

## Modification of covenant impeding reasonable user of land (Payne v Maldon DC)

12/11/2019

Property analysis: Andrew Bruce, barrister at Serle Court, examines a decision of the Upper Tribunal (UT) to modify a covenant entered into by a previous owner of land and the respondent local authority pursuant to a planning agreement made under section 52 of the Town and Country Planning Act 1971 (TCPA 1971). The applicants, who were the current owners of the land, had been granted outline planning permission for housing on the land, but the covenant prohibited such development. The UT held that, unless modified, the restriction would impede the reasonable user of the land, within the meaning of section 84(1)(aa) of the Law of Property Act 1925 (LPA 1925) and although the respondent's ability to resist development by relying on the covenant was a practical benefit, it was not of substantial value or advantage, within the meaning of LPA 1925, s 84(1A)(a). Therefore, one of the statutory tests for modifying a covenant was met.

*Payne and others v Maldon District Council* [\[2019\] UKUT 335 \(LC\)](#)

### What are the practical implications of the judgment?

It is often mistakenly assumed that the grant of planning permission for a building development removes all impediments from its progress. This is, though, to ignore the private law impact of restrictive covenants. A valid and enforceable restrictive covenant may stymie the best laid plans (for which outline or detailed permission has been granted). Such a restrictive covenant would normally benefit adjacent land and could be enforced through injunction.

However, the absence of any adjacent benefited land does not necessarily end the matter. Under [section 106](#) of the Town and Country Planning Act 1990 ([TCPA 1990](#)) and its statutory predecessors, a fiction is created which assumes that a local authority covenantee has retained adjacent land capable of benefiting from particular covenants. In this way, a local authority can maintain and enforce historic planning agreements (whether made under the Town and Country Planning Act 1932, 1947, 1962, 1971 or 1990) regardless of its land ownership. The system of planning agreements disappeared on 25 October 1991 when the [Planning and Compensation Act 1991](#) replaced [TCPA 1990, s 106](#) with a new [TCPA 1990, ss 106, 106A and 106B](#). Under the new [TCPA 1990, s 106](#), planning obligations (being a different beast to planning agreements) can be discharged or modified by the local planning authority or on appeal by the Secretary of State where the obligation no longer serves a useful purpose.

Old planning agreements still exist and they can be modified or discharged by the UT under [LPA 1925, s 84\(1\)](#). The continuing importance of this jurisdiction is illustrated by *Payne*. This case also shows that the UT is not constrained by considerations of useful purpose or obsolescence and demonstrates that [LPA 1925, s 84](#) remains a beneficial ally for developers. But the case also indicates that a local authority relying upon the fiction of adjacent affected land may find it difficult to persuade a tribunal that the agreement/covenant secures it a benefit of 'substantial' value when it cannot point to any diminution in its land value (because, of course, it does not own any such land).

### What was the background?

In 1984, the respondent and the original owner of a parcel of land, which included the application land, had entered into a planning agreement pursuant to TCPA 1971, s 52. This agreement accompanied the grant of planning permission for a development of six houses on land near to the application land. The agreement prevented the covenantor erecting any further buildings or structures on the remainder of its land.

In 2017, the applicants, who were the covenantor's successors-in-title, obtained outline planning permission from a planning inspector for the erection of 30 dwellings on the application land covered by the planning agreement. As the respondent, notwithstanding the inspector's grant of planning permission, refused to release the covenant in the

planning agreement, the applicants applied to the UT for the modification of the covenant pursuant to [LPA 1925, s 84\(1\)\(aa\)](#).

## What did the UT decide?

The UT granted the modification. It considered the statutory test under [LPA 1925, ss 84\(1\)\(aa\)](#) and [84\(1A\)\(a\)](#) of whether the impeding of 'some reasonable user of the land' secured the respondent any 'practical benefits of substantial value'.

Unusually, in this case the reasonableness of the proposed user of the land was significantly at issue. The UT noted that the grant of outline planning permission was not 'in itself determinative of a user being reasonable' but did provide the applicants with a good starting argument. The UT further agreed with the planning inspector who had granted the permission that the development provided needed housing, in particular affordable housing, in a sustainable location without harming the character and appearance of the area. This outweighed the respondent's argument that the development was outside the development boundary and was therefore contrary to the local plan.

Further, the UT concluded that although the planning agreement conferred a practical benefit on the respondent, in that it was thereby able to resist further development on the applicants' site by reference to the planning agreement, this benefit was not of substantial value. The UT stated: 'It cannot be of substantial value or advantage to the Council to resist a reasonable use of the land for a development for which outline planning permission has been granted, and which would, if permitted, go towards meeting the district's housing need.'

The UT went on to say: 'No compensation award should be made because far from sustaining a loss or disadvantage as a result of the modification, the Council would benefit from the development taking place.' However, this rather ignores the negotiating position of the respondent by virtue of the planning agreement. It could be argued that, in a situation where the respondent has no adjoining land the value of which might be diminished by any modification of the covenant, a release fee might be a realistic way of assessing value. The UT could have been asked to assess the net development value of the land and then asked what proportion of that could be regarded as a fair price for release. Although the authorities suggest release fee damages would be exceptional, they perhaps might have been appropriate in an unusual case such as *Payne*.

## Case details

- Court: Upper Tribunal (Lands Chamber)
- Judge: Peter D McCrea FRICS
- Date of judgment: 5 November 2019

*Interviewed by Robert Matthews.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

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