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BUILDING APPROVALS AS A CONDITION FOR THE MODIFICATION OF RESTRICTIVE CONVENANTS: A THORNY ISSUE

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INTRODUCTION

1. Over the years persons have approached the court to discharge or modify restrictive covenants to pave the way for or ratify development which has taken place on land. In circumstances where the development involves building activity, applicants have often found themselves opposed by local authorities or the Town and Country Planning Authority (hereafter "the TCPA") on the basis that an existing building on the land does not have the requisite approvals, and that such approvals must be obtained prior to the covenant being discharged or modified. Some applicants have challenged the position of the authorities and the TCPA. Many who have challenged have relied on the provisions of Section 3(1)(a)-(d) of the *Restrictive Covenant (Discharge and Modification) Act* to question the relevance of such objections by the local authorities and the TCPA. Ironically, the authorities also rely on the same provisions to some extent.

2. In assessing whether building approvals should be a condition for the modification of restrictive covenants, and whether such objections are justified, this paper will examine the local authority's role in the application process before the Court for the discharge/modification of restrictive covenants.

What is a restrictive covenant?

3. A restrictive covenant is an agreement which restricts a landowner in the use or enjoyment of the landowner's land ('burdened land') for the benefit of other land (benefitted land) or for the benefit of a public authority. Restrictive covenants which benefit a public authority are referred to as restrictive covenants in gross where there is no benefited land[1].

How is a restrictive covenant created?

4. A restrictive covenant may be created in several ways. For the purposes of this paper we will concentrate on the role of the local authority in their creation.

5. Restrictive covenants are generally imposed by the local authority as conditions of approval of subdivision approval. The Local Authority is so empowered by virtue of the *Local Improvements Act* (hereinafter "the LIA"). Section 5(1) of the LIA directs that an application for sudivision approval must be submitted to the local authority. It states:

> "Every person shall, before laying out or subdividing land for the purpose of building thereon or for sale, deposit with the Council a

[1] *'Restrictive Covenants and the Planning System'*, Planning Bulletin Western Australia Planning Commission (April 2000), Number 38

map of such land; such map shall be drawn to such scale and shall set forth all such particulars as the Council may by regulations prescribe and especially shall exhibit, distinctly delineated, all streets and ways to be formed and laid out and also all lots into which the said land may be divided, marked with distinct numbers, and shall also show the areas and shall if required by the Council be declared to be accurate by a statutory declaration of a Commissioned Surveyor."

6. Section 8(1) of the LIA specifically empowers the Local Authority to impose conditions upon the development. It states:

> Subject to the provisions of section 9, the Council shall on such deposit as prescribed in section 5 consider the said map, specifications, plans and sections and estimates and shall, by resolution within a reasonable time after the receipt of the same, refuse to sanction or sanction subject to such conditions as they may by such resolution prescribe, the subdivision of the said land and the formation and laying out of the said streets and ways, and may approve of the map, specification and estimates of the said street works or may alter or amend the same as to

them may seem fit and may prescribe the time within which the said street works shall be completed.

7. In a Jamaican Court of Appeal decision, ***Garnett Palmer v Prince Golding et al SCCA No. 46/98 (unreported)*** delivered on December 20, 2000, Harrison J.A. stated:

> "The Act expressly imposes on a developer these obligations for the benefit of the public and the orderly development of the locality and in particular, the health and well-being of the purchasers of lots in such a subdivision"

8. The conditions of subdivision approval form part of the record of the land and section 126 of the *Registration of Titles Act* ("RTA") forbids the Registrar of Titles from dealing with the land contrary to the subdivision approval. It states:

> "Any proprietor subdividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the Registrar a map or diagram of such land exhibiting distinctly delineated all roads, streets, passages, thoroughfares, squares or reserves, appropriated or set apart for the use of purchasers and also all allotments into which the said land may be divided, marked with

distinct marks or symbols, and showing the areas and declared to be accurate by a statutory declaration of a Commissioned Land Surveyor :

Provided always that when any such land is situated within any portion of a parish to which the provisions of the Local Improvements Act and any enactment amending the same shall apply the proprietor shall deposit with the Registrar copies, certified by the Clerk of the Board under that Act, of the map deposited with the Board and the resolution of the Board sanctioning the subdivision, and no transfer or other instrument effecting a subdivision of any such land otherwise than in accordance with the sanction of the Board shall be registered."

9. In another Jamaican Court of Appeal decision ***Riva Ridge Ltd and Viscol Services Ltd v The Kingston and St Andrew Corporation, Registrar of Titles (Intervenor)*** SCCA No: 96/2001 delivered on February 26, 2004, the implications of these provisions were assessed by the Court as follows:

> "Because Section 126 of the Act requires that the map deposited with the Registrar of Titles: "exhibit distinctly delineated all roads, streets ... appropriated or set apart for the use of purchasers ...", and

that whenever the Local Improvements Act applies, the proprietor shall deposit with the Registrar "... copies, certified by the Clerk of the Board, of the map deposited with the Board and the resolution of the Board sanctioning the subdivision ...", the deposited map or diagram showing the areas ..." and which must be: "... declared to be accurate by a statutory declaration of a Commissioned Land Surveyor" cannot differ from the plan approved by the KSAC with the conditions endorsed."

10. It is therefore at the stage of the approval of subdivision that the local authority may impose conditions which the Registrar shall endorse as covenants "for the benefit of the public and the orderly development of the locality and in particular, the health and well-being of the purchasers of lots in such a subdivision": [***Palmer v Golding et al*** (supra)]. These conditions may include:

    i. Surface drainage shall be collected and disposed of on site and not be discharged onto the parochial road.

    ii. All gates and doors in or upon any fence or opening onto any road shall open inwards with a minimum setback of 18 ft/ 5.48m.

iii. No sullage water shall be permitted to be discharged onto any road or onto any part of the adjoining lands.

iv. The buildings on the said land shall not at any time be used for the purpose of a shop, school, chapel or church and no trade or business whatsoever shall be carried on upon the said land or any part thereof excepting those buildings to be erected on such part or parts of the land as are designated and shown on the deposited plan abovementioned as Community lands or Shopping areas.

v. Not to build more than one dwelling house with appropriate outbuildings on the said land. No such dwelling house or outbuilding to be nearer than three feet six inches to any adjoining lot nor nearer than fifteen feet to the road boundary of the said land. PROVIDED However, that this covenant shall not apply to floor, roof and columns supporting the roof of any car-porte erected on the said land.

vi. No new building or any other permanent structure shall be erected within forty feet of the center line of the parochial road/road reserved.

vii. No development of this land shall take place except in accordance with the permission granted herein and in accordance with the

provisions of the Town and Country Planning [Name of Parish] Development Order, 1976.

viii. The structures shall be constructed in accordance with the plans submitted to and approved by the Local Planning Authority and the Building Authority [or name of Parish Council/ KSAC/ Portmore Municipal Council].

11. Restrictive Covenants are sometimes **imposed for planning purposes**. But whatever the reason for each restriction, as said in the ***Riva Ridge case,*** by Harrison JA:

> "The conditions imposed by the KSAC in its resolution approving the subdivision must be reasonable, for the benefit of the said subdivision and within the ambit of the powers of the KSAC."

12. Additionally, where a developer applies for planning permission for a development, the Local Planning Authority may direct that certain conditions be imposed as part of the process of granting planning permission. Section 11(1) of the *Town and Country Planning Act* (hereinafter "the Planning Act") states:

"Subject to the provisions of this section and section **12,** where application is made to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations."

13. A critical "material consideration" in the grant of planning permission is the existence and implications of certain restrictive covenants.

Discharge/ Modification of Restrictive Covenants

14. The discharge/modification of restrictive covenants is governed by the ***Restrictive Covenants (Discharge and Modification) Act*** (hereafter "the Act"). Section 3(1) of the Act sets out the grounds upon which a Judge in Chambers may discharge or modify a restrictive covenant. It states:

    (1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any **freehold land affected by any**

restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied-

*(a)*that by reason of **changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material**, the restriction ought to be deemed obsolete; or

(b) that the continued existence of such restriction or the continued existence thereof without modification **would impede the reasonable user of the land** for public or private purposes **without securing to any person practical benefits sufficient in nature or extent** to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or

(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by

implication, by their acts or omissions, to the same being discharged or modified; or

(d) that the proposed discharge or modification will not **injure the persons entitled to the benefit** of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss.

15. Section 3(2) of the Act mandates that the Court must make inquiries of the TCPA and local authority prior to making an order on each application. It states:

"**The Judge shall, before making any order under this section**, direct such enquiries as he may think fit to **be** made of the Town and Country Planning Authority and any local authority, and such notices as he may think fit, whether by way of advertisement or otherwise, to be given to the Town and Country Planning Authority and any persons

who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with."

16. The local authority in the parishes of Kingston and St. Andrew is the Kingston and St. Andrew Corporation and in relation to any other parish, the Parish Council.

Some Comments in Relation to Section 3(1) of the Restrictive Covenants (Discharge and Modification) Act

17. It is of some importance that Section (3)(1) states that the Judge, when considering whether to discharge or modify a restriction "*...as to the **user [of the land]** or the **building thereon**...*" is charged with examining restrictions "*...arising under covenant **or otherwise**...*".

Obsolescence of Covenants

18. The determination of whether or not the restriction ought to be deemed obsolete includes an assessment of critical planning considerations. These considerations may include benefits and burdens to the applicant's lands, to neighbours lands, the general amenity of the area and to future development plans for the community.

19. The Court acts properly in seeking the intervention and guidance of the planning authorities before concluding and granting orders. In ***Wrexham County Borough Council v Berry, South Bucks District Council v Porter [2003] 2 AC 558***; the House of Lords made it clear that planning considerations are solely within the purview of the planning authority. Lord Bingham of Cornhill further stated at page 578:

> "As shown above the 1990 Act, like its predecessors, allocates the control of development of land to democratically-accountable bodies, local planning authorities and the Secretary of State. Issues of planning policy and judgment are within their exclusive purview. As Lord Scarman pointed out in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 141, "Parliament has provided a comprehensive code of planning control"

20. Planning considerations are of particular concern when one considers that much like restrictive covenants, planning permission runs with the land and " *enure for the benefit of the land and of all persons for the time being interested therein...*"[2]. As such, there are instances when the terms and conditions of the planning permission and the implications of such

[2] Section 15(4) of the Town and Country Planning Act

permission must of necessity be assessed before the covenants are discharged /modified.

21. The local authority has a duty to advise the Court of these planning conditions and their implications, and whether there is or would be likely conflict between the proposed discharge/modification and the existing permissions. It is therefore important that the Judge assess the advice of the TCPA and/or the local authority to determine whether the restriction ought to be "*deemed obsolete by reason of* ***changes in the character of the property or the neighbourhood*** *or* ***other circumstances*** *of the case the Judge may think* ***material****...*"[3].

22. Thus, if a two storey **commercial** building has been erected in an area with predominantly two storey **residential** buildings, and the applicant sought to rely on 3(1)(a), the authorities may rightly bring to the court's attention whether or not the building has the requisite approvals since its existence will impact upon the amenity of the area and future development plans for the area.

[3] Section 3(1)(a)

23. Further, to determine "materiality" in full terms, the Court should also seek to include the perspectives of other authorities including the Building Authority where the covenant concerns building, Road Authority where there are adjoining public roads and so on. .

Practical Benefits

24. The local authorities objections to a Section 3(1)(b) application will sometimes include references to the "practical benefits" lost or to be lost. The prospect of future harm may be material as much as present harm: **Re Abbey Homesteads Developments) Ltd's Application [1986] 53 P&CR *1***. A "practical benefits" is not limited to a restriction to the benefit on protection of land, but is to be construed widely: ***Gilbert v Spoor [1983] Ch 27.*** The assessment of practical benefits also involves looking at planning/building considerations.

25. Some of the "practical benefits" an objector may argue are secured by certain covenants include light, peace and quiet, maintenance of property values, maintenance of a view, prevention of increased vehicular movement, prevention of noise during building operations: [***Re Vince Application***, ***[2007] EWLands LP 41 2006***; prevention of flooding:

(***George Wimpey Bristol Limited v Gloucestershire Housing Association Limited [2011] UKUT 91(LC)***]; and environmental: ***Zenois v Hampstead*** **[2011] EWCA Civ 1645**.

26. In ***Shephard v Turner [2006] EWCA Civ 8]***, the Court of Appeal reflected on an earlier decision and confirmed at paragraph 18

> "Thus, in *Gilbert v Spoor [1983] Ch 27*, the Court of Appeal rejected any suggestion that "practical benefits" were confined to financial factors, and held that loss of a landscape view, visible from land in the immediate vicinity of the objectors' properties, was a sufficient reason to refuse modification. Eveleigh LJ said:
>
> > "….the words…are used quite generally. The phrase 'any practical benefits of substantial value or advantage to them' is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression "any practical benefits" is so wide that I would require very compelling considerations before I felt able to limit it in the matter contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not

surprising that the Tribunal is required to consider the adverse effect upon a broad basis." (P 32E-G)

27. In assessing whether the restriction achieves some practical benefit, there are several factors that a Judge must consider. Some relevant factors are as listed by the Tribunal in ***Re Farrow [2001] EWLands LP_18_2000 (10 May 2001)*****:**

> (60) I have now considered the major practical benefits claimed to be secured by the restriction. My answer to the first question is that, for the reasons set out above, **the restriction, in limiting the proposed user of the application land to the erection of a single storey dwelling, secures to Mrs Blois-Brooke practical benefits which, considered overall, are of substantial value or advantage to her**. **These are: a reduction in the size and height of the dwelling to be built on the application land; limitation of loss of privacy, impairment of view, loss of light and noise and activity to those lower losses which would be caused by the erection of a bungalow on the application land**. **Overall, the benefit secured to Mrs Blois-Brooke is the limitation of the size and height of the dwelling to be built on the adjoining land to single storey with consequent limited interference with the continuing enjoyment of St Austins**

House. It is the limitation on height and the inevitable larger size of the dwelling which would be built if the restriction is modified which confers the benefits. The modification of the restriction to allow a two-storey dwelling would increase the interference above the level contemplated when the land was sold to Mr Farrow and the restriction imposed. [Paragraph 60]

28. At paragraph 52:

The existence of a restriction cannot in itself be a practical benefit otherwise it would be impossible for an application under section 84 to succeed. A practical benefit is secured by a restriction when it flows directly from the observance of that restriction. It is the prevention of the consequences of breach of a restriction which may secure a practical benefit. In *Stannard v Issa* Lord Oliver posed the question (page 188): does the restriction achieve some practical benefit? Mr. Bartle in his submissions listed nine benefits which he claimed were secured by the restriction. **Altering slightly his list I think that the matters that I should look at are: the character, height and size of the dwelling to be built on the application land,**

privacy or overlooking, protection of view or outlook, light and quiet."

29. Where the "persons entitled to the benefit" include the general public or the public interest, the local authority is often the proper entity to provide assistance and guidance to the Court as to whether or not injury will be or has been caused to public amenity or safety or otherwise, and the nature and extent of such injury or loss.

30. Whether or not a covenant in respect of a building continues to secure practical benefits will involve looking at the permissions which have been granted in the area. For example, if the covenant speaks to the height of buildings, the court must look at whether the authorities have granted building permission for building above the height restriction. It is inevitable in such case that the court seeks information on whether the said building has been granted and planning/building approval.

Implications of Section 3(2) of the Act

31. It is submitted that the local authorities role in the application process sometimes differ under section 3(1) and (3(2). On the one hand, the local

authority may be joined as a person interested in the covenant pursuant to section 3(1) of the Act. For example, where the covenant to be discharged is in respect of the distance which a building may be constructed from the road boundary, the local authority may be an interested party by virtue of being the parochial road authority as the registered proprietor of the roads and/or pursuant to the *Parochial Roads Act*.

32. In such an instance, the local authority is entitled to object in its capacity as the Road Authority. But if the local authority objects to the discharge/modification of the covenant it must provide evidence to rebut any of the arguments put forward. Its basis for objection in this instance is unlikely to be on the ground that there is no building approval.

33. However, as the Parochial Road Authority, the local authority has a duty to advise the Court whether the existing building has or is likely to have an impact on traffic movement, road usage, proximity of ingress/egress to corners or traffic lights, on street parking, encroachments, storm water run-off on the road, flooding and other road impediments. In such circumstances, the question of whether the building has been approved by the relevant authority must naturally be pertinent to the court. These are issues which would have been considered by the relevant authorities and

the Court will know whether it must detain itself with considerations which would have already been taken into account by the relevant authority.

34. The Council can object on the basis that the development is out of keeping with surrounding residential property: ***Re Farrow [2001] EWLands LP 18 2000 (10 May 2001).*** If the Covenant is modified, allowing an existing unauthorized building without taking into account the objections, this has a negative impact. It robs the Council of the opportunity to protect the amenity of the area and the interest of neighbours in the community.

35. It may be argued that the scope of the local authorities powers and duties under section 3(2) of the Act is considerably wider. All local authorities are also Building Authorities, Local Health Authorities, and much much more. They must take into consideration all matters affecting land use past, current and future. This includes structural soundness, fire safety, access to potable water, sewage connections, proximity to and establishment of cemeteries, public markets and abattoirs, land nuisances within town limits, and even issues relating to the "Keeping of Animals". The local authority is called upon by the Court as the guardian of the public interest to provide information as to the potential or actual impact

which the discharge or modification of the restrictive covenant will have on the public interest in general. When called upon to do so, the local authority must have due regard to all its statutory functions as the local authority. Where the court invokes its powers under section 3(2) of the Act, the local authorities (including the KSAC, the Portmore Municipal Council and all Parish Councils) have a duty to inform the court where there are known breaches of any statute under which the local authorities operate and have duties. The local authorities also have a duty to advise the Court of the impact or likely impact of said breaches on the public in general. Therefore, in its capacity as the Building Authority, an authority has a duty to bring to the court's attention any breach of the Building Act which exist in relation to the application before it. It has a concurrent duty to advise the Court whether or not a building has been built without building approval and the impact or anticipated impact of the specific unauthorized building including issues relating to safety.

36. As the Local Planning Authority, it has a duty to advise the Court whether the existing building was built in the absence of planning permission and what are the existing and potential implications. It must bring to the court's attention all planning issues which may be outstanding or which may impact upon the public's interest. Under the Planning Act the local

authority is empowered to consider applications for development. A development is defined by **Section 5(2)** as including:

> "the carrying out of ***building, engineering***, mining ***or other operations in, on, over or under land,*** or the ***making of any material change in the use of any buildings or other land…***"

37. Section 5(2) makes it evident that the building activity falls for the consideration of the local authority in its capacity as the Local Planning Authority. In this regard, the authority's consideration may include but is not limited to the siting of buildings, their number, area, height, mass, suitability to the locality or neighbourhood, design and external appearance and impact on neighbouring lands.[4]

38. As the Building Authority, a critical duty imposed is to address the structural integrity and safety of buildings. This includes decisions such as whether the foundation is deep enough, or the correct materials are used in the right quantities to prevent collapse of buildings and other structures in the event of flooding and/or land slippage, earthquakes or other disasters. Here, issues of safe construction for the protection of life

[4] Victor Moore, A Practical Approach to Planning Law, (11th edn, Oxford University Press 2010). See also the *Town and Country Planning (Kingston) Development Orders* or the Development Order for any other parish.

and limb are paramount. These are issues that are to be addressed before building approval is given.

39. Therefore, where there is a building on the applicant's land which does not have the requisite approvals, the local authority has a lawful obligation to bring this to the attention of the Court.

40. Further, where an application to modify or discharge a covenant is made, should the local authority fail to object when it has reasonable grounds to do so, and thereafter (a) objects upon those same grounds when an application for building approval or planning permission is made to the Council, or (b) take enforcement action against breaches that existed at the time of non-objection to the application to modify/discharge the covenant, what prevents the applicant from crying foul?

41. The same issue arose in ***Graham v Easington [2008] EWCA Civ 1503*** where a planning authority granted planning permission in its capacity as planning authority and later refused the discharge of the covenant as adjoining land owner. As stated by the Court of Appeal at paragraph 6 of the Judgment:

(6) "Not surprisingly, at the heart of the decision of the issues before the Member, as before us, was **whether the council could justify its apparent change of heart: from having granted permission, in its capacity as planning authority, to its later refusal of the discharge of the covenant under the Law of Property Act**."

42. Although arguments may well arise that circumstances, conditions and the character of the neighbourhood have changed, having failed to object, the local authority would be challenged to later say, "I did not have information then that I have now".

43. A further benefit of the local authorities' objection at this stage is that, at the very least, it gives notice to the Applicant that the local authority considers that the breach is one that requires building approval and that the authority has specific objections to said breach.

44. In addition, a building which has been constructed without planning permission may have implications for the safety of the public and particular the adjoining or surrounding lands. For example, the siting of a building may impact upon the storm water run off from the site and have

implications for flooding of the adjacent lands or the neighbourhood as a whole. The local authority would therefore be acting contrary to its duties as guardians of the public's interest if it did not bring to the attention of the court the fact that the building on the land has not been reviewed by the local authority and that it has not had the opportunity to consider the impact on the surrounding lands and amenities.

45. Along with the local authority's responsibility which arises when covenants are created, there is a continued responsibility to protect the public interest at the time when there is an effort and desire by land owners to discharge /modify covenants imposed. The public interest is thus a material consideration about which the Court should be critically concerned.

Role of the local authority

46. Where the local authority is called upon to give its opinion under section 3(2) of the Act, the Court has a duty to take into consideration the issues raised by the local authority. In the case of ***Re Bass Limited's Application (1973) 26 P&CR 156*** the UK Land Tribunal considered the question

whether the proposed user was a reasonable user for private purposes. It held:

> "The planning permissions are very persuasive in this connexion. It is difficult in the face of these permissions to say that the proposal is not a reasonable one."

47. However, in the case of ***Re: Martin's Application [1988] EWCA Civ 1*** the court made it clear that the grant of planning permission is a circumstance which the tribunal can and should take into account but it is still entitled to make up its own mind. Fox LJ in the UK Court of Appeal said:

> > "In my view, the applicants' contention is wrong in so far as it suggests that the granting of planning permission by the Secretary of State necessary involves the result that the Lands Tribunal must discharge the covenant. The granting of planning permission is, it seems to me merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by the section 84. It is for the Tribunal to make up its own mind whether the

requirements of section 84 are satisfied. The grant of permission by the Secretary of State is no more conclusive of that than is, for example, the deemed grant of planning permission under the provisions of the General Development Order. All the facts of the case have to be examined by the Lands Tribunal. There is nothing in the Town and Country Planning Acts 1962 or 1971 which suggests that these are intended to interfere in any way with the jurisdiction of the Lands Tribunal under section 84."[5]

The Power and Discretion of the Judge

48. In our jurisdiction it is the Judge in Chambers not the Lands Tribunal who considers the application under section 3 of the *Restrictive Covenants (Discharge and Modification) Act*. Nonetheless, the principle is equally applicable here. The opinion of the planning authority is relevant and persuasive.

49. It is important and necessary that the Court take the local authorities and TCPA's opinion, advice and decisions into consideration. While this is not an indication that the authority's decision is to be rubber stamped, it is

[5] Page 4, Para 19

clear that the Court is required to take planning considerations into account including building activities.

50. Where an applicant has built on premises contrary to law and without first seeking and obtaining the requisite permits, where the unauthorized building is without the benefit of input from the road, building, planning, water, fire and health authorities, a Judge upon being so advised ought to consider these to be **material** factors weighing against the person applying for the discharge/modification. Some guidance may also be found in the ***George Wimpey Case*** where due to the behaviour of the applicant, it was stated "***it is unlikely that I would have exercised the discretion that I have to modify the covenant". And further*** "**It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flout their legal obligations in this way"**

51. Nonetheless, it is for the Applicant to make its case for the discharge/modification of the covenant by satisfying at least one of the grounds set out in Section 3(1) of the Act. Unless this is done, the court cannot modify/discharge the covenant. This was reiterated in the ***George Wimpey case where the court said to the Applicant:***

"Since the applicants have not succeeded in establishing the ground relied upon, I have no power to modify the restriction, and the application is refused".

52. The local authority and/or the TCPA sometimes object on the basis that the modification/discharge being sought is contrary to approvals already sought and obtained. However, the majority of objections arise where there are **buildings already in existence without the benefit of building approval or planning permission, or any relevant permit**. On hearing these objections, the Court would not be prudent to allow modification/discharge of covenants in the absence of information that the unauthorized structures are safe or will not otherwise cause injury, or will not rob any person of practical benefits of the covenants sought to be discharged/modified.

53. A further and very important ground to consider is that where planning permission and building approval and environmental permits have already been sought and obtained, and there is an application before the Court for the modification/discharge of covenants, and such application runs **contrary** to the existing approvals, it is critical that the Court take the existence of said approvals into account. The Court can be satisfied that

issues relating to amenity, density, traffic, parking, health, sewage, fire, water access and supply, roads and other infrastructural works have all been considered by several statutory authorities who have agreed that the distance from roadways and neighbouring properties may be adjusted, and that issues relevant to storm water run-off and drainage have been considered. These are all factors that can have weighty influence on a Court's exercise of its discretion.

54. While the existence of building approval/planning permission is very persuasive in determining whether it is reasonable for the court to discharge or modify a covenant, the absence of building approval/planning permission for a building already in existence is persuasive ground to refuse or pause.