



LP/45/2004

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – discharge or modification – part of garden of dwelling house – prohibition on erecting any building – proposal to erect bungalow – whether restrictions securing practical benefits of substantial value or advantage – whether objectors’ failure to pursue objection to hearing implies consent – whether injury – covenant modified – Law of Property Act 1925 section 84(1)(aa), (b) and (c)

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

by

**(1) JOHN CHARLES GERRARD
(2) BRENDA ANN GERRARD**

**Re: Land adjoining
18 Warners Avenue
Hoddesdon
Hertfordshire**

Before: N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 7 December 2006**

Emily Windsor, instructed by Jameson and Hill, solicitors of Hertford, for the applicants.

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DECISION

Introduction

1. This is an application by Mr John Charles Gerrard and Mrs Brenda Ann Gerrard under paragraphs (aa), (b) and (c) of section 84(1) of the Law of Property Act 1925, seeking the discharge or modification of restrictive covenants affecting vacant freehold land, formerly forming part of the garden of a single dwelling house known as 18 Warners Avenue, Hoddesdon, Hertfordshire, so as to permit the construction of a bungalow. This is the second application to this Tribunal in respect of the same piece of land. On 6 October 1988 the Member (Mr V G Wellings QC) dismissed the first application on the grounds that the proposal would adversely affect the amenities of certain neighbouring properties. The building now proposed is different from the one which formed the subject of the previous application. It is the applicants' case that the changes which have been made to the design of the building have eliminated the adverse effects which would have resulted from the earlier proposal.

2. There are two relevant restrictions. The first was imposed by a conveyance dated 20 December 1963 between (1) Frederick Arthur Bevan Braithwaite and Mary Howarth Braithwaite (Vendors of the first part), (2) Frederick Arthur Bevan Braithwaite, Francis Lloyd Gibson Braithwaite and Mary Howarth Braithwaite (Vendors of the second part) and (3) Bben Development Company Limited (Purchaser). The conveyance related to part of the grounds of Sheredes, a large country house and estate then on the outskirts of Broxbourne. It contained, among others, the following covenant:

“For the benefit and protection of the remainder of the ‘Sheredes’ Estate being retained by the Vendors of the first part or the Vendors of the second part and edged blue and yellow on the plan attached hereto (hereinafter called ‘the retained property’) or any part or parts thereof and so as to bind so far as may be the property hereby conveyed into whosoever hands the same may come the Purchaser hereby covenants with the Vendors of the second part that the Purchaser and the persons deriving title under it will at all times hereafter observe and perform the restrictions and stipulations set out in the Fourth Schedule hereto.”

3. Paragraph 2 of the Fourth Schedule provided that:

“No permanent building shall be erected on the land hereby conveyed except not more than 49 private dwelling houses all erected of good materials in a good and workmanlike manner with or without garages or usual outbuildings.”

4. By a deed dated 11 January 1965 made between the same parties, the first restriction was modified so as to substitute for the previous limitation a restriction on the development of the land together with other land to not more than 72 private dwelling houses.

5. The second set of restrictions was imposed by a Transfer of the application land together with the dwelling house known as 18 Warners Avenue. The Transfer was dated 18 February 1966 and made between Bben Development Company Limited (the Transferor) and Peter Brian James (the Transferee). The Transferee covenanted:

“... for the benefit of the remainder of the Transferor’s said Sheredes Estate or any part thereof and so as to bind the property hereby transferred into whosoever hands the same may come that he the Transferee and his successors in title will at all times hereafter observe and perform the stipulations and conditions set out in the Third Schedule hereto”

6. Paragraphs 4 and 6 of the 1966 Transfer provided as follows:

“4. There shall not at any time be erected or placed on the property hereby transferred any building or other structure, hut or caravan ...

6. No building or other structure shall be erected on the property hereby transferred and no temporary hut shed or caravan or other outbuildings (except a greenhouse) shall be erected or placed on the property hereby transferred except in accordance with the plans and elevations previously approved in writing by the Surveyor for the time being of the Transferor whose fees in connection therewith shall be paid by the Transferee.”

7. On 5 September 1989 planning permission was granted by the local planning authority for the erection on the application land of a detached L-shaped bungalow comprising three bedrooms, two bathrooms (one en-suite), two reception rooms, kitchen and garage. This permission was renewed on 5 October 1994 and again on 23 November 1999. It formed the subject of the application made to this Tribunal in July 2004. On 11 September 2006 planning permission was granted for a revised proposal. The approved plans still showed a detached, three bedroom bungalow, roughly rectangular in shape, but with a protruding lounge and with a conservatory towards the northern end. There is a parking area in front of the dwelling instead of an integral garage and a different access to comply with the requirements of the highway authority. Copies of the plans accompanying the revised planning application were sent to the objectors on 19 May 2006.

8. Formal objections to the Lands Tribunal application were made by the following objectors, who lived in neighbouring properties and who it was accepted had the benefit of the restrictions: Mr Robert de Larrabeiti of 4 Benford Road; Mr James W Felton of “Badgers”, 2 Benford Road and Mrs Rosetta Lewis of 1 Benford Road.

9. On 1 September 2005 the Registrar of the Tribunal directed the parties to file and serve any expert reports and witness statements of fact upon which they intended to rely within 28 days. No such documents had been filed by any of the objectors by 13 December 2005, when the Registrar made a number of orders, including the following:

“Unless an objector lodges with the Tribunal and serves on the applicants’ solicitors an expert report and/or witness statement by 13 January 2006 he or she will be debarred under Rule 46(2) of the Lands Tribunal Rules 1996 from adducing evidence or claiming compensation, unless he or she can show cause why such an order should not be made.”

10. By a letter dated 10 October 2006, in the continued absence of any reports or witness statements from the objectors, they were asked, if they wished to submit reasons why a debarring order should not be made, to do so within the next seven days. No such reasons were submitted within seven days or at all and the appropriate debarring order was made by me on 20 October 2006. On 5 December 2006 Mr Felton advised the Tribunal that he would be unable to attend the hearing of the application as a result of work commitments. At the hearing Ms Emily Windsor of counsel, who appeared for the applicants, stated that she had been informed that another of the objectors, Mrs Lewis, had recently died.

11. Ms Windsor called one expert witness, Mr Peter Carter FRTPI, principal of Peter Carter Associates, chartered town planners and development consultants of Sandy, Bedfordshire. One of the applicants, Mr Gerrard, produced a brief witness statement dealing with the various planning permissions for the erection of a bungalow on the application site. I agreed to admit this evidence without requiring Mr Gerrard to give oral evidence. No persons attended the hearing apart from the applicants’ representatives.

Facts

12. In the light of the evidence, I find the following facts. Until 1984, the application land formed the southern part of the garden of the house known as 18 Warners Avenue. It is part of the Sheredes Estate which comprises Warners Avenue, Benford Road and Sheredes Drive.

13. The application land, together with 18 Warners Avenue, occupies a corner position in a cul-de-sac of eleven houses in the north-west part of the estate. It is approximately triangular in shape and has its main (western) frontage to Park Lane. The length of that frontage is 33.8m and the site area is 0.136 acre (0.055ha). The site is flat, partly laid to lawn and partly planted with ornamental shrubs and trees. Park Lane runs to the west of and parallel to Warners Avenue. To the north, both roads join Cock Lane, which leads eastwards to Hoddesdon town centre and westwards towards open countryside. A short distance south of the application site, Park Lane and Warners Avenue join Benford Road, which runs in an easterly direction from the Park Lane junction.

14. The layout and appearance of the estate are typical of housing estates of the early 1960s. As originally built, the estate comprised 72 houses and bungalows, built in uniform rows along the street frontage. There was one house type (repeated 50 times) and two bungalow styles, both of similar external appearance. One of the estate covenants required front gardens to be open plan. Two additional houses have been built within the estate since its original

completion – one a 4 bedroom family house on the side garden of 30 Benford Road and the other on the side garden of 32 Benford Road, constructed as part of an adjacent estate.

15. In the 37 years or so since the estate was originally built, there have been significant changes to its character. These include the addition of first floor extensions above garages and two storey side extensions. These works have resulted in a denser appearance, especially along the southern side of Benford Road and in the cul-de-sac formed by Nos. 2 to 22 Warners Close. Many residents have used planting and new forms of driveway to reduce or eliminate the original open plan feel to the front of their properties. This is especially the case along Benford Road and Sheredes Drive. By building extensions, adding pitched roofs to original flat roof elements and installing different types of replacement windows and doors, residents have created a variety of street frontages. Recent years have also witnessed the building of a number of conservatories in a range of styles.

16. The proposed building is a single storey bungalow, sitting squarely on the site and with a gross external floor area of 131.25m² including the conservatory. It is approximately 2.3m high from ground to eaves and, with a roof pitch of about 35°, the height to the ridge is 4.4m.

17. The planning permission for the proposed development dated 11 September 2006 contained a number of conditions. Among others, these required that the approved plans must be adhered to; boundary screening must be provided to a standard approved by the local planning authority; no further windows, doors or openings of any kind shall be inserted in the flank elevations without the written approval of the local planning authority; no development authorised by the Town and Country Planning (General Permitted Development) Order 1995 shall be undertaken unless the local planning authority otherwise agrees in writing; and details of all screen and boundary walls and fences and of a landscaping scheme are to be submitted to and approved by the planning authority before the development is commenced, and thereafter provided and maintained.

The First Lands Tribunal Application

18. When the first application was considered by this Tribunal in 1988, the owners and occupiers of ten local properties and the original development company, Bben, objected to the application. Mr Wellings also admitted a petition signed by persons who were not objectors, but all of whom were owners and occupiers of properties on the estate. Of the eleven objectors, only the owners and occupiers of 16 and 20 Warners Avenue appeared at the hearing and the owner of No.16, Mr Adams, gave evidence.

19. The Tribunal's conclusions were recorded as follows:

“I am satisfied that the proposed development of the application land would constitute some reasonable development of it, at all events, if the restrictions did not exist. They undoubtedly impede such reasonable user but I am not satisfied that, in impeding that user, they do not secure to persons entitled to the benefit

of them any practical benefits of substantial value or advantage to them. On the contrary, in my judgment, the overlooking of the garden of No.16 Warners Avenue by the dormer window in the elbow of the L would be a serious detriment to Mr and Mrs Adams, as would be the prospect of the blank north elevation of the new building in substitution for the semi-rural view southwards from their property which they now enjoy. I agree with Mr Adams that the new building would be unduly conspicuous, more particularly when viewed from his property and also from Park Lane. I also think that it would be too close to the boundary with No.20 and a pleasant part of its garden. For these reasons, the application fails both under paragraphs (c) and (aa) of section 84(1) of the Act and is dismissed.”

The Applicants’ Case

20. Mr Carter said that, since the Tribunal first considered the matter, there had been significant changes in planning policy and other matters which warranted a reconsideration of the previous decision. More than ever before, national planning policy now recognised the need to maximise the use of previously developed urban land for housing purposes. This had resulted in a reduction in the release of greenfield housing sites, encouragement to develop under-utilised land in urban areas and an insistence on higher densities than hitherto. At the same time policies existed to protect residential amenities.

21. The applicants had taken steps to reduce the amenity impact of the proposed development compared with the scheme put forward to the Tribunal on the previous occasion. They no longer proposed to install dormer or first floor windows which, if the original proposal had been approved, would have resulted in the garden of 16 Warners Avenue being overlooked. The overall ridge height of the dwelling had been reduced from 6.4m to 4.4m. The northern elevation, which formerly would have comprised a 6.4m high gable end, had been replaced by a 4.4m high hipped roof. In addition to the reduction in the overall height of the building, the omission of the gable had significantly reduced its bulk. Only a receding part of the roof would be visible from the garden of 16 Warners Avenue, comparable in height to a domestic garage or outbuilding. Thus, the visual intrusion upon the outlook of the occupants of 16 Warners Avenue had been substantially removed, and on this occasion – unlike in 1988 – the owners of that property had not objected to the proposal. Although the distance from the boundary with 20 Warners Avenue had not changed materially, the impact of the building had been significantly diminished as a result of the reduction in its height. The current owners of 20 Warners Avenue had written to the Tribunal, confirming that they had no objection to the erection of a bungalow on the site. In 1988 the Tribunal had seen no cause for concern in the relationship with 1 Benford Road. The latest plans showed that the bungalow would be even further from that property than before, and with a much lower profile.

22. Objections to the latest proposal had been received from the owners of two properties which had not produced objections in 1988, namely 2 and 4 Benford Road. Those properties were on the south side of Bedford Road, opposite No.1 and at some considerable distance from the proposed development site. No.1 was situated between those two properties and the site.

In 1988 the Tribunal had rightly concluded that No.1 would not be adversely affected by the development then proposed. The current proposal would have no effect whatever on Nos. 2 and 4.

23. In terms of the effect of the bungalow on pedestrian and vehicular activity in the estate generally, all access would be on to Park Lane, the estate's main distributor. That road, being a fairly indirect link through to Broxbourne High Street, carried a modest amount of traffic, and the additional vehicle or two would not be noticed. There was little if any street parking in Park Lane and the proposed building would not generate any congestion. It would have parking available within its curtilage, and occasional street parking by visitors would not create any problems. The proposed bungalow would not be visible from Warners Avenue, due to its low profile and the screening of intervening buildings. It would not be seen from either the front or rear windows of No.20, due to the angle of the houses to each other. The dwelling would be seen from some of the rear windows of No.18, but the owners of that property had not objected to the current application. The roof of the new dwelling would also be seen slightly from the garden of No.20, just above existing mature planting and screen fencing. The tip of the roof, garage-like in appearance, might perhaps be visible from the rear garden of 1 Benford Road in winter months, although there were two well planted boundaries in between. This had been accepted as inconsequential by the previous Tribunal, even when a building with a higher profile was being proposed. There was in any event no reason why it should not be seen. There was nothing unusual or undesirable in residents in an urban housing estate catching a glimpse of a neighbouring roof. It would certainly not dominate the view from these gardens, which were already surrounded by other houses, nor would it result in any additional overshadowing of adjacent houses or the gardens of the objectors. In terms of appearance, therefore, the proposal would have no discernible effect upon the present qualities of the area.

24. Landscaping within the site comprised ornamental conifers, within a border of fruit trees and a willow. The application plan showed, and a planning condition required, that such planting would be retained. The plan showed other trees along the boundary. Some of the conifers closer to Park Lane might have to be removed for access purposes, but there was no intention to remove any of the existing planting along the common garden boundaries. There was no reason why any planting of visual value to neighbours should be removed, and there could therefore be no reasonable landscaping objection to the proposal.

25. The only other potential effect of the proposal upon the character and amenity of the estate in general was the desire of neighbours to continue to enjoy the same level of privacy in their grounds as they had at present. There were no objections to the current plans on the ground of privacy. In any event, Mr Wellings had commented on this matter as follows:

“At ground floor level there would be no overlooking of any property, at all events, so long as the existing screen of fences (mostly 1.8m high), trees and shrubs, continues to exist.”

The retention of these features was secured by planning conditions and by a mutual desire for privacy. As the current proposal was for a single storey building only, there was no question of any loss of privacy arising.

26. Mr Carter concluded that the proposed modification should be granted because the restrictions, in impeding the proposed user, secured no practical benefits of substantial value or advantage to those entitled to enforce them (ground (aa)) and the proposed discharge or modification would not injure the persons entitled to the benefit of the restriction (ground (c)).

Conclusions

27. The absence of any sustained objection to the present application provides strong evidence that grounds (aa) and (c) are made out. Having heard Mr Carter giving evidence and answering the questions I put to him, and having inspected the application site and the surrounding area on the morning of 19 December 2006, I accept Mr Carter's conclusions on grounds (aa) and (c).

28. Ms Windsor submitted that the application should also be allowed on ground (b). There is some force in that submission, since the three admitted objectors failed to continue with their objections to the conclusion of the proceedings and their implied consent may not unreasonably be inferred. As I have said, however, it appears that Mrs Lewis, one of the objectors, may have died and, if that is unfortunately the case, the views of her successors on the subject of the application have not been sought or made known to the Tribunal. The application on ground (b), therefore, is rejected.

29. I have not lost sight of the fact that, as mentioned in paragraph 7 above, the plans which were approved by the local planning authority on 11 September 2006, and to which the current application now relates, differed from the plans which accompanied the application to the Tribunal when it was first made on 12 July 2004. On 19 May 2006 copies of the amended plans were sent by the applicants to the objectors, who have clearly had adequate notice of the precise proposals for which modification of the restrictions is being sought. Others, however, who may have had the benefit of those restrictions, have not been given formal notice of the revised proposals. Mr Carter explained in detail the differences between the two sets of plans and, at my request, produced a composite drawing showing the position of the bungalow as originally proposed and as amended. In the light of that evidence, I am satisfied that there would be no material difference between the effects of the two proposals on the amenities of those entitled to the benefit of the restrictions. Such persons, therefore, have not been prejudiced by the applicants' action in only providing formal notification of the amendment to the three admitted objectors.

30. Since the requirements of grounds (aa) and (c) have been satisfied, I have jurisdiction to modify the restrictions. I am satisfied that I should exercise my discretion to modify them. Accordingly, I order that the restrictive covenants in the conveyance dated 20 December 1963, as modified by the deed dated 11 January 1965, and in the conveyance dated 18 February 1966

shall be modified so as to permit the erection of a bungalow on the application site in accordance with the planning permission dated 11 September 2006 (Borough of Broxbourne Ref.7/0653/06/F/HOD) or any subsequent permissions which are the renewal of that permission and including any reserved matters approved pursuant to such permission or permissions.

31. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is determined.

Dated 10 January 2007

N J Rose FRICS