



Neutral Citation Number: [2024] UKUT 00164 (LC)

**Case No: LC-2023-157 IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925**

6 June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – redevelopment of the site of a former dwelling house destroyed by fire – renewed application with range of redevelopment proposals for one or two houses – some proposals without planning permission – whether restriction secures practical benefits of substantial value or advantage – s.84, Law of Property Act 1984 – application refused

BETWEEN:

NIGEL JAMES RUTHERFORD BRIANT

Applicant -

and-

HUGO JOHN BALDACCHINO

Objector

**Smugglers Hyde,
47 Brook Lane,
Corfe Mullen,
Wimborne,
Dorset, BH21 3RD**

Mrs Diane Martin MRICS FAAV

**7-8 March 2024
Havant Justice Centre**

The applicant representing himself
Mr Charles Auld, instructed by Porter Dodson, for the objector

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The following case is referred to in this decision:

Briant v Baldacchino [2020] UKUT 0206 (LC)

Introduction

1. This is a second application by Mr Briant to obtain the modification of a covenant which prevents him from developing his own land to the extent he would like, his first application having been refused in 2020 (see *Briant v Baldacchino* [2020] UKUT 0206 (LC)). Mr Baldacchino objects to this application, as he did to the last.
2. The application land, 47 Brook Lane, is a plot extending to 0.14 ha, on which was sited a small partly thatched period cottage known as Smugglers Hyde. It was originally owned, together with the objector's land, by Mrs Rosebud Proctor. It is understood that in 1987 she sold the whole to Mr and Mrs Stanley and is believed then to have had second thoughts. On 2 September 1987 Mr and Mrs Stanley sold the application land back to Mrs Proctor, subject to a covenant for the benefit of the part they retained (now 49 Brook Lane) in which, as transferee, she agreed:

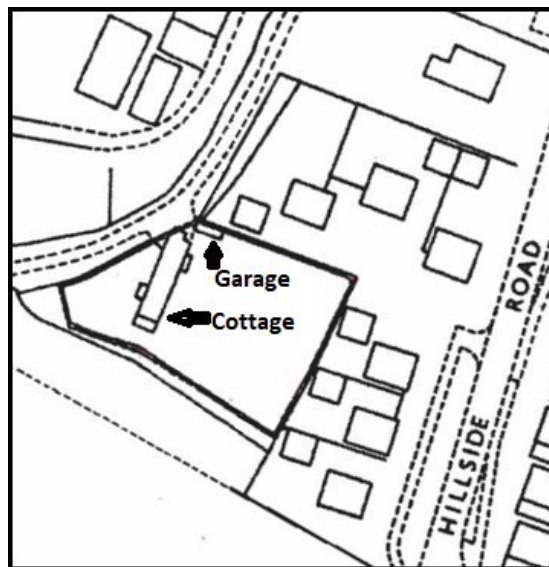
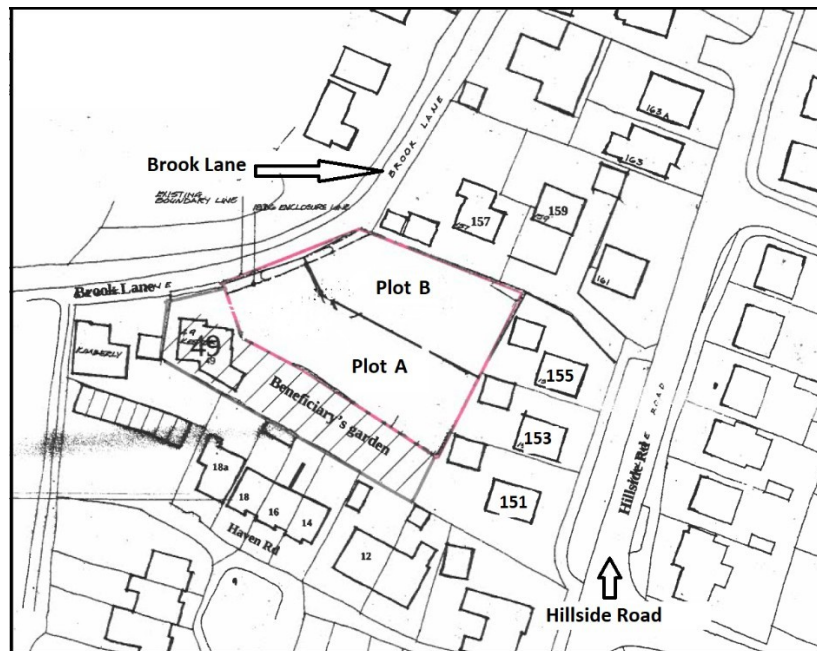
“Not to erect any further building of any kind on the property hereby transferred save for an extension to the existing garage and then only in accordance with plans first submitted to and approved in writing by the Transferors (such approval in respect of plans for any garage extension not to be unreasonably withheld).”
3. A house known as Kestor was built on the retained land in 1989, and was purchased by Mr Baldacchino, the objector, in April 2014.
4. Mrs Proctor died in 2007 and shortly afterwards Smugglers Hyde was badly damaged by fire. The applicant, Mr Briant, purchased the application land in 2009. Much of the original fire damaged house has been demolished, leaving only a tiled two storey gable end section close to the boundary with Kestor.
5. Since purchasing Smugglers Hyde, Mr Briant has made 32 planning applications to Dorset Council, all for single dwellings, most of which have been sited so as to permit severance of the plot allowing two dwellings to be built, either side by side at the front of the plot along Brook Lane, or at the front and rear of the plot. 15 planning permissions have been granted of which one, granted in 2011 and renewed in 2014, was for a replacement dwelling very similar to the original Smugglers Hyde. The objector says he would support this proposal for a proposed modification, if indeed one was needed simply to rebuild what was previously there. The applicant says that an issue has arisen with the highways department, over encroachment of the original footprint onto the dedicated width of the adjoining lane, which precludes development of that proposal. A further permission for a single replacement dwelling, of larger scale, was granted in 2016, leaving scope at the rear of the plot for a further house to be provided. This proposal was considered in a 2019 application to the Tribunal (see below) but modification of the covenant to allow it was refused because of its overbearing size and proximity to Kestor.
6. As various planning permissions have been granted, Mr Briant has engaged in negotiations with Mr Baldacchino for a release or modification of the covenant, but Mr Baldacchino maintains that only a house which respects the original location and scale of Smugglers Hyde is acceptable to him, so the parties have never been able to reach an agreement.

7. In 2019 Mr Briant made an application to the Tribunal for modification of the covenant, under grounds (a), (aa) and (c) of s.84(1) of the Law of Property Act 1925, to permit construction of one or two of five dwellings with planning permission. The application was refused, but elements of the decision by the Tribunal (Mr Andrew J. Trott FRICS), *Briant v Baldacchino* [2020] UKUT 0206 (LC) (“the 2020 decision”) have been relied on by both parties in this application.
8. Mr Briant made a new application on 16 March 2023 seeking modification under grounds (aa) and (c) of s.84(1) to allow any one or two of seven dwellings to be constructed, of which only four have a current planning permission. Previously Mr Briant was represented by counsel, and had instructed an expert, but in this application he represented himself and adduced no expert evidence.
9. The objector was represented previously and in this application by Mr Charles Auld, who called Mr Nigel Jones BSc FRICS ACI Arb of Chesters Harcourt in Yeovil to give expert evidence. Mr Jones has been a chartered surveyor for 43 years, working in Dorset and Somerset as a general practitioner in residential and commercial property. He has been a member of the President of the RICS’s Panel of Independent Experts and Arbitrators for 25 years. He was instructed by the objector’s solicitors to provide a valuation of Kestor with the benefit of the covenant, and his opinion of the loss or disadvantage to the objector, and impact on value of Kestor, if it is modified to permit implementation of one or more of the applicant’s proposals. Mr Jones’s first report was dated 27 June 2023, at which stage none of the applicant’s proposals had planning permission. His supplemental report, dated 4 January 2024, provided an update on market values but still pre-dated the granting of three of the four permissions now extant.
10. I made an inspection of the application land, and of the garden and interior of Kestor, on the afternoon of 6 March 2024. I was accompanied by the applicant and Mr Auld on the application site and also by the objector when I viewed his home and garden. The applicant had been asked to lay out lines to provide indicative footprints, ideally to be agreed with the objector, of his preferred combination of dwellings for the two plots and, if feasible, to provide flags indicating the top height of each building. This ambition was not achieved, although the applicant had positioned some structures and lines in an attempt to demonstrate the extent of his proposals. He referred me to the roof heights of neighbouring dwellings, as shown on his site section plans, as a guide to comparative heights of the proposed buildings.

The factual background

11. Corfe Mullen is a large village which, together with adjoining Broadstone, forms a northern extension to the town of Poole. The application site and the objector’s property are on Brook Lane, at the western edge of the village where the built up area opens out into countryside. The density of houses along Brook Lane is conspicuously lower than that of the adjacent roads.
12. The location plan below shows the application land, with the two plots A and B proposed for development, and the objector’s land hatched. Brook Lane is adopted and made up in its higher reaches, but is unadopted and unmade along the stretch shown on the plan, where it has the status of a bridleway. The land slopes up away from Kestor (No.49)

northwards towards 157 Hillside Road and also eastwards towards 155 and 153 Hillside Road.



13. The larger scale plan above, taken from the title plan for the application land, shows the orientation and size of the original cottage called Smugglers Hyde, with its access and garage at the northern corner. At the hearing of the previous application a statement of agreed facts had been provided, which was summarised in the decision at paragraphs [16] and [17] as follows:

“16. At its closest point the remains of the existing house at Smugglers Hyde is 4.5m from the boundary with Kestor. This is a two-storey gable end with a ridge height just under 8m above the level of the boundary. The gable end is 4.5m wide. At first floor level there is a bedroom window facing south towards Kestor. At ground floor level there is a door with windows either side. At the rear of the property, now demolished, was a single-storey flat roof sun room which extended a further 2.5m to the east. At

the front of the house, also demolished, was a pitched roof porch extending 1.6m to the west of the main elevation with windows facing east towards Kestor. Smugglers Hyde was 20.6m long with its main elevations facing west (front) and east (rear). The windows in these elevations did not directly overlook Kestor. There is a detached garage at the far north west of the plot.

17. There was no agreement about the accommodation in the original cottage. Mr Briant produced “indicative” floor plans apparently showing how the cottage could be reconfigured. This showed five bedrooms, including two at ground floor level, one of which was accessed through the kitchen and the other through the living room. There was a single (windowless) bathroom on the first floor and a WC on the ground floor. No stairs are shown at first floor level. I do not consider this to be a sensible or realistic layout. Smugglers Hyde was a cottage with limited accommodation being only one room deep.”

14. Since purchasing the site the applicant has opened up a second access, adjacent to Kestor, which enables the site to be split into two plots, each with their own access.
15. Kestor is a four bedroom, two storey house with a part single storey element at the rear. This includes a sitting room, dining area and kitchen extension, all of which have views over the patio and fish pond up through the long rear garden with its trees and mature shrubs. At the far end of the garden the objectors have created a secluded sitting area with summer house. The house is located at the front of its plot, close to Brook Lane, with a hardstanding/parking area for three cars, leading to an integral garage. The house fills almost the whole width of the plot, sitting very close to the boundary with the application land where the line of the boundary makes a dog-leg. At that point, in the narrow gap between the house and the boundary, is a pedestrian garden gate from the front parking area to the rear of the house and the garden. The boundary with the application land is the responsibility of the applicant and is fenced with 6ft high close-boarded vertical timber panels provided by him since he bought the application land. The long boundary on the south side of the garden adjoins the rear gardens of five properties on Haven Road, but this is less apparent due to the mature trees and shrubs inside the boundary fence.

The legal background

16. Section 84(1) of the Law of Property Act 1925 gives the Upper Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions. The conditions relied on by the applicant in this case are (aa) and (c).
17. Condition (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.

18. 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.”
19. Where condition (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.
20. 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.
21. The applicant’s case is that the restriction should be modified under ground (aa), because it impedes a reasonable use of the land and does not secure to the objector any practical benefits of substantial value or advantage. The application was also made under ground (c), but the submissions focused on ground (aa).
22. The case for the objector is that the restriction was imposed to preserve the tranquillity of the garden behind Kestor, the enjoyment of which is vulnerable to activity from the adjoining higher ground of the application land. The area around Kestor has become increasingly urbanised and had the restriction not been in place since 1987, then the tranquillity would inevitably have been destroyed already by development of two or even three houses on the application land.
23. Whilst the objector accepts, following the 2020 decision, that a development of two houses is a reasonable use of the application land, he says that in preventing two houses the restriction secures a benefit of substantial advantage to his property. Moreover, modification of the restriction to allow just a single replacement dwelling in one part of the application land would create a “thin end of the wedge” situation whereby the advantage of being able to prevent development of a second dwelling might no longer be substantial.

The proposed developments

24. The applicant invites the Tribunal to choose from a menu of seven possible developments, and suggests that three potential replacement dwellings for plot A (RD1, RD2 and RD3) should be considered first, and if modification is permitted for one of these then three potential new dwellings for plot B (ND1A, ND1B and ND2) should be considered. Should the Tribunal not approve any of the plot A proposals, then the plot B proposals should be considered independently. Should none of those be approved then the Tribunal is asked to consider what is described as a reinstatement dwelling (REIN1),

although plans show that it would not have the same footprint as the original dwelling, and would leave plot B undeveloped.

25. This singular approach makes it difficult for the Tribunal, and the objector, to understand and have confidence in the applicant's true intentions for development. At a case management hearing on 22 September 2023 I explained that the Tribunal would only rarely modify a restriction to permit development which was not clearly defined by a planning permission. It has been a particular feature of this application that the detail of the various proposed developments has evolved constantly. I warned the applicant that before permitting modification on ground (aa) it is necessary for the Tribunal to assess the likely impact on the objector of the proposed development, and therefore the scale of benefit secured by the restriction. For that reason only proposals defined by planning permission were likely to have any real prospect of success. An extended timescale was agreed with the parties to allow for decisions to be received on the latest planning applications, and then for the objector's expert to provide a supplemental report taking those decisions into account.
26. By the time of the hearing the applicant's four latest proposals had received planning permission, being RD2 and RD3 on plot A, and ND1A and ND2 on plot B. In each case the planning officer's report and subsequent permission concerned only the single dwelling and plot under consideration. Reference was made to proposals for the alternative plot, but they were not considered together.
27. As an illustration of the difficulty in pinning down the detail of the applicant's proposals, the drawings approved in January 2024 for RD2 had been amended from those submitted with the application to the Tribunal. The applicant did not attempt to hide the changes, and I allowed the approved version to be substituted in the application. Of more concern is the fact that the approved drawings for ND1A and ND2 show plot B to be rectangular, as in the site plan above, whilst the approved drawings for RD2 and RD3 each show plot A cut short to allow plot B to have an L-shape at the end of the garden adjoining Kestor. The applicant says that he removed the rear of plot A from the planning applications for RD2 and RD3 to prevent the planning authority from revoking permitted development rights over the area where he would intend to site some garden outbuildings.
28. Of the remaining three proposals without planning permission, RD1 received a recommendation for approval in January 2023, subject to a s.106 agreement not to erect a previously consented dwelling on plot B. The s.106 agreement was never completed, but the applicant says that as the permission on plot B has lapsed, planning permission is sure to be obtained easily. None-the-less, no planning permission exists for RD1 and for the reasons I explained to the applicant at the case management hearing in September 2023 I am not prepared to modify the covenant on ground (aa) without a clearly defined development proposal.
29. ND1B, is described by the applicant as a scaled back version of ND1A. By this logic he says that it is sure to be acceptable for planning permission. But, again, without planning permission I am not prepared to modify the covenant to permit it.
30. Finally, REIN1 has not been the subject of a planning application and so, again, the application on ground (aa) fails.

31. Attention is therefore focused only on the four proposals with planning permission.
32. Each of the development proposals would include outbuildings. Approved plans for RD2 and RD3 show a double garage and a cycle store adjacent to the entrance to Brook Lane, backing on to Kestor. Approved plans for ND1A and ND2 do not show any outbuildings. However, earlier versions of plans submitted with this application, when plot A was at full length, show a greenhouse, home office and garden store at the end of plot A, and separate garden studio and garden store buildings at the end of plot B. The applicant says he did not

need to show the garden outbuildings on the plans submitted for planning permission, because they would be permitted development within the planning system, but he acknowledges that the provision of outbuildings is prevented by the restriction which would therefore require modification to permit them.

33. The approved floor plans show gross internal floor area at each level of the proposed buildings. These were agreed by the parties, as summarised below, for comparison with the original dwelling. The applicant makes the point that an additional 17 sq m of attic space in the original cottage could have been developed into habitable space by the installation of one or more windows, without contravening the restriction.

	Gross internal floor area (sq m)				
	Original	RD2	RD3	ND1A	ND2
First floor	39.7	42.8	67.5	62.3	0.0
Ground floor	88.1	105.0	134.3	130.0	129.0
Total above ground	127.8	147.8	201.8	192.3	129.0
Basement	0.0	54.5	70.4	0.0	50.0
OVERALL	127.8	202.3	272.2	192.3	179.0

34. The summary of floor areas shows that each of the proposed dwellings has a considerably larger total floor area than the original dwelling. RD2, RD3 and ND2 each include more than 25% of the total floor space within basement accommodation.
35. The parties proceeded on the basis that the benefits of the restriction should be considered by comparing the effect on amenity and/or value of allowing one or more of the proposed developments, with the effect of providing a replacement building, or modern equivalent of the same size, on the original footprint of Smugglers Hyde. That consensus assumes that the covenant would not restrict a like for like reconstruction of what was destroyed by fire in 2007.
36. Mr Auld submitted that the 2020 decision, at paragraph [102], had already determined that prevention of the erection of two properties secures to the objector practical benefits of substantial advantage. The paragraph reads:

“I have found that by impeding any of the two-house schemes (A1F or A2F with A3R or B1F with B2F) and all the single house schemes (A1F, A2F, B1F and B2F), the restriction secures practical benefits of substantial advantage to the objector. In reaching this conclusion I have considered the comparative effect of each proposal against that of a replacement for Smugglers Hyde. In each case the effect

of the proposed development would be more prejudicial to the amenities secured to the objector by the restriction to a degree that establishes substantial practical benefits.”

37. The applicant challenged Mr Auld’s interpretation of the paragraph and I agree with the applicant that the determination concerned only the particular two-house schemes considered in that earlier application.
38. The proposed developments for each plot will now be considered in more detail, together with the submissions of the parties, including expert evidence, on whether in impeding its implementation the restriction provides to the objector practical benefits of substantial value or advantage.

Plot A

39. For the plot A proposals the applicant focuses attention on the scale of the new building at first floor level, by comparison with the original dwelling, in an attempt to demonstrate an improvement in the impact on Kestor. The objector takes into account the scale of the whole building, including the length of the ground floor structure alongside his boundary, and the impact of the basement accommodation.

RD2 – Planning reference 2023/04227 approved 12 January 2024



40. The approved plan for RD2 shows the footprint of the original dwelling across the two plots, indicated by a faint broken line, and in plot B the footprint of proposal ND1A is indicated. RD2 has two bedrooms, a bathroom and ensuite shower room on the first floor. At ground floor is a large kitchen/dining/ family room, a living room, a study and a bathroom. At lower ground floor (basement) is a media room, a home gym, a utility room and shower room. The basement is only accessed internally, but the media room benefits from light created by a stepped terrace on the south east corner and the home gym from a light well at the south west corner.

41. The southern elevation of RD2, facing Kestor, has a hipped roof sloping away from the boundary, whereas the original cottage had a full height elevation up to the ridge. The ridge height of RD2 is 0.6m lower than the original tiled end section. At first floor the elevation is 4.87m from the boundary, compared with 4.5m before, and has one window as before, but in this case at high level. At ground floor the building is 1.74m closer to the boundary, being only 2.76m away. However, this single storey elevation has no door, unlike the original, and only one window at high level. On the rear elevation the original glazed garden room is replaced with a single storey lean-to structure facing out into the rear garden, away from Kestor. The gable end of the building and the single storey element closest to Kestor are 5.2m wide, compared with the original dwelling at 4.5m wide, but the other single storey elements to the south and north of the proposed dwelling add a further 5.6m of width to the structure.

RD3 – Planning reference 2023/04067 approved 12 January 2024



42. As for RD2, the approved plan for RD3 shows the footprint of the original dwelling and the footprint of ND1A. RD3 has a total floor area 35% larger than RD2. It has three bedrooms, a bathroom, an ensuite shower room and a study on the first floor. At ground floor is a fourth bedroom with en suite shower room, a living room, a large kitchen/living/dining room, a utility/WC and separate laundry room. In the basement are a media room and home gym, both larger than for RD2, and a bathroom. As with RD2, light to those rooms would come from a stepped terrace and a light well.
43. The southern elevation of RD3, facing Kestor, has a cropped hipped gable, similar to RD2, but the width of the gable end is 1.0m greater at 6.2m. The ridge height of the gable end is the same as for RD2, but the ridge height of the main part of the house is higher. The first floor of the gable end is 4.87m from the boundary, as for RD2, but a little wider. The separation of the single storey element from the boundary with Kestor is 2.64m along the full width of 11m. The applicant says that the ground floor level of RD3 along this elevation is lowered by 0.4m (compared with RD2) to compensate for the greater width.

There is a kitchen window in the single storey element which, under a planning condition, must have obscure glazing up to 1.7m. The first floor window is high level, as for RD2.

Submissions of the parties on plot A proposals

44. In the 2020 decision (at paragraph [109]) it was concluded that "...a more modest proposal, reflecting (but not necessarily replicating) what was on the application land before is more likely to succeed." I asked the applicant to confirm which of his proposals meets that criterion and he said that it is RD2, which he describes as a two-three bedroom dwelling. His preference is for RD3, which is bigger and better appointed, but he leaves it

to the Tribunal to decide which satisfies ground (aa). The applicant says that the design of RD2 is an improvement over the original dwelling because it has a hipped roof, a lower ridge height at the gable end, greater separation from Kestor at first floor level, no door in the elevation adjoining Kestor, and only high level windows at ground and first floor. He says it would therefore enhance the visual amenity of Kestor by comparison with the original dwelling and reduce overlooking into the property, thereby improving privacy.

45. In the planning officer's report recommending grant of permission the development is described as "...a two bedroom (with ground floor study) two storey dwelling...". The planning officer comments on the basement rooms as follows: "As these rooms are not principal living rooms, they are not required to afford the same light and outlook requirements as principal rooms (such as bedrooms and living rooms) and the poor outlook they would have is not a reason to refuse the proposal and addresses the Planning Inspector's concerns." This refers to the refusal on appeal of a similar planning application made in 2021 which showed two bedrooms in the basement. The planning inspector had commented that the outlook from, and light to, bedrooms in the basement would be poor and not allow acceptable living conditions.
46. RD2 is little different from the earlier refused application, except that the basement rooms have been renamed. The objector says that it is, in reality, a five bedroom dwelling when the ground floor study and two basement rooms, with their adjacent bathrooms, are taken into account.
47. In terms of impact on the enjoyment of Kestor, the objector fears particularly the impact of two new large family houses proposed to be built in a divided application site that sits at a higher level than his own property. Regarding proposals for plot A, his objections do not differentiate between RD2 and RD3, but he says that the generally greater mass of the proposed houses will be visible from Kestor and the greater capacity for residents will have an impact in terms of noise and intrusion, particularly from any buildings at the end of plot A, in the area excluded from the plot as shown on the approved plans. When the objector and his wife bought Kestor in 2014, it was the tranquil setting and the long garden which instantly appealed to them, and the end of their garden is a peaceful haven. They were reassured that the existence of the restriction would protect them from development over and above reinstatement of the original derelict dwelling.
48. The objector is concerned that the basement rooms will require noisy mechanical ventilation or air conditioning systems and also that excavation for a basement so close to his boundary will cause disruption to the water table and potential for waterlogging in

his (lower level) garden where he has a fish pond and a patio. Water run-off and drainage from the proposed development is a concern in general because of the proposed increase in hard surface area.

49. In terms of the impact on value of Kestor, it was Mr Jones's opinion that the market value of Kestor if it adjoined a new dwelling of the same size and position as the original cottage, would be £725,000. As things stand, it adjoins a derelict cottage in a site with a long history of planning applications, leading to uncertainty about future development and also the prospect of a dispute over potential modification of the restriction. These factors would cause a diminution in value to £650,000, but the benefit of the covenant might add £10,000 to lift value to £660,000.
50. In his report in June 2023 Mr Jones commented, with justification, that it was hard to determine exactly what was proposed for plot A, particularly in regard to outbuildings at the far end of the garden, which had been excluded from the area subject to a planning application. At the date of his supplemental report on 4 January 2024 there had still been no decision on the application for RD2 so his comments remained general. Mr Jones described Kestor as a relatively ordinary modern house, with orientation of the principal living accommodation to the rear looking over its long rear garden, which is its really valuable and attractive asset. Any substantial intrusion into the garden from an adjoining property would be a loss and disadvantage to Kestor. The higher level of the application land is particularly relevant.
51. Mr Jones considered that the proposed garage and cycle store buildings, which would back on to Kestor at its entrance, would not cause any loss or disadvantage to it. Neither would the proposed garden store and home office if they were to be built at the end of the garden adjoining Kestor. He considered that the main factor affecting value would be the proximity of the proposed houses on plot A, and their greater bulk, extending further along the boundary with Kestor than the narrow end of the original dwelling. The difference in levels between the application site and the garden of Kestor would cause the development to feel overbearing. Moreover, any development on plot A would leave the uncertainty of what might subsequently be built on plot B at an even higher level. It was his opinion that all of the proposed schemes, whether in isolation (leaving uncertainty as to the other plot) or in combination would cause significant loss and disadvantage to the objector.
52. Mr Jones did not differentiate between RD1 (not considered here), RD2 and RD3 in making an assessment that depreciation from his hypothetical value of £725,000 (with a modern but equivalent replacement dwelling) would be in the range of 10-15% (£72,500 to £108,750). He retained this view, even while acknowledging that RD2 and RD3 would cause less overlooking than the original dwelling. I asked him if he thought any other purchaser of the application land would be satisfied with confining themselves to development proposals for a small single dwelling in such a large plot. Mr Jones acknowledged that this would constrain the range of interested purchasers, probably to retired couples rather than families. The risk and uncertainty of future proposals and applications is why he considered the benefit of the restriction alone was no more than £10,000. With the benefit of control comes the prospect of controversy. Prospective purchasers of Kestor would be buying as a family home and would not want the cost and inconvenience of defending the restriction.

53. On behalf of the objector Mr Auld submitted that the applicant is obsessed with building two houses and that his approach is to keep pushing until he gets his way. His proposals for plot A are always sited close to the boundary with Kestor and always extend further east along that boundary than the original dwelling, which would have an impact on the enjoyment of Kestor's garden. Lights from the rear elevation of the house would be visible from the end of the garden, and the orientation of the rooms would enable overlooking of the summer house. A dwelling sited closer to the road, where the garage and cycle store are shown, would preserve the integrity of the garden.
54. Mr Auld submitted that the evidence of the applicant should be viewed with caution. He cannot be relied on to produce consistent documents, as some in the Tribunal's bundle were different from those in the objector's bundle, nor can he be relied upon to provide transparency in interpreting his proposals. His submissions, and his posts marking out boundaries on site, have focused only on the proximity and scale of the proposed buildings at first floor level, omitting to describe the full scale of the ground floor elements. His site section plans, showing the comparative heights of surrounding houses in Hillside Road, are misleading because they don't allow the perspective of distance. The applicant did accept that the last point had some merit since the plans were not produced using computer generated imaging (CGI).
55. Mr Auld further submitted that the applicant's extraordinary approach of using the Tribunal as a consultation process, described in the 2020 decision as "scattergun approach" is not excusable for a litigant in person who has already had the benefit of legal representation (albeit only after his application was made) and a decision on a similar application.

Discussion and determination of plot A proposals

56. The applicant has been at pains to explain how his latest proposals for a dwelling on plot A have been designed to minimise the impact on the objector of height, scale and overlooking. But even RD2, which is described as a two-three bedroom house and is more modest in size than RD3, has the potential for occupation as a five bedroom house in close proximity to the boundary with Kestor's rear garden, at a raised level. The fact that 25% of the floor area is at basement level brings to the fore the potential impact on Kestor of disruption to the water table and to surface water drainage, although no evidence was adduced on this. In the planning officer's report it was confirmed that the excavation required would be extensive, but the application site was said not to be affected by high ground water levels or surface water flooding risk. Retaining wall design and means of construction would be dealt with under Building Regulations.
57. From my inspection of the garden behind Kestor, looking over the application land at the gable end remains of Smugglers Hyde cottage, it is obvious that the greater length and mass of RD2 alongside the boundary, closer to it than Smugglers Hyde at ground floor level, would feel overbearing. The potential for occupation as a five bedroom house means that noise and intrusion from domestic activity in the outside areas of RD2, immediately adjacent to and above Kestor's garden, would inevitably have an impact on the enjoyment of it. I acknowledge the point emphasised by the applicant that the long boundary on the other side of Kestor's garden adjoins the back gardens of five properties on Haven Road, so it is already exposed to similar factors. But the fact is that the mature

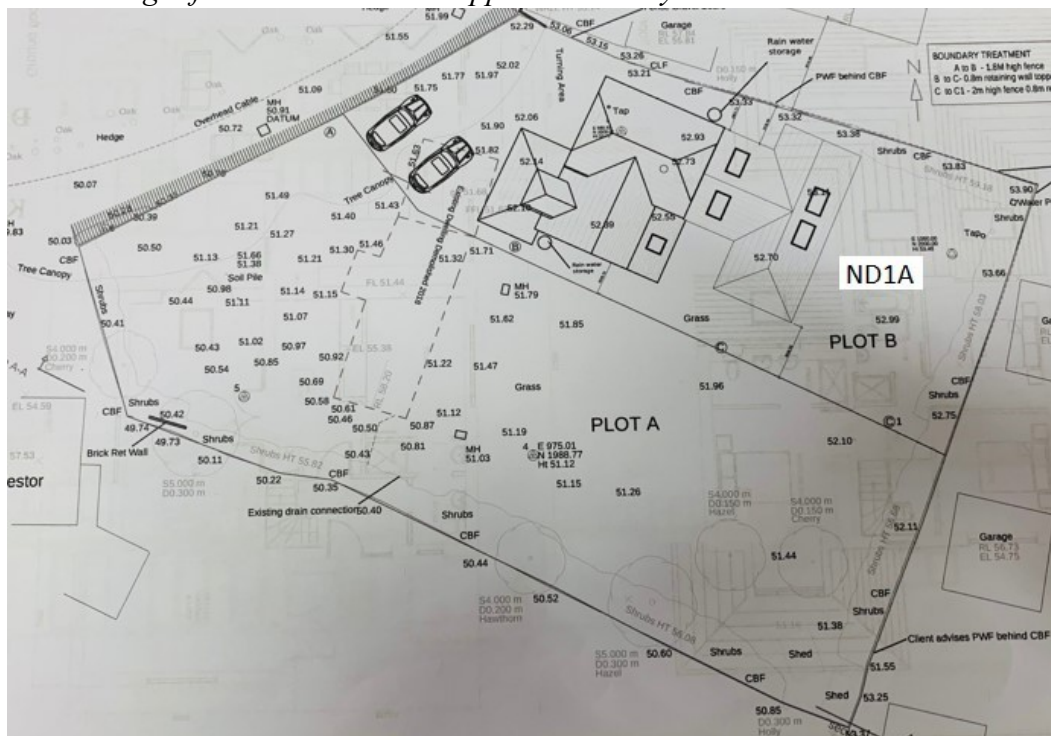
planting along that boundary, and the separation distance of the Haven Road dwellings from the boundary, mitigate the exposure to noise and disturbance.

58. I am conscious that since the objector purchased Kestor he has never had to live next to neighbours on the application land, so much of the garden tranquillity that he values so highly is derived from the lack of resident neighbours on that side. It is, therefore, important to consider only the additional impact which the applicant's proposals would create over and above use of the application land for a single replacement dwelling in compliance with the covenant. In this respect, Mr Jones's opinion on the view of prospective purchasers of Kestor is helpful.
59. It was Mr Jones's opinion that neither the location of the proposed garage and cycle store buildings adjacent to the entrance to Kestor, nor the likely installation of a garden store and home office at the end of the garden adjoining Kestor, would cause any loss or disadvantage to it. But the proximity and bulk of the proposed houses for plot A, at a higher level, would cause significant loss and+ disadvantage and have an impact on value.
60. I agree with Mr Jones that the two key factors in this application for modification of the covenant to allow development on plot A are proximity and bulk. I also consider that the objector's concerns about the construction of basement accommodation so close to the boundary are valid. The applicant has tinkered at the margins with dimensions and design features of the proposed dwellings, but the plain fact is that his proposed dwellings are significantly bigger than Smugglers Hyde and sited too close to the boundary with Kestor. I consider that in preventing either of the proposed dwellings RD2 and RD3 the covenant secures to the objector practical benefits of substantial advantage. I therefore have no jurisdiction to modify the covenant to allow development on plot A.

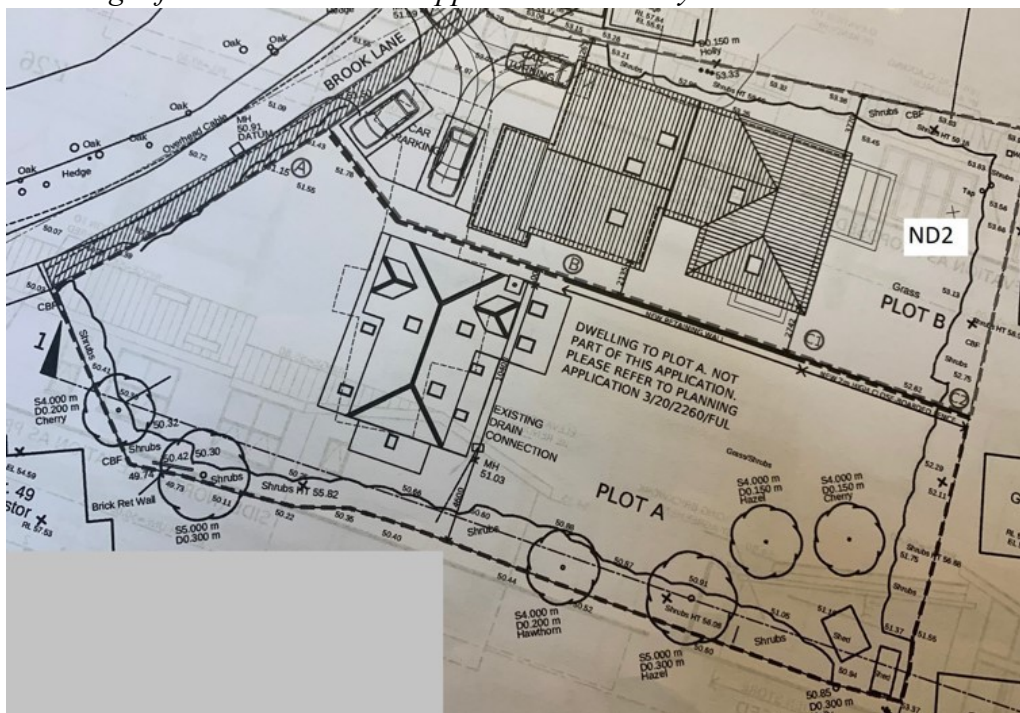
Plot B

61. In his proposed decision tree the applicant acknowledges that permission to modify the restriction to allow development of RD2 or RD3 on plot A might not be given. In that case he asks that separate consideration be given to development of ND1A on plot B, as the preferred development, or to ND2 as a fallback development should modification to allow ND1A be refused.
62. The vehicular access from Brook Lane to plot B is the original access to Smugglers Hyde at the north corner of the application land.

ND1A – Planning reference 2023/01483 approved 28 July 2023



63. ND1A has three bedrooms, a bathroom and an en suite shower room on the first floor. At ground floor below that section of the house it has a living room, large hall, study and WC/shower room. In the continuation ground floor, within the single storey part of the house at the eastern end, it has an L-shaped kitchen/dining/living area with access to the garden. This is the only one of the four proposed dwellings considered in this application which has no basement accommodation. A particular feature of the proposal, and a condition of the planning permission, is the maintenance for the lifetime of the development of a 2m high fence, standing on a 0.8m high retaining wall, along the majority of the boundary with plot A.
64. The applicant describes this proposed dwelling as more favourable for the objector than a proposal on the same site for which modification was refused in the 2020 decision but, as I explained in the case management hearing, this is a stand-alone application which will not be determined by detailed comparison with proposals from the previous application. None-the-less, the floor area of the accommodation, at 192.3 sq m, has been reduced considerably from the earlier proposal, particularly at first floor, to make a less intrusive structure.



65. The approved plan for ND2 shows in plot A the development known as RD1, which does not have an extant planning permission and is not considered in this decision. ND2 is different in character from the other proposed dwellings in that it is a single storey building with basement. The total floor area of 179 sq m is the smallest of any of the proposed dwellings, with 28% of that area provided within a basement. In the ground floor in the western section there is a kitchen/dining area, a study, hall and WC, with attached cycle and garden store. In the eastern section there is a living room, two bedrooms (labelled bedroom 2 and bedroom 3) and a bathroom. In the basement is a room labelled as a home gym, including a generously sized en suite shower room with double vanity unit (which suggests potential use as bedroom 1), a media room and a utility room.
66. The building would have a contemporary appearance, with shallow pitched gabled and asymmetrical roofs, and walls featuring a combination of render, vertical timber cladding and brick. As with ND1A, it is a condition of the planning permission, that the 2m high close boarded fence along the majority of the boundary with plot A be maintained for the lifetime of the building.

Submissions of the parties on plot B proposals

67. The applicant cites paragraphs from other Tribunal decisions which explain the assessment, in those cases, of loss or disadvantage caused by proposed development which does not adjoin an objector's property. But every application is unique and conclusions drawn on other application sites can be of no assistance in the circumstances of this application where distances, topography and design features will all be different from those considered elsewhere.

68. He says that the distance of 28 metres between Kestor and either of the dwellings proposed for plot B, and the screening provided by the 2m high boundary fence between plots A and B, mean that the development will have no material impact on Kestor's privacy or visual amenity. The objector will already be aware of the houses at 153 and 155 Hillside Road, at a higher level.
69. The applicant also relies on the fact that the existence of the original dwelling (or its replacement) would block the view of a dwelling on plot B, leaving the view northwards dominated by the gable end of 157 Hillside Road which sits at a higher level than plot B. The impact of light emanating from plot B would similarly be mitigated by a dwelling on plot A. In any event, efforts have been made to keep glazing in the southern elevation of ND1A and ND2, facing down towards Kestor, to a minimum.
70. The objector is concerned that from his garden a 2m high fence between plots A and B, viewed above a 2m fence on the boundary between his garden and plot A would stack up to look like a 4m fence in total. He also believes that from the peaceful end of his garden the lights in the eastern elevation of a new dwelling would be visible. Mr Auld submitted that the fence may be a condition of the planning permission but is unlikely to be the subject of enforcement action by the planning authority, so enjoyment of the objector's property is vulnerable to it being removed at some point in the future.
71. In his report Mr Jones considered that when viewed from Kestor's garden ND1A, on higher land, would be a substantial and dominant building, which would cause loss of value to Kestor in the order of 8-10%. It was his opinion that if plot B were developed in isolation there would be a further impact on value of Kestor caused by concern as to what would happen on plot A, leading to an overall diminution in value from £725,000 of 1015%. Mr Jones did not distinguish between ND1A and ND2 in terms of their impact, notwithstanding that ND2 is a single storey building and would inevitably be less visible from Kestor's garden.

Discussion and determination of plot B proposals

72. I note that the report of the planning officer, in which grant of planning permission for ND2 was recommended, contains an apparent discrepancy over the number and location of bedrooms, and therefore of the significance of living conditions in basement rooms. Although ND2 is described as a three bedroom single storey dwelling, only two ground floor rooms are labelled on the approved floor plans as bedrooms. A planning inspector had refused a previous similar application on plot B because of the lack of satisfactory living conditions for future occupants with regard to outlook from and light to basement bedrooms. In this proposal bedroom 3 on the ground floor has a window in the northern elevation which was considered by the planning officer to have less than acceptable levels of light as a result of being only 2.5m from the boundary fence and wall to 157 Hillside. The rooms in the basement were also considered to have a limited outlook and to receive limited light, but the report stated: "However, the rooms would not be principal rooms and would not require the same standard of outlook as bedrooms or living rooms and it is considered that the home gym, media room, utility room and en suite proposed are acceptable and there is no objection on the grounds of poor living conditions." The report continues: "The proposal would offer acceptable outlook to the other principal rooms and

it is considered that the restricted outlook from the bedroom window on the north elevation is not reason enough to warrant refusal of the application.”

73. The position with the approved plans for ND2 is therefore not dissimilar from that already discussed in connection with RD2 on plot A, where the relabelling of basement rooms has been sufficient to get around concerns previously expressed by an inspector on the adequacy of living conditions in those rooms. The likely reality is that the basement room in ND2 labelled ‘home gym’, with its en suite shower room, would be used as bedroom 1 and would leave two of three principal rooms with inadequate living conditions – a proposition for which planning permission may have been refused.
74. My deductions from this analysis support the submission of Mr Auld that the applicant has been relentless in pursuing planning applications for two large houses on the application site, making minor changes to proposals for each plot then resubmitting as new and separate applications, to the point where planning resistance has been overcome. I note a comment in the planning officer’s report dated 10 January 2024, for the committee which considered the long planning history on the site and then approved RD2, RD3 and ND2, stating that the significant number of applications on the site is a result of the applicant attempting to satisfy a covenant on the land. In my view the applicant has not demonstrated any real desire to satisfy the covenant, only a desire to maximise the built area of two dwellings on the application land, with some lip service paid to their potential impact on the objector.
75. Although ND2 is a single storey building, it is a house with a substantial footprint sitting on the highest ground in the application land. However, sitting behind a 2m high fence, its mass and its lights would be less visible from Kestor’s garden than those of ND1A and, by virtue of the separation distance across plot A, the impact of noise and intrusion would not be a serious concern. It is arguable that the covenant does not secure to the objector practical benefits of substantial advantage in impeding a modification to permit ND2 and I would hesitate to refuse modification based on these impacts alone.
76. The main thrust of the argument against modification for development on plot B is that it would allow severance of the site and leave plainly open the question of what will happen next on plot A, causing uncertainty and concern in the mind of a prospective purchaser of Kestor and therefore depreciating its market value. The very fact that the applicant has achieved planning permissions with some question marks over detail would give depth to such concern. The planning system is not a bulwark upon which such a purchaser could rely.
77. Mr Jones expressed the opinion that prospective purchasers of Kestor today would be deterred by the need to become involved in protracted negotiations and/or proceedings for proposals on the application land in order to benefit from the covenant which protects the amenity of the property. He placed a value of £660,000 on Kestor as it currently stands, by comparison with a prospective value of £725,000 if there were a modern replacement dwelling of similar location and size to the original Smugglers Hyde cottage. That reflects a loss of value of 9% caused by the risk and uncertainty of future redevelopment along with the unattractive prospect of defending the benefit of the covenant.

78. In considering the impact of modification on plot B, it was Mr Jones's opinion that development of ND1A (the only proposal with planning permission when he wrote his report) would cause depreciation of 8-10% because of its visibility and dominance from Kestor's garden, rising to 10-15% if it was developed in isolation leaving uncertainty over the future of plot A.
79. I found Mr Jones's base evidence on market values more helpful than his percentage ranges, and I accept his opinion that the value of Kestor is currently £660,000, by comparison with the prospective value of £725,000 with a replacement dwelling on the application site in compliance with the covenant. I consider that modification of the covenant to allow development of ND2, the least intrusive of the proposals for plot B, would cause no uplift in the value of Kestor from the figure of £660,000 because, in severing the application site, it would remove none of the uncertainty over development on the adjacent plot A. It would therefore sustain the loss of £65,000 from the potential value of £725,000. At 9% this is a substantial loss of value.
80. The parties agree that the benefit of the covenant should be considered against the benchmark of a compliant modern dwelling and I find that in impeding the proposals for plot B the covenant does secure to the objector benefits of substantial value, leaving me no jurisdiction for modification.

Conclusion

81. My determination of the application for modification of the covenant to permit development on plot A is that I have no jurisdiction because in impeding the development the covenant secures to the objector benefits of substantial advantage. My determination of the application for modification of the covenant to permit development on plot B is that I have no jurisdiction because in impeding the development the covenant secures to the objector benefits of substantial value.
82. I am conscious that this application has been unsatisfactory from many perspectives. It is an irony that by juggling numerous planning applications and amendments, ostensibly to offer the Tribunal a menu of options for modification across the two plots, the applicant has created such an onerous burden for the beneficiary of the covenant, and any future beneficiaries, that modification is an unlikely prospect.
83. In a concluding paragraph [109] of the 2020 decision, Mr Trott said:
- “...While Mr Briant has satisfied the planners - at least for half the applications he has made – that the proposed development should be for a larger house or for two houses, he has not satisfied the different requirements of section 84. Nevertheless, the pattern of planning decisions indicates the application land is suitable for residential development and a more modest proposal, reflecting (but not necessarily replicating) what was on the application land before is more likely to succeed.”
84. The applicant did not heed those words. None of the proposals I have considered “reflects” in any way the original dwelling on the application land. They were essentially re-worked earlier proposals, all involving severance of the site into two plots with large dwellings. Even had I been prepared to consider the proposal called REIN1 (implying a

reinstatement dwelling), which does not have planning permission, it is a much larger building than the original and would occupy only part of the site so that concern over future development of the remainder of the site would still be a major consideration in assessing the practical benefits of the covenant.

85. It is not for the Tribunal to advise the applicant how he should proceed from here, but there are strong messages resulting from this decision which need to be clearly understood. An application to the Tribunal is not a consultation process. Any future application on this site without planning permission to define it at the date of the application is likely to be refused. Applications and proposals presented in the alternative are likely only to lead to confusion and to diminish the prospects of success. Any proposal which involves severance of the site would need properly to take account of practical benefits in term of amenity which the covenant provides to the objector.

Diane Martin MRICS FAAV

Member, Upper Tribunal (Lands Chamber)

6 June 2024

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.