree that the configuration and layout of the estate is such that the opportunity for any further residential development within the area of the building scheme is extremely unlikely. Finally, on the plus side of the applicant's case, I accept that the undertakings relating to reinstatement and repair to any damage caused during construction seem reasonable, as does the fact that the new occupiers would become liable for their due proportion of ongoing maintenance costs.

35. It is the question of overlooking and invasion of privacy to the rear gardens of no.42 and thence, to a diminishing degree, to those behind nos.44–50 where I consider the objectors' arguments have the most weight. Having viewed the application land both from the site itself, and from the rear gardens of the even-numbered properties (and in some cases from upper floor windows) I accept that a new 2 storey house located where no.38A is proposed to be sited will have a severely detrimental affect upon privacy and, from the three first floor bedroom windows of that property, will mean those gardens are seriously overlooked. It was apparent from my inspection that the very long rear gardens of the even numbered properties are a particular feature which appeals to the type of occupiers that reside in them. It was clear from the standard of maintenance and care to those gardens that they were a source of considerable personal pride to their owners, and the loss of the relative quiet and privacy that they currently enjoy would, in my judgment, amount to a considerable loss of practical benefits. Although there is some strength in the applicant's argument that the properties are already overlooked to some extent both from adjoining houses and those at the rear in Kings Mead, I accept Mr Skeats's point that the latter are somewhat further away.

36. Although the overlooking and loss of privacy will be most severe to Mr Skeats's own property, and to a slightly lesser degree to no.44, I noted that the rear aspect of nos.48 and 50 is canted slightly towards the application land, so the question of overlooking affects them too. I am entirely satisfied that by impeding the proposed development the restriction secures to the owners of nos. 42-50 Morris Road practical benefits of substantial value or advantage. The application, pursued solely under ground (aa) therefore fails, and it is refused.

37. It will be clear from the views that I have expressed above, that it is the siting and design of the second property, no.38A, that has caused the application to fail. I do agree with the objectors that a single unit more or less on the proposed footprint of no.36A would not create the same problems of overlooking and loss of privacy. Were the applicant eventually able to resolve the potential drainage problems, it may well be that an application in respect of this would succeed. Indeed, the objectors said that they would not object to a single unit in that location.

38. This determines the substantive issues in this application, and the decision will become final when the question of costs is decided. The parties are now invited to make submissions on costs in writing.

DATED 20 November 2009

P R Francis FRICS