Is there a restrictive covenant that affects the land?

First you must establish that there is a covenant, which is valid and affects the land. This question can normally be answered very quickly by checking the title deeds to your property. If you do not have these or the position is not clear, your solicitor will be able to help you.

Discharge and modification of restrictive covenants

Once you have established that there is a restrictive covenant which might be preventing you from either building or altering a property then you should consider whether the covenant is capable of being modified or discharged under section 84 of the Law of Property Act 1925. Under this legislation, the Upper Tribunal (Lands Chamber) has the power to make an order, which wholly or partially discharges or modifies the restriction.

There are three main grounds that you may rely on:

1. You reach an agreement with the person entitled to the benefit of the covenant.

2. There have been changes in the character of the property or the neighbourhood or other circumstances which the Tribunal consider relevant, which make the restrictive covenant obsolete; for example, the neighbourhood may have become much more built up since the granting of the original covenant.

3. The continued existence of the restriction would interfere with the reasonable use of the land. This only applies if the Tribunal is also satisfied that the restriction: -

   (a) Does not give anyone entitled to the benefit of the covenant any practical benefits of substantial value or advantage (in other words limiting or removing the covenant will not cause the person with the benefit any great disadvantage); or

   (b) Is contrary to the public interest; and that in either case money will be an adequate compensation.

This third ground is by far the most common. The Tribunal will take into account the development plan and any declared or ascertainable pattern for the granting or refusal of planning permissions in the relevant area. The granting of planning permission is not the be-all and end-all but is a very good starting point.
You would normally instruct a surveyor to prepare a report to establish whether the person entitled to the benefit of the covenant would lose any practical benefit of substantial value or advantage; for example they might lose privacy or be subjected to more noise. The surveyor would try to calculate any decrease in value the proposed development or alterations might have on the land belonging to the entitled person. The Tribunal has decided in one case that a decrease in value of about 1.5% of the objector’s property was not substantial and therefore the application succeeded.

**Procedure and tactics**

The first step is to write to the person with the benefit of the covenant to establish whether they are prepared to negotiate and agree a price to release the restrictions. At this stage it may also be useful to obtain an expert surveyor’s report showing that there is likely to be little or no decrease in the value of the objector’s property. One should normally instruct a solicitor at this stage.

If negotiations fail and you have to make an application to the Tribunal, you should instruct your solicitor to prepare the application. There are specific rules about how the application should be prepared. Normally the application will have with it:

1. A copy of the document imposing the restriction or some other documentary evidence of it, if it is not available.

2. A plan showing the land with the benefit and the land subject to the restriction.

It still may be possible to negotiate with the objector at this stage. If this does not work then the matter will be dealt with at a hearing before one member of the Tribunal Panel, who is usually a surveyor by profession. There will usually be a site inspection by the Tribunal member hearing the application.

If the Tribunal decides to vary or discharge the restrictive covenant the amounts of compensation awarded by the Tribunal can be relatively low. Although these awards are not usually based on the value of removing the covenant to you, occasionally, percentages of net development value have been used as an appropriate compensation award. The Tribunal decides who pays the costs of the application. It is probable that you will end up paying the objector’s costs whatever the result.

The Lands Tribunal website, www.landstribunal.gov.uk, is very useful as it contains details of previous decisions.

If you have any queries about this area of law please contact Jonathan Kenwright of Croft Solicitors via email on jonathan.kenwright@croftsolicitors.com or tel: 01242 285 855