



LP/69/2004

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – discharge or modification – former chalet bungalow and clinic site – restriction to private dwelling house or professional use by medical practitioner or solicitor – proposal to erect building for worship and religious instruction – whether restriction obsolete – whether maintenance of restriction contrary to public interest – whether restriction securing practical benefits of substantial value or advantage – whether injury – application refused – Law of Property Act 1925 section 84(1)(a), (aa) and (c)

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

by

MAHAVIR FOUNDATION LIMITED

**Re: The Timbers
Brookshill
Harrow Weald
Middlesex**

Before: The President and Mr N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 25-27 October 2006**

Joseph Harper QC, instructed by Porter Crossick, solicitors for the applicant
Philip Noble, instructed under the Direct Public Access to the Bar Scheme, for most of the objectors
Ramesh Dewan, one of the objectors, in person

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No cases are referred to in this decision

The following cases were referred to in argument:

Re Davis' Application (1950) 7 P & CR 1

Re Briarfield's Application (1976) 35 P & CR 124

Re Davies's Application (1971) 25 P & CR 115

Re Hunt's Application (1996) 73 P & CR 126

Re Page's Application (1995) 71 P & CR 440

Ridley v Taylor [1965] 1 WLR 611

Re Teagle's and Sparkes' Application (1962) 14 P & CR 68

Re Saviker's Application (1973) 26 P & CR 441

Re Henman's Application (1970) 23 P & CR 102

Re Emery's Application (1956) 8 P & CR 113

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

DECISION

Introduction

1. This is an application under section 84(1) of the Law of Property Act 1925 by the Mahavir Foundation Limited seeking the discharge or modification of a restrictive covenant affecting freehold land. The application land is part of the Harrow Weald Park Estate and formerly contained a chalet style bungalow known as The Timbers, which was used as a clinic/medical centre from 1985 until it was purchased by the applicant in 2001. The applicant is a Jainist organisation, which has obtained planning permission for the erection on the land of a single storey replacement building for use as a place of worship and religious instruction and seeks discharge or modification to enable that permission to be implemented. The objectors are the residents of 68 houses on the Harrow Weald Park Estate.

The restriction

2. The restriction in issue was imposed by a conveyance of a roughly rectangular area of land forming part of the Harrow Weald Park Estate, having as its eastern boundary a frontage of 188 feet to the west side of Brookshill and, as its northern boundary, a frontage of 180 feet to a path or roadway then known as North Drive. The conveyance was dated 7 October 1925 and made between William Willmot Pendleton, Charles William Brewington Simmonds and Herbert Brown (the vendors) and Arthur Frederick Austin (the purchaser). The conveyance contained the following covenant by the purchaser:

“AND the purchaser himself his heirs, executors, administrators and assigns and his and their tenants and to the intent that such covenant shall at all times devolve with the property hereby assured and be binding on the purchaser and all future owners and occupiers thereof doth hereby covenant with the vendors their heirs, executors, administrators and assigns the owners for the time being of the remainder of the Harrow Weald Park Estate (but not so as to render any persons liable in damages or otherwise for any breach occurring after he shall have parted with all interest in the hereditaments and premises hereby conveyed) that he the purchaser his heirs, executors, administrators and assigns will henceforth duly observe and perform the reservations stipulations and restrictions set forth in the said First Schedule hereto.”

3. Paragraph 3 of the First Schedule provided that:

“No house for the time being standing on the said land shall be used for any trade business manufacture or otherwise than as a private dwelling house only. Any stable coach house garage or other erection shall be used for private purposes in connection with the house only and not separately or in connection with any trade business or manufacturer. Nothing herein contained shall however be deemed to prevent any medical practitioner or solicitor practising in or upon the premises.”

Meaning of the restriction

4. Mr Joseph Harper QC for the applicant said that the proposed development would not breach the first part of the restriction – “No house for the time being standing on the said land shall be used for any trade business manufacture or otherwise than as a private dwelling house only” – since there was no longer any house standing on the land. The reference in the second part of the restriction to “other erection” could plausibly be construed as simply applying to ancillary buildings within the curtilage of a house, so that it would not prevent the proposed religious use of the building for which the applicant had obtained planning permission. The applicant, however, had made the application on the basis that the restriction did prevent the proposed use, and Mr Harper said that it was on this basis that the applicant’s case proceeded.

5. The suggestion that the restriction might not prevent the proposed use had not been voiced before the hearing. Had it been, it is likely that the Tribunal would have ordered the suspension of the proceedings under section 84(3A) to enable the decision of the court to be obtained on this short, but fundamental, point of construction, which, if determined in the applicant’s favour, would have obviated the 3-day hearing before us. We deal with the application, as the applicant asks us to do, on the basis that the proposal to erect on the land and use a building for the purpose of worship and religious instruction would be contrary to the restriction.

The application land and its surroundings

6. In 1805 a William Windale acquired 26 acres of land bounded by a road called Brookshill to the east and Uxbridge Road to the south and erected a substantial mansion in the north eastern quarter of the site. He created a lake along the western edge of his land and in 1822 he purchased an almost equal additional area immediately to the west. The avenue to the mansion ran in a northerly direction from the junction of Uxbridge Road and Brookshill, where there was a gate lodge. There were gardens and parkland near to the main house.

7. A bailiff’s house, coach house, stables and other ancillary estate buildings were built in the north western corner of the land, served by North Drive, a lane running along the northern boundary from Brookshill. There was a lodge, known as North Lodge, immediately north of the Brookshill entrance to the drive, and a further lodge was constructed at the south western corner of the estate facing the Uxbridge Road, with a drive running northwards from here to the estate buildings. The application land, situated on the south side of the junction of Brookshill and North Drive, contained an estate cottage, known as The Cottage.

8. During the 1920s and 1930s parts of the 50 acres or so comprising the Harrow Weald Park Estate were sold off. Along the Uxbridge Road frontage about 20 houses were constructed. A new road, West Drive, was constructed on the western part of the estate, running north from Uxbridge Road to the original estate buildings, and two short cul-de-sacs, each known as West Drive Gardens, were constructed on each side of it about one-third of the way up. West Drive and West Drive Gardens were wholly developed, with about 50 houses, in the course of the 1930s. A further cul-de-sac, Lakeland Close, was later constructed on the

east side of West Drive. The mansion itself was sold in 1937, together with parts of the grounds closely associated with it, was used for educational purposes during the second world war and was demolished in 1956. Houses were constructed in Park Drive, formerly the principal access to the mansion house. The estate buildings on the north-eastern part of the estate were sold off. Two large houses in substantial grounds were built, The Squirrels off West Drive and The Eagles, which was accessed along North Drive. It appears that covenants in similar terms to that in the present case were imposed on each of the conveyances of estate land.

9. The former bailiff's house and other ancillary buildings, now all dwellings, remain at the north western corner of the estate, where there is countryside beyond the original estate boundaries. This group of buildings and North Drive, the lane leading to Brookshill, are within a conservation area designated by the London Borough of Harrow in recognition of their special architectural or historic interest. The conservation area includes North Lodge, gate posts fronting Brookshill, the lane and The Eagles, a 1940s house within the former walled garden. The Victorian buildings have been locally listed by the local authority. Elsewhere on the estate the mid twentieth century houses sit among, or are seen against a backdrop of trees. The lake remains, and there are now paddocks and overgrown woodland to its north east and east. To the south of the application site, on the site of the former mansion, there now stands Harrow Weald Park, a sheltered housing development in two-storey terraces around an open-sided courtyard set among trees and woodland. It contains some 32 apartments and is managed by the local authority.

10. The application land is situated at the extreme north eastern corner of the estate, some 650 to 700 metres north of the junction with Uxbridge Road. It is largely vacant, although most of the foundations of the former bungalow remain, as does a large timber garage or shed. The grounds are extensively overgrown and planted with substantial shrubs and a number of trees, especially along the boundaries. The boundary to Brookshill is at present defined by a recently installed timber fence supported by concrete posts.

11. North Lodge, a single storey house surrounded by a small garden, lies immediately north of the application site, separated from it only by the lane. Immediately further north is a recently constructed three storey block of 18 flats known as Brookshill Gate.

12. On the opposite (eastern) side of Brookshill is the rear part of the Harrow Weald Cemetery, which has its main entrances off Uxbridge Road and, to the east, Clamp Hill. To the south of the cemetery are a number of private houses and, further south, is the Harrow Weald Campus of Harrow College. This comprises a substantial series of buildings, with open areas wrapping around behind the adjacent dwelling houses. Towards the junction of Brookshill with Uxbridge Road there is an open playing field and to the east of that is a Harrow Council day centre and then All Saints Church.

13. In the vicinity of the application site Brookshill is approximately nine metres wide with footpaths on either side. The road has a 30 mph speed limit and is well trafficked. It runs downhill from the north and contains a total of eight bends, with the application site being

located on the seventh bend. There has been a history of numerous road accidents outside the site, some of them serious.

Planning history

14. The planning history of the application site, so far as is relevant, is as follows. In 1982 planning permission was refused for the change of use of the chalet bungalow to a dental surgery. The application was considered to be contrary to the policy of the local planning authority, as it would result in the loss of a residential unit and would introduce a commercial activity into the Green Belt. In the same year planning permission was granted for the use of two of the rooms of the dwelling as a doctor's surgery, with the rest remaining in residential use.

15. In 2001 a certificate of lawfulness was granted, following an application submitted by the applicant as prospective purchaser, confirming that the use of the property as a clinic was lawful, such use having continued since 1985. The applicant took over the property in November 2001. On 24 January 2002 it made an application for planning permission to add a single storey rear extension to the existing building. The purpose of the extension was stated to be to provide space for statues and an idol to be located over virgin land in accordance with the applicant's religious requirements. In a letter to the local planning authority dated 1 May 2002 the applicant's architect stated that

“this property is generally used for communal worship and instruction on two occasions per week, usually on a weekday morning but sometimes at the weekend, for a congregation of between twenty to thirty people. It is also used on a casual basis by individual members of the Foundation for personal prayer at other times – this because each member has a key to the building.”

16. Planning permission for the proposed extension was granted in June 2002. Although the proposal constituted inappropriate development in the Green Belt, the applicant's religious requirements were considered to be very special circumstances which justified consent being given.

17. On 28 February 2002 the applicant's architect had written to the local planning authority as follows:

“An application is currently before your Council for a single-storey rear extension to the existing building to provide, with appropriate internal alterations, a room more suited to the needs of the Mahavir Foundation in the use of this building for prayer meetings and religious instruction.

The Committee of Elders of the Foundation have indicated to me that they will be quite satisfied with the building once altered and extended if planning permission is granted. However, they wonder if it may be possible to replace the present two-storey building with a single-storey building designed for their particular needs and of similar plan area, sited as the present building or elsewhere within the curtilage.

It is appreciated that redevelopment may be difficult as the site is located in the Green Belt and in an Area of Special Character, but it is felt that now is the right time to seek your advice rather than regret later having never asked.”

18. On 14 October 2002 the applicant’s architect submitted a planning application for “new single storey building to replace existing two-storey building, sited as existing, for public worship and religious instruction.” The application stated that there were parking facilities for 35 cars on the site. Conditional planning permission for the proposed development was granted on 12 December 2002.

19. In 2003 an application was submitted for a revised scheme. On 1 August 2003 the Chief Planning Officer wrote to those who had submitted objections to the proposed development. He said:

“I write with regard to a planning application for the above site. The application proposes a single-storey replacement building for use as a place of worship and religious instruction. The application will now be reported to the next meeting of the Council’s Development Control Meeting on 10 September. The meeting is open to the public and starts at 7.30 pm at the Civic Centre, Station Road, Harrow. Should objectors wish to speak, they may nominate one person to speak on their behalf for 3 minutes at the meeting and the applicant will have the right of reply. Speakers should contact the Council’s Committee Clerk [telephone number given] at least 48 hours in advance of the meeting.

Whilst writing, I would advise that use of the site for religious purposes did not require planning permission and therefore is not an issue for the Committee in deciding this application. The previous authorised use of the site as a clinic fell within Class D1 of the Use Classes Order. Use for religious purposes falls within the same use class and therefore no change of use is considered to take place and no consent from the Council is required. When the applicants first acquired the site they applied for a small extension to the building which was granted by the Council. They then applied again, this time to demolish the building then existing and replace it with a modern one of similar size, replacing the first floor with a basement to reduce the overall height. The application was also granted. The current application seeks to raise the ground level of the building by between 0.5m and 1m to provide improved access for disabled persons and to add ornamentation to the building appropriate to its use. The capacity of the building would not change from the previous permission. The Council are not able to restrict the use in terms of the number of people who attend, or to prevent the use taking place. I hope this clarifies the situation for you.”

20. The planning officer’s report to the Committee included the following remarks under the heading “Consultation Responses”:

“The objections to the principle of the use and traffic are not relevant to the current applications. Wide notification has now taken place, this did not occur with regard to the use because it did not require planning permission from the Council. The proposed increase in height, due to changes in ground levels, and the increased

ornamentation are considered appropriate for the site and would not detract from this part of the Green Belt.”

21. The chief planning officer subsequently changed his recommendation from “grant” to “defer”, following receipt of a letter from the Government Office for London, directing the Council not to grant consent until the Secretary of State had had time to consider a request from a third party to call-in the proposal. In fact, the Committee decided to refuse the application because of the proposed increase in height.

22. On 12 November 2003 a further application was made for a similar scheme to that which had been refused in September, but with a variation to the elevational treatment. The officer’s report to the Committee meeting on 14 January 2004 recommended that consent be granted. It included the following observations:

“Green Belt/Area of Special Character and Visual amenity

The issue of appropriate/inappropriate development has already been dealt with by virtue of the planning permission granted in 2002 for a replacement building. This proposal does not alter the overall footprint of the building and no new issues in relation to the Green Belt are introduced.

Compared to the most recently refused scheme, the current proposal has deleted the raising of ground levels which revert to their original position. The new ornamentation has been restricted to the front elevation only. The level of ornamentation is not considered to be excessive and with the deletion of the proposal to raise ground levels would not be so prominent. The revised roof treatment compared to the original permission would enhance the building’s appearance with a mansard replaced by a flat roof.

The new footpath would facilitate access from the car park and would not be obtrusive. This aspect of the proposal was not previously considered unacceptable.

Overall it is not considered that there are sound objections on Green Belt/Area of Special Character grounds given the amendments made and the original permission.

Traffic Safety

Much of local residents’ objections to the most recent scheme related to traffic generation and car parking. It must be remembered however that the use as a place of worship did not require planning permission as it falls within the same use class as previous uses at the site (Class D1). What did require consent was a replacement building. The application now proposed would not increase the capacity of the building over that of the originally approved scheme for a replacement building. Members previously have accepted this view and the most recent scheme was not refused on traffic/parking grounds. It would therefore be unreasonable to take a different view for the current scheme.”

23. Planning consent for the amended scheme was granted on 13 February 2004. The permitted building was shown as being arranged on ground floor and basement levels. The ground floor is in two main parts. The first contains an entrance hall, reception/office, a kitchen, a disabled wc and a staircase leading to the basement. Its overall dimensions are approximately 5.5m x 8.4m, including the kitchen (3.2m x 2.9m) and a staircase. The entrance hall gives access to the prayer hall (8.25m x 12.07m). The basement consists of a store, cleaner's room and 3 male and 3 female wcs. It is approximately 5.5m x 8.4m overall.

24. The planning permission was subject to detailed conditions which, in summary, required:

- (a) development to commence within 5 years;
- (b) no music or other amplified sound to be audible at the boundary of any nearby residential properties;
- (c) provision of surface water attenuation/storage works in accordance with approved details;
- (d) meetings to take place only within the building and no use to be made of the landscaped grounds for purposes of worship or religious instruction or for any festivals or ceremonies;
- (e) submission of a scheme of hard and soft landscape works including a survey of all existing trees and hedgerows on the land;
- (f) all landscaping to be carried out in the first planting and seeding seasons following occupation of the building or completion of the development, whichever is sooner; any trees or shrubs dying within 2 years from completion of the development to be replaced;
- (g) development not to commence until samples of the external materials have been approved;
- (h) the building to be used only between 08:00 and 20:00 Monday to Sunday inclusive without the prior written permission of the local planning authority.

The application and the objections

25. The applicant now seeks the discharge of the restriction or alternatively its modification so as to permit its use in accordance with the planning permission. The application is made on grounds (a), (aa) and (c) of section 84(1) of the Act. There are objections from residents in 68 houses on the Harrow Weald Park Estate, all of whom are accepted as being entitled to the benefit of the restriction. They relate to 44 houses in West Drive, 10 in Uxbridge Road, 6 in West Drive Gardens, 5 in Lakeland Close, 2 in Park Drive and 1 in Brookshill.

26. At the hearing Mr Joseph Harper QC called, as witnesses of fact, Mr Vinod Kapashi, the president and one of the founding trustees of the applicant and Dr Kenneth Lancer, the previous owner of the application site. He also called three expert witnesses: Mr A J N Warner FRICS, Dip TP, a partner of Messrs Dalton Warner Davis, chartered surveyors (planning), Mr J R Budd BA (Hons), MSc, MCILT, MIHT, technical director of Singleton Clamp and Partners, consulting engineers and transportation planners (highways) and Mr T W

Firrell FRICS, MEWI, MAE (effects of proposals on objectors' properties). One of the objectors, Mr Ramesh Dewan of The Squirrels, 31 West Drive, appeared in person and gave evidence. Counsel for the remaining objectors, Mr Phillip Noble, called one expert witness, Mr D F McCoy Dipl Arch (Oxford), ARIBA, FRTPI, FRIAI, a director of McCoy Associates. He called the following objectors to give factual evidence: Mrs Rita Harcourt, the owner of North Lodge, Brookshill; Mr Steven Astaire of 32 West Drive; Mrs Susan Hust of 63 West Drive; Mr Harold Karmel of 8 West Drive and Miss Justine Hobbs of 48 West Drive. He also produced a witness statement and affidavit from Mrs Pamela Giles of Oak Lodge, Brookshill, which was admitted as evidence under the Civil Evidence Act 1995. Finally, he called factual evidence from Mr Robert Fenton QGM of Priory Cottage, Brookshill and Mr David Scott of Roxey, Brookshill. Mrs Giles, Mr Fenton and Mr Scott are not entitled to the benefit of the restriction. Following the hearing we carried out an inspection of the application land and the rest of the Harrow Weald Park Estate.

Grounds of application – summary of the parties' cases

27. On ground (a), the applicant says that the restriction is obsolete insofar as it applies to the application site. When the restriction was imposed in 1925, the mansion house was still standing. The application site contained an estate cottage, forming part of the estate and accessed from within it. Once the mansion house had been demolished and replaced by sheltered housing, the reason for the imposition of the restriction no longer applied. That reason was to preserve the integrity of the Harrow Weald Park Estate for the benefit of the mansion house. Without the mansion house, the application site became an isolated pocket of land which bore no relation to any other part of the estate. Moreover, it is said, other significant changes have occurred both within the estate and beyond it, which have rendered the restriction obsolete.

28. The objectors' case on ground (a) is that the covenant was intended to benefit all residents on the estate in preventing development for commercial or public purposes, and to restrict the uses on the estate to residential only. That purpose can still be achieved. None of the changes which have occurred in the neighbourhood, including the demolition of the mansion house, have changed the character of the estate to such an extent that it is not identifiable or that the restriction no longer affords real benefits to the residents.

29. On ground (aa), the objectors agree that the proposed use of the application site constitutes a reasonable use. The applicant says that, in a multi-faith society, it is contrary to the public interest to prevent worship and/or contemplation from taking place at a location convenient to Jainists. It adds that, bearing in mind the restrictions on the use of the property which have been imposed by the local planning authority, the restrictive covenant confers no practical benefits on the objectors which would be sacrificed if the proposed development were to proceed. With the exception of North Lodge, all the properties on the estate have between them and the application site considerable areas of land and/or woodland. The character of their environment is completely different from that at Brookshill, so that nothing that is proposed for the application site will have any effect on any other part of the estate. Although North Lodge is only some 80 metres from the proposed new building, it will be invisible or only partially visible from it and the two buildings will be separated by the driveway and the proposed car park. Moreover, North Lodge itself fronts a very busy road, it lies opposite a

cemetery and is overlooked by Brookshill Gate, a far more dominating feature in its environment than the proposed development could ever be. The proposed development will have no effect on North Lodge whatever.

30. The objectors do not accept that the restriction is contrary to the public interest, nor that the use of the new building will be as limited as is being suggested. They say that there is a real risk that further planning permissions will be granted authorising extensions to the proposed building on the grounds that more space is needed by the applicant, or by another religious group which might acquire the building in the future. The objectors will then be faced with the choice of agreeing to a further modification of the covenant or incurring significant costs in objecting once again. The covenant secures the practical benefit of providing protection which the planning system is unable to do. Moreover, the proposed modification, if granted, will make it easier for developers to seek further modifications elsewhere on the estate to a system of covenants which has survived for many years.

31. On ground (c) the applicant's case is that, because of the remoteness of the application site from the remainder of the estate and the character of Brookshill in terms of traffic flow and the developments along it, the proposed modification will cause no injury to any of the objectors. The objectors reiterate the adverse effects of the modification to which they referred in connection with ground (aa).

Evidence

32. In his written witness statement Mr Kapashi said that the applicant was a registered charity, established in 1987. It took its name from Lord Mahavir, the last Tirthankara (or prophet) of the Jains and the teacher of the Jainist principles as they are known today. Jainism was closely associated with Hinduism and Buddhism. Ahimsa, or non-violence, was the central teaching of the religion. It meant avoiding all harm, including mental harm, to even the smallest being. The anuvratas (five life-long minor vows) provided the framework for lay Jains who aspired to live according to this principle. These vows included ahimsa (non-harming), satya (truthfulness), asteya (not stealing), brahmacharaya (abstinence from sexual activity outside marriage) and aparigraha (keeping possessions within limits). Jainism is a cultural and familial faith. There are approximately 4m practising Jains around the world. Approximately 25,000 to 30,000 are based in the United Kingdom, with about 15,000 of those living within the M25 boundary. The Jain religion is split into many sects, each believing in a different interpretation of the scriptures. Around 75% of the Jain population in the United Kingdom belong to the Oshwal Foundation.

33. Mr Kapashi said that the Foundation was formed in order to provide a local place of worship for the Jain community, who, Mr Kapashi said, lived predominantly in the Harrow area of London. The applicant was mainly a religious organisation and did not offer the social and educational facilities provided by other Jainist groups. It had a membership of around 300 families, with Foundation circulars being sent to about 450 addresses. Until 1987 members practised their faith through other Jainist organisations and informally at the houses of like-minded friends.

34. In 1995 the applicant acquired a property known as 557 Kenton Road, Harrow, which had since been used by its members as a temple for group worship. The temple can hold a maximum of approximately 50 worshippers at any time. It is a house temple and, as such, is not properly consecrated. The applicant had been looking for a site for almost 10 years which would be suitable for the construction of a new temple. It had always been its goal to find a permanent site and the house temple at Kenton Road was only intended to represent a temporary solution until the new temple could be built.

35. The applicant found a site about five or six years ago at Elmwood Avenue, Kenton. Planning permission was not forthcoming, however, and the site had to be sold. The application property was considered to be ideal, being situated in a peaceful location with ample parking. It was also known that planning would not be a problem, since a place of worship fell within the same planning use class as a doctor's surgery. Planning permission would only be required to rebuild following demolition of the existing structure.

36. At the time of purchase of the application land, Mr Kapashi said, the applicant's solicitors pointed out the existence of the restrictive covenant. This was not considered to be a problem, however, in view of the age of the covenant, the relative isolation of the property and the fact that the then existing use was far more intrusive than that proposed by the applicant. The property was purchased for £450,000 and planning permission was sought for the existing property to be demolished and the new temple to be constructed with the same footprint as the existing structure.

37. Having purchased the land, the applicant then made arrangements for a consecration ceremony, which was necessary before building work could commence. The event was a one off ceremony and no such event would occur again. The ceremony was held on 11 May 2003. It was expected that about 400 people would attend. The applicant hired the Bentley Wood High School to provide car parking and a place to serve food after the ceremony. As a result of a misunderstanding the school car park was re-surfaced the day before the ceremony and was not in a condition to be used. About 600 people arrived on the day. Because of the resurfacing works at the school not all cars could be parked there. However, 100 cars were accommodated within the boundary of the school. Between 5 and 10 cars were parked on Brookshill; but no cars were parked on West Drive. There was no excessive noise on the day of the ceremony, which ran from 9.00 am to 12 noon. A number of those attending walked along Brookshill to the site.

38. In the light of the requirements of the planning permission, Mr Kapashi said, the temple grounds would not be used for any ceremonies or other such activities. About 25 people would attend the temple each day. The size of the proposed hall is only 42 feet by 27 feet. A number of Jain festivals or holidays fall during the year. During these festivals Jains come together to observe fasts and take vows. These activities usually fall in August or September. They would not be held at the temple, but would continue to be undertaken in collaboration with the Navnat Vanik Association. The Navnat Association purchased its own large property in June 2005 at Printing House Lane, Hayes, Middlesex. All such activities would be held there, as it was large enough to accommodate both congregations.

39. Lord Mahavir's birthday falls in March or April. Again, Mr Kapashir said, this festival would not be celebrated at the temple and the applicant would work jointly with the Navnat Association to host the festivities in their newly acquired premises. The main reason why the festivities would not be held at the temple, however, was that the consumption of food was strictly forbidden in all Jain temples. Moreover, the planning permission contained restrictions on the level of music or any other amplified sound emanating from the temple. The applicant intended to create a peace garden in the vicinity of the temple, which would be sympathetic to the local environment and open to everyone.

40. In the course of his oral evidence Mr Kapashi made certain additional points. The existing temple at 557 Kenton Road did not belong to the applicant but to the Mahavir Trust. The trustees intended to keep it open, even if a new temple was built on the application site. Although access to the proposed building would technically be open to all Jains, the chances of visitors coming from afar were remote. In the unlikely event that numbers attending resulted in overcrowding, people would be refused admission. The applicant's membership doubled between 2002 and 2005, but it had now stopped growing. The total cost of constructing the proposed temple, including building costs and professional fees, would probably be close to £1m. The ground floor kitchen shown on the approved plans was intended to give the receptionist facilities for making tea. Mr Kapashi did not know why the approved plans showed a total of seven wcs; the architect was responsible for the details. There was a properly consecrated temple in Harrow and Wealdstone and others in South London, Potters Bar, and one or two in private houses.

41. It was put to Mr Kapashi that the website of the Institute of Jainology stated that 1,000 plus people had been present at the consecration ceremony. He said that this was wrong. His information regarding car parking on the day of the ceremony came from a number of volunteers who were on duty outside the application site at the time and had questioned those attending.

42. Dr Lancer said that he operated a private surgery and slimming clinic on the application site between 1981 and 2001. The clinic was open from 9.00am to 9.00pm on Monday, Tuesday, Wednesday and Friday, from 9.00am to 12 noon on Thursday and Saturday and from 9.00am to 1.00pm on Sunday. The clinic was very busy on Sunday mornings. It was visited by a steady stream of people during the week. On an average week a total of about 200 patients attended. Most patients arrived by car. During peak hours the general traffic was intensive. There were perhaps 30 cars parked in the car park at times of peak capacity.

43. The experts called by the applicant expressed the view that the proposed modification would cause no harm or injury to the owners of properties with the benefit of the restriction. Mr Warner said that the application site was at the north-eastern extremity of the main built area of the estate. The area had experienced considerable changes since the covenant was imposed, in the form of more traffic, travelling faster, along Brookshill and the introduction of non-residential uses— the college and the day centre – to what was formerly an entirely residential area. The proposed development had been assessed by the planners in the light of very restrictive policies and had been deemed acceptable provided various conditions were imposed. Mr Budd considered the proposal would have no material impact on traffic intensity or highway safety. Mr Firrell's view was that the temple would have no adverse effects on the

objectors' properties or their value. They were mostly too far removed to be affected. North Lodge was closer, but the new building would be adequately screened and its use would not be prejudicial.

44. Mrs Harcourt said that she had lived at North Lodge until recently. On the day of the consecration ceremony in 2003 there were coach parties, cars parked on the pavement in Brookshill, much noise and many people, some of whom asked to use the lavatory in North Lodge. Miss Hobbs said that dozens of cars driven by people attending the ceremony had driven up West Drive. Members of her family had lived in the road for at least fifty years. Throughout that time the public had regularly used the lane leading from the top of West Drive to Brookshill, even though part of it was now privately owned. Mr Karmel said that he had lived in the area for 23 years. He had walked along the lane four or five times a week and had never been stopped.

45. Other matters raised by objectors in their evidence included the following. The planning permission for the proposed temple was only obtained because of a loophole in the system. Restrictive covenants should be enforced and upheld. They provided more protection to neighbours than the planning system. Any relaxation would lead to developers buying plots of land on the estate in order to redevelop them at a higher density and thus destroy the character of the area. The application property was situated at a known traffic black spot and the proposed development would increase the danger of accidents still further. The estate was a rare oasis of peace and tranquillity, with horses to be seen grazing only 15 miles from Central London. With very few exceptions the residents on the estate were united in opposing any interference with the system of covenants which had served the area well. It had ensured that the residential development remained at a low density, with limited traffic and no non-residential uses.

46. Two local residents gave evidence about the intensity of use of the clinic. Mrs Giles said that she had attended the clinic once a week for 4 or 5 months in 1989. On average, she never saw more than three patients in the building at any one time. There were rarely more than three vehicles parked in the car park. Mr Scott said that he had lived some sixty yards north of the application property for 43 years. When the use of the bungalow changed to a clinic, he did not notice any increase in the number of people visiting the building. On the day of the consecration ceremony, cars had been parked along both sides of Brookshill although it was a single lane road and a coach had been parked in the road at the rear of his house.

47. The expert called by the objectors, Mr McCoy, said that, in contrast to the chalet bungalow previously on the application site, the proposed building would have an unusual aesthetic character clearly announcing its non-residential character. It would appear as a visually incongruous constituent of an estate which, despite the changes which had occurred, had retained its original character to a significant extent.

Conclusions: (a) obsolescence

48. Ground (a) applies where, by reason of changes in the character of the property or the neighbourhood or other circumstances the restriction ought to be deemed obsolete. Mr Harper's primary contention was that the purpose of the restriction was to ensure that the house on the land, The Cottage, which had been built and used as part of the mansion house estate and was reached from drives running within the estate, remained in residential use in order to protect the amenities of the mansion house. Demolition of the mansion house therefore rendered the restriction obsolete. We do not consider that the purpose was so narrow. The covenants were annexed to "the remainder of the Harrow Weald Park Estate" and were imposed for its benefit, and they were in similar form to those imposed on other parts of the estate, both buildings and unbuilt-on land, when they were sold off at about the same time. The basic purpose, in our judgment, as with all these other parcels, was to ensure that all parts of the estate retained a residential character. Accordingly the demolition of the mansion house did not, in our judgment, render the restriction obsolete.

49. Mr Harper pointed to other changes that, he suggested, made the restriction obsolete on any basis. The Cottage itself had been demolished, a new house had been built on the site in the 1950s, this house had been used as a clinic for about 20 years, and it had been demolished. The site of the mansion house now contained blocks of old persons' accommodation. In Brookshill, outside the estate but close to it, a three-storey block of flats had been built immediately to the north of North Lodge on the site of a demolished house, other large houses to the north had ceased to be used, a school had been built and extended rearwards on the east side of Brookshill, and Brookshill itself had become heavily trafficked.

50. We accept that, for the purposes of paragraph (a) the neighbourhood can properly be regarded as including the parts of Brookshill adjacent to the estate and the eastern frontage to it. To treat the neighbourhood as confined to the estate itself, as Mr Noble urged, would suggest that the estate possessed a degree of isolation which, on the basis of our inspection, we do not think that it has. It is undoubtedly an entity, but its character could still be affected by changes in the use of bordering land.

51. We do not, however, consider that the changes to which Mr Harper pointed are such as effectively to deprive the restriction of its purpose. The basic purpose, as we have said, was to ensure the retention of the residential character of all parts of the estate. It is clear that that character has been preserved. The mansion house was in educational use for a time, but it is in residential use now. There have been no other changes of use within the estate, apart from the use of the former house on the application site as a clinic. But the restriction contains an express exception for a doctor's surgery (on the basis, no doubt, that such a use would not harm the residential character of the estate) and the use itself, we are satisfied on the evidence, was small-scale and unobtrusive. The replacement of the mansion house with old persons flats, on a part of the estate surrounded by woodland, has not affected its residential character. Nor has the redevelopment, for residential purposes, of the land to the north of North Lodge. The school buildings fronting Brookshill appear to be contemporaneous with the 1920s and 1930s housing development within and outside the estate and remain consonant with it, and we do not see that any of the factors relied on by Mr Harper, alone or in combination, have affected the residential character of the estate. Ground (a) is not in our view made out.

Conclusions: (aa) practical benefits of substantial value or advantage

52. Ground (aa) applies where the restriction impedes some reasonable user of the application land and (subsection (1A)), in doing so, either does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage or is contrary to the public interest. There is, as we have said, no dispute that the proposed use, having received planning permission, should be regarded as reasonable. The applicant's case is advanced on the basis of both of the subsection (1A) alternatives, and it is on these that the disagreement lies.

53. Mr Harper submitted that in impeding the proposed use the restriction was contrary to the public interest. It must, he said, be contrary to the public interest to prevent worship and/or contemplation as described by Mr Kapashi from taking place at a location convenient to Jainists. The public interest required that faiths should have places of worship. Put in this way, the ground is not in our judgment made out. Mr Kapashi's evidence falls far short of showing that the place of worship that the applicant seeks to create must be located on the subject land. There is clearly no need for a temple to be located in the immediate locality in view of the relatively wide spread of the Foundation's members. Although Mr Kapashi said that the Foundation had been looking for a site for ten years, his evidence was unspecific as to how the search was conducted. He mentioned only one other site (at Elmwood Avenue, Kenton) as having been considered. We find it impossible to believe that a thorough search conducted over a considerable period of time would not have thrown up other possible sites. It is the intention to keep open for worship the existing temple in Kenton Road, Harrow, so that on any view the inability to use the subject land would not constitute a denial of the opportunity to worship, albeit that no part of the Kenton Road site has been consecrated on undeveloped land. We are not satisfied that the restriction in impeding the proposed use is contrary to the public interest.

54. The other subsection (1A) alternative requires the consideration of whether the restriction in impeding the proposed use does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage. In considering this question, it is relevant to compare the effects of the proposed use with the effects of the potential uses that would not be prevented by the restriction. The case for the applicant was that the proposed use would not in itself have any significant adverse effects and in any event it would be less busy than a clinic, which was the last active use of the land, would be. The evidence of Dr Lancer was relied on to show how busy such a clinic might be. Having heard that evidence and also the evidence about the clinic given by Mrs Giles and Mr Scott, we are left with the clear impression that that use, over the 20 years that it was carried on, was low-key and undisturbing. By contrast the proposed use involves the possibility that very substantial numbers of people may attend the site from time to time. We accept that the consecration ceremony, which was attended by many hundreds of people, was a unique event. Nevertheless, because of the number of the Foundation's member families (some 300 according to Mr Kapashi), all of whom could be expected to look to the temple for regular worship, and the many thousands of Jains in the Greater London area and other parts of the UK, there is, we find, a real possibility of gatherings with substantial numbers occurring in future. While we note Mr Kapashi's estimate that about 25 people would attend the temple each day, the fact that some 7 wcs would be installed and also a kitchen clearly suggests an expectation that there

would be occasions when many more than this would do so. Moreover it is impossible to know how intense the temple use might become in the long term, whether on the part of the Mahavir Foundation or on the part of some successor in title. The fact is that it is a use that has the very real potential for attracting large numbers of people.

55. There is only one house, the owner of which is entitled to the benefit of the restriction, that is close to the subject land. That house is North Lodge. We have no doubt that the consecration ceremony was extremely disturbing for Mrs Harcourt, and we think that even much smaller gatherings would be likely to have a significant adverse effect on the amenities of that house, while the traffic associated with larger gatherings, at what is on the evidence a hazardous section of road, would be a matter of genuine concern to the occupier. The power to prevent the proposed use with the potential that it has for these adverse effects is in our judgment a practical benefit of substantial advantage to her. We do not think that this benefit is in any way diminished by the presence to the north of North Lodge of the Brookshill Gate flats.

56. The impact of the proposed use on the other residents of the Harrow Weald Park Estate who are entitled to the benefit of the restriction would be of a different nature. The purpose of the restriction was to preserve the residential character of the estate. The proposed use, with the potential for large gatherings, would be inimical to that character, in our view, and in a way that the clinic use would not be. This would be of particular significance to the two houses that have their access along North Drive, immediately adjacent to the subject land. It would also adversely affect the residents of the north-western part of the estate who enjoy using North Drive as a walk, although, since they have no entitlement to do this beyond at most a licence terminable at will, the weight to be attached to this particular effect must be limited. Those on the other parts of the estate would only be aware of the use (with one exception, which we will mention) when passing the end of North Drive in their cars. But the consciousness that the subject land is part of the estate, the residential nature of which the residents value highly, means that the use would be seen as an intrusion. There is additionally the likelihood that West Drive would be used for car parking in the event of large gatherings. We are satisfied that this occurred on the occasion of the consecration ceremony and, although West Drive is some distance from the subject land, there are parking restrictions down Brookshill and along Uxbridge Road which would be likely to lead to parking in West Drive. Taking these effects together, we consider that the power to prevent them is a practical benefit of substantial advantage to the residents of the estate and to each of them.

57. It is no answer to the concerns of the residents, in our view, to say, as the applicant does, that the present planning permission contains conditions designed to prevent the use from having adverse effects – for instance, the limit on the audibility of music and the requirement that meetings must be confined to the building. There can be no guarantee that in the decades ahead those conditions will not be breached or, if they are, that enforcement action will be taken or that they will not be modified. Nor is there any means of controlling the number of people who may attend. There is a further consideration also. The objectors spoke of the need that there would be to press the local planning authority to take action in the event of breaches occurring or to resist any relaxation of the conditions, and we accept that it is an important part of the benefit that the restriction confers that, since the use is prevented, the residents are relieved of the need to take steps to pressurise the planning authority in this way.

58. The objectors urged that the system of covenants on the estate was intact and that to discharge or modify the restriction would constitute the thin end of the wedge. We are not persuaded by this argument. Were we to order discharge or modification it would be because of the particular nature of the application land and the proposed use, and we have little doubt that it would be seen as an exceptional case. If there were proposals elsewhere on the estate for the erection of houses on sub-divided plots or of flats (which, as we understand it, are the principal concerns of the objectors in relation to the thin end of the wedge argument) or even for some non-residential use (although there is nothing to suggest that a proposal of this sort is in prospect), we do not think that an application to discharge or modify the relevant restriction would be rendered more likely, and we have no doubt that, if an application were made, the prospect of its succeeding would not be affected by our decision in the present case. We are satisfied, however, that the application must fail on ground (aa) for the reasons that we have explained above.

Conclusions: (c) no injury

59. Our conclusion that ground (aa) is not made out for the reasons we have set out in the preceding paragraphs means that ground (c) fails also.

Decision

60. The application is accordingly refused. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision, which will become final when the question of costs has been determined.

Dated 7 December 2006

George Bartlett QC, President

N J Rose FRICS