

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT00262 (LC)

UTLC Case Number: LC-2022-590
Royal Courts of Justice,
Strand, London WC2A

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RETRICTIVE COVENANTS – MODIFICATION – covenant not to use other than as a single private dwelling house – planning consent for change of use to a residential care home for up to four children or young persons – whether covenant secures practical benefits of substantial value or advantage – application for modification granted

BETWEEN:

**MR PANASHE MUSKWE (1)
MS TASUNUNGURWA HAVAZVIDI-MUSKWE (2)**

Applicants

-and-

MICHELLE COCHRANE

Objector

**Re: 6 Hereford Drive,
Braintree,
Essex,
CM7 9FX**

**Mrs Diane Martin MRICS FAAV
5 September 2023**

Decision Date: 31 October 2023

The applicants represented themselves
The objector did not attend the hearing and was not represented

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Introduction

1. This is an application for the Tribunal to modify restrictive covenants (“the restrictions”) that burden the title to 6 Hereford Drive, Braintree, Essex CM7 9FX (“the Property”), preventing use other than as a single private dwelling house with usual outbuildings. The applicants, Mr Muskwe and Ms Havazvidi-Muskwe, own the freehold of the property but reside with their family elsewhere. They both work within the childcare sector and wish to use the Property within their business as a self-contained home for children in care.
2. The restrictions are contained within a transfer dated 2 June 1997 between Bovis Homes Ltd (transferor) and Abbey Developments Ltd (transferee) and in a transfer dated 28 February 2000 between Abbey Developments Ltd (transferor) and Gary Paul Thomas and Ruth Beatrice Thomas.
3. On 11 December 2020 Braintree District Council (“the Council”) granted planning permission for a change of use of the property from residential dwelling (C3) to Residential Care Home (C2) for up to four children/young persons. From January 2022 until November 2022 the Property was used as a home for the care of two children in breach of the restrictions. The period of breach has some significance in this decision because it gave the objector experience from which to provide examples of problems arising from the proposed use.
4. On 11 November 2022 an application was made to this Tribunal for modification of the restriction under grounds (aa) and (c) of s.84 of the Law of Property Act 1925 to permit implementation of the planning consent. An approved publicity notice was served on Bovis Homes Ltd, Abbey Developments Ltd and the occupiers of numbers 1 to 36 Hereford Drive. Notices of objection were received from the owners of No. 4 and No. 20 Hereford Drive, but the latter was subsequently withdrawn leaving Ms Michelle Cochrane of No. 4 as the sole objector. Due to family and work commitments Ms Cochrane was unable to attend the hearing and I accepted the reasons stated in her notice of objection as her evidence.
5. A short hearing took place on 5 September 2023, attended only by the applicants in order that I could take evidence on their application and the way that the residential care home would be run. The applicants had provided an expert valuation report, prepared by Mr Timothy Matthews BSc (Hons) FRICS of TMA Chartered Surveyors in Chelmsford, and I accepted this on the papers. The following day I made an inspection of the Property and of No 4 and I am grateful to the parties for taking time to show me their respective properties. I was also driven past a property in a nearby street which is in use as a residential care home.

Factual background

6. The Property is a detached two storey house with attached single width garage, erected some 20-25 years ago within a large residential estate on the east side of Braintree. The house is of red brick construction under a concrete tiled roof, with uPVC windows and doors. A uPVC conservatory has been added to the rear of the house. The ground floor comprises an entrance hall, study, cloakroom/WC, kitchen/dining area, living room and

conservatory. The first floor comprises a landing, master bedroom with en-suite shower and WC, three further bedrooms and a family bathroom. The Property occupies a corner plot of 280 sq m, with garden to the rear and side fenced with vertical board timber panels.

7. Hereford Drive rises gently up to meet Bridport Way so that No.4 sits close beside but a little higher than the Property and set back from it. It is of similar construction, but a smaller property with three bedrooms. The garage has been converted to provide additional living space, as has the adjoining garage to No. 2. The plot size of No. 4 is also smaller than the Property at 199 sq m.
8. Their relative positions are shown below:



9. The applicants purchased the Property on 26 March 2019 for £340,000. They first made a planning application for change of use to a house in multiple occupation (C4), which was refused on 26 June 2019. In October 2019 they made a new application for change of use to a residential care home (C2) for up to four children/young persons.
10. The application was called in for determination by the planning committee and the planning officer's report to that committee stated that it had generated 31 letters of objection and one of support. The report confirmed that local plan policies state that within predominantly residential areas permission will be given for the development of residential care homes, providing (*inter alia*) there is sufficient amenity open space, the boundary treatments provide privacy and a high standard of visual amenity for both residents and neighbouring properties, and parking provision meets the Council's standards for C2 use at one space per full time member of staff. The proposal was considered to meet those requirements.

11. The report reviewed the impact on neighbouring residential amenity by reference to local plan policies, which state that "...development shall not cause undue or unacceptable impacts on amenities of neighbouring properties." Concerns expressed by neighbours in objections included "...a fear that there will be an increase in antisocial behaviour and the types of residents would increase disruption and disturbances resulting in neighbours not being able to enjoy their own properties and surrounding outside amenity areas." The report stated that the home would be registered with Ofsted and there would be one to one supervision of the children, making it unlikely that the types of nuisance cited by neighbouring residents in relation to young offenders, alcohol or substance misusers, nor late night disruption would be likely to occur. It confirmed that whilst the fear and perception of crime is a material planning consideration, there was no reasonable evidence base for the fear in this instance and a refusal could not be reasonably justified on those grounds.
12. The report considered that there would be an increase in comings and goings to the site, caused by the operational requirements of the care home, but the level of movement was not considered to intensify the use to an extent that it would be incompatible in the residential location when considering that the dwelling could house a family of six.
13. A further reason for concern had been loss of privacy to a neighbouring property. However, as no alterations were proposed it was not considered that the proposal would cause a greater degree of harm than the existing C3 use as a residential dwelling.
14. The report concluded: "Officers are mindful of the concerns raised by neighbours in relation to the functioning of the dwelling as a care home. However, the information provided with the application provides clarity as to the number of residents and how they will be cared for. Officers consider that the use of the dwelling as a care home, for up to 4 children aged between 8 and 18 with close care and supervision, would not have a detrimental impact on the amenities of the surrounding properties to a degree such as to be considered contrary to the above policies."
15. The committee's decision to grant permission is dated 11 February 2020 and is subject only to two standard conditions: to start with three years of the decision and to carry out the development in accordance with the plans submitted (which showed no alterations to the Property).
16. The grant of planning permission allowed the applicants (these restrictions excepted) to look after children as an unregulated activity, i.e. Ofsted approval was not a condition of the permission, but Covid delayed the start of care home activity until January 2022. Two children were cared for at the house on a programme which lasted until November 2022. The applicants had been advised that Ofsted approval would not be available for the care of children in a property where the activity was in breach of restrictions as this would leave the children vulnerable to disruption from their home at some point.
17. Care activity therefore ceased in November 2022 and the Property has remained unoccupied while this application runs its course.

The legal background

The restrictions

18. The 1997 transfer states that the Property must not be used

“other than as a single private residence.

...”

19. The 2000 transfer prohibits use

“other than as a single private dwellinghouse with usual outbuildings”

Statutory provisions

20. 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.
21. 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. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.
22. 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.
23. 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.”
24. The Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it. If the applicant agrees, the Tribunal may also impose some additional restriction on the land at the same time as discharging the original restriction.

The application

25. The applicants seek to have the restrictions modified to permit use in accordance with the planning permission, including any renewal of that permission. They make their application under ground (aa) on the basis that the restrictions impede a reasonable use of the land for private purposes. They say that the proposed use is reasonable because

planning permission was granted, no external changes will be made to the Property and it can already accommodate a family with four children so there will be no intensification of use. Moreover, the neighbourhood already has a residential care home for children less than 200 metres away in the same residential estate.

26. The applicants say that impeding the proposed use does not secure any practical benefits to those benefiting from the restrictions and that neighbouring properties would not suffer diminution in value or loss of amenity as a result of modification. In the alternative, if there are any practical benefits they are not of substantial value or advantage and money would be adequate compensation.
27. I am satisfied that the proposed use is reasonable, and that it is impeded by the restrictions. My decision will therefore focus on the evidence of the objector and the applicants, together with the expert report of Mr Matthews and my observations during my inspection, to determine whether impeding the proposed use secures to the objector any practical benefits of value or advantage.
28. The alternative application for modification under ground (c), that the proposed modification will not injure the persons entitled to the benefit of the restrictions, can be dealt with in the light of my finding under ground (aa).

The objection

29. Ms Cochrane's reasons for objecting to the application arise mainly from her experience of living next to the Property during the period in 2022 when it was in operation as a care home for two children. She stated that during that period there were numerous visits from the police, and on some occasions, ambulance staff. A front window had been smashed by a child, with glass scattered across the street, and on another occasion a perfume or aftershave bottle was found smashed outside the Property with broken glass on the street. She observed that interior damage to the Property, for example to window blinds, had required repairs to be made on numerous occasions. Shouting and banging were heard, sometimes late at night, causing disturbance to neighbours.
30. Ms Cochrane and her husband have a young family, aged four and seven in March 2023, and have concerns about the potential impact on them of disturbances at the Property, particularly in the summer months when children from both houses would be in their gardens.
31. Ms Cochrane had an overall concern that the value and saleability of their home would be affected by modification of the restrictions to allow an ordinary residential property to be used for a business of this nature, with additional cars coming and going. In the event of modification Ms Cochrane wished to claim compensation of £40,000.

The evidence of the applicants

32. The applicants are a married couple, each of whom is a qualified social work practitioner with about 20 years of experience working with vulnerable children in communities, residential units and foster families. They have a passion for their work and have seen a need for more care homes such as one nearby in the same residential estate. They have their own family home in Romford and purchased the Property specifically to use as a

children's home for two to three sibling children. The maximum of four approved in the planning permission is unlikely to be necessary, but is available if needed.

33. They explained that the ethos of a care home is to provide as normal a family home as possible, in a location which is not distinguished from properties on the rest of the street. Each care home must have a name in order to be registered, and the registered name for the Property is Peniel Tower House, but this is not displayed anywhere. Children who have suffered trauma will have issues, but they are constantly supervised and supported, and issues do not spill into the community but are managed inside the home, as they would be in any family.
34. The ratio of carers to children is usually one to one, as each child in care has a dedicated support worker, but for three siblings it would be two to three staff and for four children it would be three staff. Carers work day shifts and night shifts, the latter from 10.00 pm to 10.00 am with an hour of handover at each change. At night one carer is always awake, there being a changeover between the waking and sleeping carers during the night shift.
35. The two children in residence from January to November 2022 were looked after by at least two qualified and experienced staff at all times, under supervision of the applicants. During that period no complaints were received from neighbours in respect of noise and the police were not called out as a result of any neighbour complaint. The applicants confirmed that the police and ambulance services were called out several (up to five) times in 2022, because the support workers must do that when someone is at risk, for example if a child self-harms, even when they remain in control of the situation.
36. The garage at the Property is used for storage so only a single space on the drive is available for parking. However, many support workers use public transport so would not need to park a car, and those who drive will often park in a neighbouring street so that there is only ever one car at the Property.
37. Modification of the restriction would enable the property to become Ofsted registered, which would involve regular inspection by them and other independent services to ensure that it remains a safe and nurturing home for children.

Expert valuation evidence

38. Mr Matthews is a Fellow of the RICS, an RICS Registered Valuer and a member of the Expert Witness Institute with over 35 years' experience of land and property matters in Essex and south east England. He acts regularly as an expert witness in property and valuation matters. Mr Matthews had received instructions from the applicants' solicitors to prepare valuations of the Property and No. 4 and to consider whether modification of the restrictions would have any adverse effect on the value of the latter.
39. Mr Matthews observed that a large number of properties in this part of Essex are used as dwellings for assisted living in order to provide accommodation for both adults and children who require either round the clock or regular care to facilitate their special needs. The providers of assisted living care adopt a range of business models. Where the property remains in the ownership of the residents, the planning use remains classified as C3 but, where the extent of care provided is more significant, planning permission for change of use to C2 or C4 (HMO) is required.

40. Reference was made to a house in Braintree where an application had been made in May 2021 for a certificate of lawfulness for use as a supported living house for up to five children aged 16 to 17, with one member of staff on site. The Council had decided that the proposed use would not amount to a material change of use and would not require planning permission. Within recent years three other properties, in Braintree, Great Baddow and North Weald, had been granted permission for change of use to C2 and the case officers of the relevant councils had considered that the impact on neighbouring residential amenity would not result in any undue or unacceptable impact for nearby properties.
41. Mr Matthews considered that there would be dozens of houses in the residential estates of Braintree providing supported living services, some quietly occupied without the need for planning consent, all with no measurable effect on the value of other residential properties in the locality. It is only when an application for change of use is made that the attention of local residents is drawn to the situation. It was his opinion that the future use of the Property for C2 assisted living would not be significantly different to the use of any other nearby four bedroom house because the children residing at the Property would be closely supervised by resident carers.
42. Mr Matthews placed a market value on the Property, as at 26 July 2023, of £450,000 and a value on No.4 of £385,000. It was his opinion that C2 use of the Property would have no adverse impact on this value.

My inspection

43. Hereford Way is a pleasant cul-de-sac of detached houses within an extensive development of similar properties. The street falls away slightly on a gentle curve. The Property sits on the corner of another small cul-de-sac, with the side garden sloping down to that road, so the only property in close proximity to it is No. 4. The houses vary in design and size, but almost all have only a single garage with a single parking space on the drive. Additional parking therefore needs to be on the street, and those vehicles I saw parked were perched half on the pavement to avoid blocking the road for wider traffic such as delivery vans. However, I visited late morning on a weekday so it is likely that many residents' cars were not in situ.
44. I was able to inspect all the rooms at the Property and walk in the garden to the rear and side. It has not been occupied since November 2022, so inevitably lacked a homely feeling, even though basic furniture remained in the bedrooms and living rooms. Institutional features included named cupboards in the kitchen, locks on bedroom doors and a monitoring camera on the stairs. The garden was mostly laid to rough grass, which appeared to have been strimmed, with a sitting out area and garden furniture in front of the conservatory. The garden was otherwise notably empty of ornamental planting and features. The boundaries are fenced with vertical board timber panels. Because No. 4 sits at a higher level than the Property, its boundary fence sits on top of a brick wall of over 1 metre in height, providing a high screen between the two gardens.
45. The entrance to No. 4 is set back slightly from that of the Property, although there would still be an awareness of comings and goings at the front. I did not go into every room in No.4, but inspected the rear garden from where the occupiers would be most aware of any activities at the Property. The garden is small and mostly paved, with a raised and enclosed grass play area against the rear boundary. It has panel fenced boundaries either

side, to the Property and No. 2, and at the rear to two other properties, giving it exposure to four sets of neighbours. However, because No. 4 sits at a higher level than the Property, it may be less exposed to the activities there than those in the other gardens.

Does impeding the proposed use secure any practical benefits of value or advantage?

46. I have sympathy with the evidence of Ms Cochrane, based on her experience of living next to the Property for a period of 11 months when it was in use as a residential care home as proposed by this application. I can understand the concern that she and her husband have regarding the potential for disruptive events at the Property to impact on their enjoyment of No. 4 and on the experience of their young family when in the garden.
47. The applicants acknowledged that there had been police and ambulance call outs to the Property during that period, and their explanation that it is a requirement to request these in certain circumstances is helpful. They have been open about the fact that the Property would become a home used within a business, rather than a traditional family home, although there would be nothing done to prevent it from reverting to normal residential use at a future sale.
48. Mr Matthews' report was helpful in explaining that it is not uncommon for houses in residential areas around Braintree to be used as residential care homes, sometimes without the need for a planning application which draws attention to the situation. I note that there will be a range of uses and classifications of properties accommodating children in care, depending on the age profile and number of children.
49. I accept that No. 4 is the property most exposed to activities at the Property, but I also take into account the fact that the difference in level between the two properties provides more protection and separation of the rear gardens than is available for the other adjoining properties. Ms Cochrane reported a number of incidents which troubled her during the period when children were in residential care at the Property, but did not go so far as to say that these were regular occurrences. She was concerned about potential for disturbance during the summer months when children from both houses would be outside, but did not report any particular incidents that had happened in that respect. Despite the occasional attendance of the police at the request of the applicants' staff, Ms Cochrane had not had cause to seek their assistance herself and her evidence did not identify anything which would have justified any formal intervention. It may fortunately be uncommon, but any garden of a residential property has the potential to host occasional activities which other residents might find disruptive or unpleasant. When necessary, such situations can usually be dealt with by polite neighbourly requests for moderation or, in extreme cases, by reporting anti-social behaviour.
50. The applicants have explained that in order to get Ofsted approval, and therefore be regulated by them, they need modification of the restrictions to ensure that the care of children can continue without the risk of interruption. I understand that Ofsted regulation of a care home is concerned with the standard of care for the resident children, rather than any impact on the neighbours and the outside environment, but it would provide an assurance that the care activity being conducted at the Property was monitored and regulated.
51. The limited scope for on-street parking for visiting cars has the potential to cause frustration between neighbours, but I see that as a general problem in Hereford Drive

rather than one specific to the two properties. It is unusual for cars to be parked inside garages so, with only single parking spaces on most driveways, I would expect any household with more than one car, or when receiving visitors, to have a car parked on the street. In fact, an advantage of the Property's corner location is that the side boundary runs along the adjoining cul-de-sac. On the day of my inspection the applicants' car was parked there without causing an impact on any other property. I accept the evidence of the applicants that when a house is used as a care home the intention is not to draw attention to that use, and that it would be unusual for several cars to be parked there at once.

52. The final point made by Ms Cochrane concerns the potential for her property to be devalued or become less saleable because modification of the restrictions would leave it located next to a property used in a child care business. I take the concern seriously, but there are many features of a property which can make it appealing or not to different prospective purchasers and discerning the impact of one feature alone is hard even for property valuation experts. Mr Matthews stated his expert opinion that the proposed use of the Property would have no adverse impact on No. 4 or any property in the locality. Another expert may have stated a different opinion, but I did not have the benefit of any further evidence. I accept the thrust of Mr Matthews' opinion, although I would put it in terms that there would be no discernible adverse impact, rather than no adverse impact at all.
53. Having reviewed all the evidence, and in the light of my site inspection, I do not find that impeding the proposed user secures any benefit of value or advantage to the objector.

Other matters

54. S.84(1B) requires the Tribunal, when determining whether s.84(1A) applies, 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 planning officer's report for the planning permission at the Property, and Mr Matthews' review of other consents in the area, provide evidence that there is a discernible pattern for the grant of consent for change of use from C3 to C2. That pattern provides some support for the application.
55. 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. The restrictions were created firstly by the 1997 transfer in anticipation of the wider residential development, and then in respect of the particular plot on which the Property sits by the 2000 transfer. Both restrictions are only 20 years old, and still have general relevance to the enjoyment of residential property in a residential area. I do not consider that the spirit and intention of those restrictions is offended by this modification to permit residential occupation by children under care and supervision.

Determination

56. I am satisfied that ground (aa) is made out and that I have discretion to modify the restriction which impedes a reasonable use of the Property and does not secure the persons entitled to the benefit of it any practical benefits. It follows that ground (c) is also made out because the proposed modification will not injure those persons. Nothing in the circumstances of the application, including the applicants' brief use of the Property in 2022 in breach of the restrictions, causes me to regard this as a case in which the Tribunal should refuse to exercise its discretion.

57. The following order shall be made:

The restrictions in the Charges Register for 6 Hereford Drive, Braintree, Essex CM7 9FX shall be modified under section 84(1)(aa) of the Law of Property Act 1925 by the insertion of the following words:

“Provided that the use of the property as a residential care home (C2) for up to four children/young persons subject to the conditions attached to the grant of planning permission on 11 February 2020 by Braintree District Council under reference 19/01899/FUL shall not be a breach of this restriction.

Reference to the above planning permission shall include any subsequent planning permission that is a renewal of that planning permission and any other matters approved in satisfaction of the conditions thereto.”

Mrs Diane Martin MRICS FAAV

31 October 2023

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.