

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – MODIFICATION – proposal to operate an Ofsted registered childminding business - covenants not to carry on trade or business and to use only as a private dwellinghouse – application under s.84(1)(aa) and (c) – no admitted objectors – whether proposed use is reasonable – whether proposed use is impeded by the covenant – application granted

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

BY:

STEVEN STUART JOHNSON and LISA MARIE JOHNSON

**Re: 44 Knights Hill
Aldridge
Walsall
WS9 0TG**

Mrs Diane Martin MRICS FAAV

DETERMINATION ON WRITTEN REPRESENTATIONS

Decision Date: 10 November 2022

No cases are referred to in this decision:

Background

1. This is an application for the Tribunal to modify restrictive covenants (“the restrictions”) that burden the title to 44 Knights Hill, Aldridge, Walsall (“the Property”), preventing its use for trade or business and limiting use to a private dwellinghouse only. The applicants wish to operate an Ofsted registered childminding business at the Property.
2. The Property is a detached two storey house facing onto the residential street of Knights Hill in the town (formerly a village) of Aldridge near Walsall. Knights Hill rises in a south westerly direction from its junction with Erdington Road and the Property is the third house from the junction, with its access drive located on the outer edge of a bend in the road. Road-side parking is possible on the opposite side of Knights Hill road.
3. The covenants are contained in a conveyance dated 11 December 1937 between Mary Nobel Miller (1) and Joberns Limited (2) (“the 1937 restriction”) and a conveyance dated 1 October 1965 between Churn Hill Investments Limited (1) and Industrial Buildings (Birmingham) Limited (2) and Carl Marius Lowe (3) (“the 1965 restriction”).
4. Mr and Mrs Johnson (“the applicants”) made their application on 16 October 2021. As directed by the Tribunal, on 28 July 2022 a publicity notice was served on potential beneficiaries of the restrictions at 32 to 48 Knights Hill, 152 to 184 (even) Erdington Road, 221 to 243 (odd) and 244 to 256 (even) Whetstone Lane. An earlier publicity notice, dated 1 February 2022, had given notice of the application to modify the restriction in the 1937 conveyance. This gave rise to objections from Mr and Mrs Murphy of 34 Knights Hill and Mr and Mrs Meller of 42 Knights Hill. However, no documentary evidence of entitlement to the benefit of the covenants could be supplied for either property so the objections were struck out. The publicity notice dated 28 July 2022 gave rise to no further objections.
5. The applicants have not applied for planning permission to run a childminding business from the Property because it is their understanding that no permission is required for a business of up to six children. The Tribunal informed the applicants by email on 10 October 2022 that in the absence of planning permission it is quite difficult for the Tribunal to be satisfied that the grounds for modification under section 84(1)(aa) or (c) are made out and invited the applicants to adjourn their application until planning permission was obtained. The applicants declined to do so. In the absence of scrutiny by the local planning authority, which would follow from an application for planning permission, the Tribunal must therefore satisfy itself that the proposed use of the Property is reasonable before it can modify the restriction to permit a business use.
6. On 25 October 2022, by arrangement with the applicants who were away at the time, I made a site inspection of the Property frontage and its surroundings. This was during a week when schools were shut for the half term holiday and there was very little traffic passing up or down Knights Hill, or along Erdington Road. None-the-less, I identified a number of potential issues which are relevant to the question of whether the proposed use for a childminding business is reasonable. One issue is the extent to which vehicle movements at the property are compromised by its location – on a bend in the road, close to the junction

of Knights Hill with Erdington Road. Another is whether it is possible to turn a car within the property, to avoid the need for a reversing manoeuvre either to gain access to the property or to leave it. A third is the extent to which on-site parking space is limited and road-side parking is restricted by the location. Generally, the application raises a question about the extent to which additional vehicle movements and parking generated by a business use would have an impact on the owners and occupiers of neighbouring properties.

7. The Tribunal wrote to the applicants on 27 October 2022 to express these concerns and invited them to choose between adjournment until planning permission is obtained or seeking a decision from the Tribunal, with the opportunity either to submit further evidence in writing or to make their case at a video hearing. They chose to seek a decision having submitted further evidence in writing.

The legal background

8. The 1937 conveyance contains, so far as relevant to this application, the following restriction:

“No trade or business whatsoever shall be carried on upon the said land edged pink on the said plan or any part thereof and no act or thing should be done or suffered thereon which should be a nuisance or annoyance to the owners or occupiers of adjacent hereditaments but this should not preclude the purchaser or the persons deriving title under her from using and occupying any dwelling house or dwelling houses which may be erected on the said land in connection with the business of small-holder market gardener farmer or poultry farmer carried on upon the land edged blue on the said plan and upon the adjoining land and premises of the purchaser.”

9. The 1965 conveyance contains the following restriction:

“The purchaser to the intent that this covenant shall be binding upon the owner for the time being of this property hereby conveyed and shall enure for the benefit and protection of the adjoining and adjacent land of the Company to use the property hereby conveyed for the purpose of a private dwellinghouse only.”

10. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The application was made under grounds (aa) and (c).
11. Ground (aa) of section 84(1) is satisfied where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures “no practical benefits of substantial value or advantage” to the person with the benefit of the restriction, or that it is contrary to the public interest.

12. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to 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.”
13. Where ground (c) is relied on, the Tribunal may discharge or modify a restriction if it is satisfied that doing so will not injure the persons entitled to the benefit of the restriction.
14. In this case there are no identified persons entitled to the benefit of the restrictions, so ground (c) has no relevance and under ground (aa) the Tribunal’s considerations are confined to whether the continued existence of the restrictions would, unless modified, impede some reasonable use of the Property for private purposes.

The applicants’ case

15. The applicants say that, whilst the predominant use of the Property would remain as a private dwelling, they plan to provide a high standard of education to pre-school children in an Ofsted registered setting, in compliance with all legislative requirements for health and safety, safeguarding and site inspections. Mrs Johnson has 25 years’ experience working in the education sector providing before and after school facilities. Their intention is initially to set up with one or two children, with the hope of building up to six children. If the business is successful they will explore the option to expand up to nine children, which they understand would require planning permission.
16. The applicants made an enquiry to Walsall Council Planning Services, to see what planning permission would be required to run the business, and have supplied an email response stating that up to six external people (sic) would be considered as acceptable to a child minding business under Use Class C3 (Residential). I note that the email also advised the applicants to apply for a certificate of lawful development as protection against any future enforcement proceedings.
17. Their case on ground (aa) is that the restrictions impede their proposed reasonable use of the Property, which will be predominantly internal to the dwelling, involve no alteration to the exterior appearance of the Property and produce only minimal additional traffic and noise. They say that the proposed use will be in the public interest as they know of no other childminding service in Aldridge.
18. In response to concerns raised following my site inspection, the applicants make a number of points. Regarding vehicle movements, they believe that not all potential parent clients would arrive by car, with some arriving by bus and others on foot from nearby streets. From Mrs Johnson’s experience of before and after school care, not all children are dropped off and collected at the same time, so any additional vehicle movements at the Property would be staggered and average times for parking to drop off and collect would be unlikely to exceed five minutes.

19. The applicants do not consider that the need for vehicles to reverse into or out of their drive is an unusual situation and point out that this happens all over the country on a daily basis because most residential accesses are one directional. They do not consider that the location of the Property creates a particular problem for vehicle movements. The applicants supplied evidence obtained from West Midlands Police, by a Freedom of Information Act request, which shows that in the five year period from 2017 through to 2021 no road traffic collision occurred on Knights Hill, two speeding tickets were issued on Erdington Road and/or Knights Hill, and one ticket was issued for a traffic offence of unnecessary obstruction or dangerous parking on Erdington Road and/or Knights Hill.
20. Regarding the limitations of on-site and road-side parking the applicants say that road-side parking on Knights Hill takes place on a daily basis during term time for drop-off and collection of children from local schools with no significant issues, as revealed in the police statistics. However, the driveway of the Property is described as 75 feet long and the applicants supplied photographs of five cars parked (tightly) on it, along with their caravan and some remaining space, to demonstrate that the driveway would be adequate for the needs of their business. They make the point that many childminding businesses in the UK would not have any on-site parking.
21. Finally, in support of their submission that impeding the proposed use is contrary to the public interest, the applicants supplied evidence from the Information for Childminders webpage of Walsall Families Information Service stating that the number of registered childminders in Walsall has been steadily declining and expressing a desire to reverse the trend.

Discussion and conclusions on ground (aa)

Is the proposed use reasonable?

22. In the absence of a planning application, with scrutiny by the local planning authority and scope for objections to be made, I must use my own judgment to determine whether the proposed use is reasonable for the purposes of this application. My impression on inspecting the Property was that it is compromised for a business use involving cars by the location of its access on the bend at the bottom of Knights Hill, close to the junction with Erdington Road.
23. I have considered carefully the points made and evidence supplied by the applicants in response to my comments. Regarding vehicle movements I give particular weight to the submission that parents dropping off and collecting pre-school children would be in situ only for a short time and would be unlikely to arrive all at the same time. If this did happen on any day, however, I consider it unlikely that they would park tightly on the drive, as demonstrated in the photographs supplied by the applicants, because of the necessity to open both the front and rear doors to a sensible degree. So, if there was insufficient space on the drive, there would be a need for the car either to wait on the side of the road for someone to leave, or to park on the opposite side of the road and walk the child/ren across to the Property. It is not ideal to consider that cars could be reversing out of the drive into the road where children were crossing, but the numbers involved, the likely staggering of times and the

involvement of parents makes this of less concern. The statistics from West Midlands Police are helpful insofar as they provide evidence that the roads close to the Property are not known to be hazardous as a result of speeding and dangerous parking.

24. I commend the applicants for the research they have done to provide evidence in support of their application and I consider they have demonstrated that, on balance, a small Ofsted registered childminding business for up to six children would be a reasonable use of the Property.

Do the restrictions impede that use?

25. Even a small childminding business, for which planning consent is not required, must be registered with Ofsted and comply with various statutory requirements. That business use would be impeded by the 1937 restriction.
26. The 1965 conveyance restricts use of the Property to that of a private dwelling house only. Any use beyond that of a private dwelling house is therefore impeded by the restriction.

Is impeding the use contrary to the public interest?

27. I note that the applicants have made a submission on this matter but do not comment further since it is not a test which this application needs to satisfy.

General considerations

28. S.84(1)(B) requires the Tribunal to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area. The evidence of an email from the Planning Services at Walsall Council is sufficient to demonstrate the view of the local authority that planning permission is not required for the proposed use to commence.
29. The Tribunal is also required to take into account the period at which and context in which the restrictions were created or imposed and any other material circumstances. When the 1937 restriction was imposed, the lack of restriction on the business of “small-holder market gardener farmer or poultry farmer” is evidence of very different circumstances at Knights Hill. The 1965 restriction was imposed 57 years ago, on first sale of the Property, and still has validity in its overall intention to retain residential use of the Property on a residential street.

Determination

30. I am satisfied that jurisdiction is made out under ground (aa) for me to modify the restrictions, where there are no identified persons entitled to the benefit of them and they impede a reasonable use of the Property for a registered childminding business. I am satisfied that should the applicants wish to grow their business beyond six children they will make a planning application to do so and the scrutiny of that proposal by Walsall Council and any

potential objectors will be sufficient that I do not need to limit the modification to permit only a smaller business.

31. The following order shall be made:

The restrictions in the Charges Register for 44 Knights Hill, Aldridge, Walsall WS9 0TG shall be modified under section 84(1)(aa) of the Law of Property Act 1925 as follows:

1. Paragraph 1(1) in the Schedule of restrictive covenants shall be modified by entering after the words “No trade or business whatsoever” the words “with the exception of an Ofsted registered childminding business”.
2. A new paragraph shall be entered into the Schedule of restrictive covenants to state:

“2 Clause 3. of the 1965 conveyance has been modified to read “THE Purchaser to the intent that this covenant shall be binding upon the owner for the time being of this property hereby conveyed and shall enure for the benefit and protection of the adjoining and adjacent land of the Company hereby covenants with the Company to use the property hereby conveyed for the purposes of a private dwellinghouse only, which may include the operation of an Ofsted registered childminding business”

32. An order modifying the restrictions shall be made by the Tribunal provided, within three months of the date of this decision, the applicants have signified their acceptance of the proposed modification in the Charges Register of the Property.

Mrs Diane Martin MRICS FAAV
Member, Upper Tribunal (Lands Chamber)

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal’s decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.