UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0360 (LC)
UTLC Case Number: LP/30/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – PRACTICAL BENEFITS OF SUBSTANTIAL VALUE OR ADVANTAGE – terrace of five houses to be built in breach of "one house one plot" covenant – visual amenity – noise – light – maintenance of a hedge – application refused

AN APPLICATION UNDER SECTION 84(1), LAW OF PROPERTY ACT 1925

BETWEEN:

BLUE ANGEL PROPERTIES LIMITED

Applicant

AND

MARGUERITE JENNER **Objector**

Re: 1 Hollyshaw Close,
Camden Park,
Tunbridge Wells,
TN2 5AB

Judge Elizabeth Cooke and Mark Higgin FRICS
4-5 November 2020
Royal Courts of Justice

Tom Weekes QC for the appellant, instructed by Wedlake Bell
Philip Rainey QC for the respondents, instructed by Dentons UK and Middle East LLP

The following cases are referred to in this decision:

Dean v Freeborn [2017] UKUT 203 (LC)
Re Surana's Application [2016] UKUT 367
Willis v Rollins [2019] UKUT 315 (LC)

Introduction

1. This is an application for the modification or discharge of restrictive covenants attached to 1 Hollyshaw Close, Camden Park, Tunbridge Wells, where the applicant wishes to build a Georgian-style terrace of five houses in breach of "one house one plot" covenants. The applicant also has planning permission for an alternative single house, which would not breach the covenants. The objector, Mrs Marguerite Jenner, lives next door at 2 Hollyshaw Close.

2. We conducted a site visit on 3rd November 2020. We were shown the application site where poles had been placed to indicate the position of the rear elevation and height of both the terrace and the single new house. We also saw the interior and exterior of number 2 and the front garden of number 3. We are grateful to the parties for allowing us access to their properties, and for the effort that went into the provision of the poles which proved invaluable. In addition, we walked around Camden Park, and also went to look at comparable properties identified by the parties in other parts of Tunbridge Wells, notably several at Nevill Park. This was a case where an extended site visit was especially helpful; as will be seen, an appreciation of the very different styles of Hollyshaw Close, Camden Park itself and Nevill Park was important to our decision.

3. We heard the application at the Royal Courts of Justice on 4 and 5 November 2020. The applicant was represented by Mr Tom Weekes QC and the objector by Mr Philip Rainey QC and we are grateful for their arguments. We heard evidence from Mr David Saunders of the applicant company and from the objector Mrs Marguerite Jenner. Expert evidence was provided for the applicant by Professor Bob May BA (Hons) PBI Dip Mgt MCMI AoU FRTRI, a director of the firm Ryan and May, and by Andrew Highwood LLM FRICS FAAV a director of Savills (UK) Limited. Louise Hooper BA (Hons) CMLI, the Principal of Louise Hooper Landscape Architect, and Michael Tibbatts MRICS MEWI, a Consultant at Scrivener Tibbatts, gave expert evidence for the objector.

4. In this decision we describe Hollyshaw Close and Camden Park together with the proposed and alternative developments. We set out the law, and then consider the evidence of fact and the expert evidence before explaining our conclusion.

Camden Park and Hollyshaw Close

5. Camden Park is one of nine residential Parks in Tunbridge Wells. Its development commenced in 1850 with two lodges overlooking the Meadow, an area of open land in a central position which is to be maintained in perpetuity as meadow or parkland. Subsequent development has been of low rise and low density with a mixture of styles and scale. It is a conservation area, and is described by the experts in this case as Arcadian or sylvan, referring to its mature landscape setting, undulating landform, tranquillity and biodiversity amongst other attributes. Despite that, it is close to the town centre and mainline railway station.

6. The road known as Camden Park encircles most of the undeveloped part of the park, with two primary limbs radiating from the entrance to the park at Camden Hill. Hollyshaw Close is on the south eastern limb.

7. Hollyshaw Close was originally a development of three houses, each on a site of approximately an acre. It was developed to maximise the benefit of its sloping topography, with numbers 2 and 3 on a lower level than number 1, all three properties enjoying views over open countryside. The application site was described during the hearing as being akin to an upturned saucer but it is important to appreciate that its entrance is noticeably higher than the rear (southern) boundary. The original house (built in the late 1950s, demolished this last summer) was at the Camden Park (northern) end, leaving a flattish area of slightly higher ground in the middle of the plot; the southern end of the garden is a one-in-seven slope down to number 2.

8. 2 Hollyshaw Close is a two-storey house, also of 1950's heritage. It is about 50 feet from the northern boundary but orientated to the south; its reception rooms are very light and airy with both front and back windows. It has a large landscaped garden with beautiful wide open views. Number 2 has the most regular site of the 3 properties at Hollyshaw Close, being rectangular with a shallow gradient. It is not for us to judge architectural merit, but in view of some of the comments made in the evidence we wish to say that while its style could be described as dated, it is a very lovely house in a beautiful situation.

9. The road named Hollyshaw Close is a private road belonging to number 2. It is approached, as we said, from Camden Park, and presents quite a contrast to it. Camden Park is lined with properties that range from the medium-sized to the magnificent; what they have in common is that they are for the most part built elbow-to-elbow, across the width of their plots and close to the side boundaries, although there are large gardens behind each. Hollyshaw Close is markedly more spacious and peaceful.

10. Two houses away from 1 Hollyshaw Close, further east along Camden Park, is Hollyshaw, a single building comprising six terraced houses in a Georgian style. It was not built for that purpose; it was a military hospital during the war, and later (within Mrs Jenner's memory) a children's home. It is to some extent the inspiration for the terraced property that the applicant wishes to build.

11. A further contrast is seen in Nevill Park, on the other side of the centre of Tunbridge Wells, with a gated road like Camden Park. It is a crescent shaped road just over half a mile in length with various cul-de-sac offshoots. It also has a wooded nature but has a much more open aspect than Camden Park, due to a low density of development characterised by large houses on substantial plots coupled with wide verges.

12. The applicant has planning permission (obtained in March 2018 following an application in 2017, and then in slightly modified form in December 2019) from Tunbridge Wells Borough Council for a redevelopment of the site ('the proposed development') involving the demolition of the existing house and its replacement with a terrace of 3 three storey

and 2 two storey houses. There will be an underground car park; the building will look like a single, late Georgian style house. The Council attached several conditions to the consent including the need for prior approval of materials, lighting, hard and soft landscaping, the commissioning of bat surveys, a timetable of arboricultural supervision and a Tree Protection Plan, details of levels and the car park. Most of the conditions were to be satisfied before the development could commence.

13. The total area of the building is 15,550 ft^2. It will stand on the highest and widest part of the site. This will reduce the size of the rear garden and place the new building closer to number 2 than was the original house; the south wall of the proposed development will be 95 feet away from the boundary with number 2.

14. In July 2019 the applicant was also granted planning permission to build a single 3 storey house ('the alternative development') with an area of 9,135 ft^2. It too is late Georgian in style; it would be 18 feet closer to the southern boundary than the proposed development, 3.5 feet taller and about 33% narrower. It would have a gym on the second floor, with a balcony looking south. The plan following paragraph 20 below shows the three properties at Hollyshaw Close; on the plot of number 1 the original house is blanked, and the outlines of the proposed and alternative developments are shown in yellow and blue respectively.

15. The grant of planning permission for the proposed development was controversial. A petition against the 2017 application received 127 signatures, and there were 87 objections to the 2017 application and 78 to the 2019 application. Notable amongst the objectors were Camden Park Ltd, Royal Tunbridge Wells Civic Society and Camden Park Residents Association. There were supporters of the application although it is not clear how many; 13 according to the planning officer's notes, or seven recorded on the local authority Planning Portal according to the objector.

16. Many of the objectors relied upon the Tunbridge Wells Arcadian Area Planning Policy EN24, which stipulates that for developments which would affect the character or appearance of the area four criteria must be satisfied:

    i) The proposal would result in a low density of development where building heights, site coverage, distance from site boundaries and from front and rear building lines respect the predominant characteristics of the area.

    ii) Landscape would dominate within the site and along its boundaries.

    iii) Access widths would be narrow; and

    iv) Buildings and parking would be well concealed in views from public places.

17. The Planning Committee on the other hand, when giving consent for the five house scheme, considered that the 'proposed building, in design terms, would have greater architectural merit than the existing dwelling'. They went on to say in the decision in relation to the amended application that 'It is considered that by pushing back in to the plot

[the new building] will be more in keeping with the area and also help conceal the additional bulk so it will be less prominent'.

18. The Conservation Officer in her report said that:

> 'A single large house would be preferable, but despite the size some care has been taken to be faithful to the Classical orders and to appear as one large mansion – I also note that it will recede into the background somewhat due to the position and landscaping'.

19. The Conservation Officer's report dated 6th February 2019 in relation to the alternative development reiterated a comment in her report to the Committee in the earlier application for the proposed development:

> 'In regards to the proposed replacement, … large houses and parkland setting are the key characteristics of the conservation area here. The current building, as stated above, encroaches on the parkland setting. Whilst the 20th century development in this location has caused harm, the replacement of the existing building with one whose architectural merits are of greater quality and respect the 19th century character, and which importantly is set further back, would in my view, preserve the special character of the conservation area in comparison with the existing situation'. …
>
> 'An Italianate style would be much more appropriate and preferred, as a reference to the style of houses designed during the Camden Park development.'

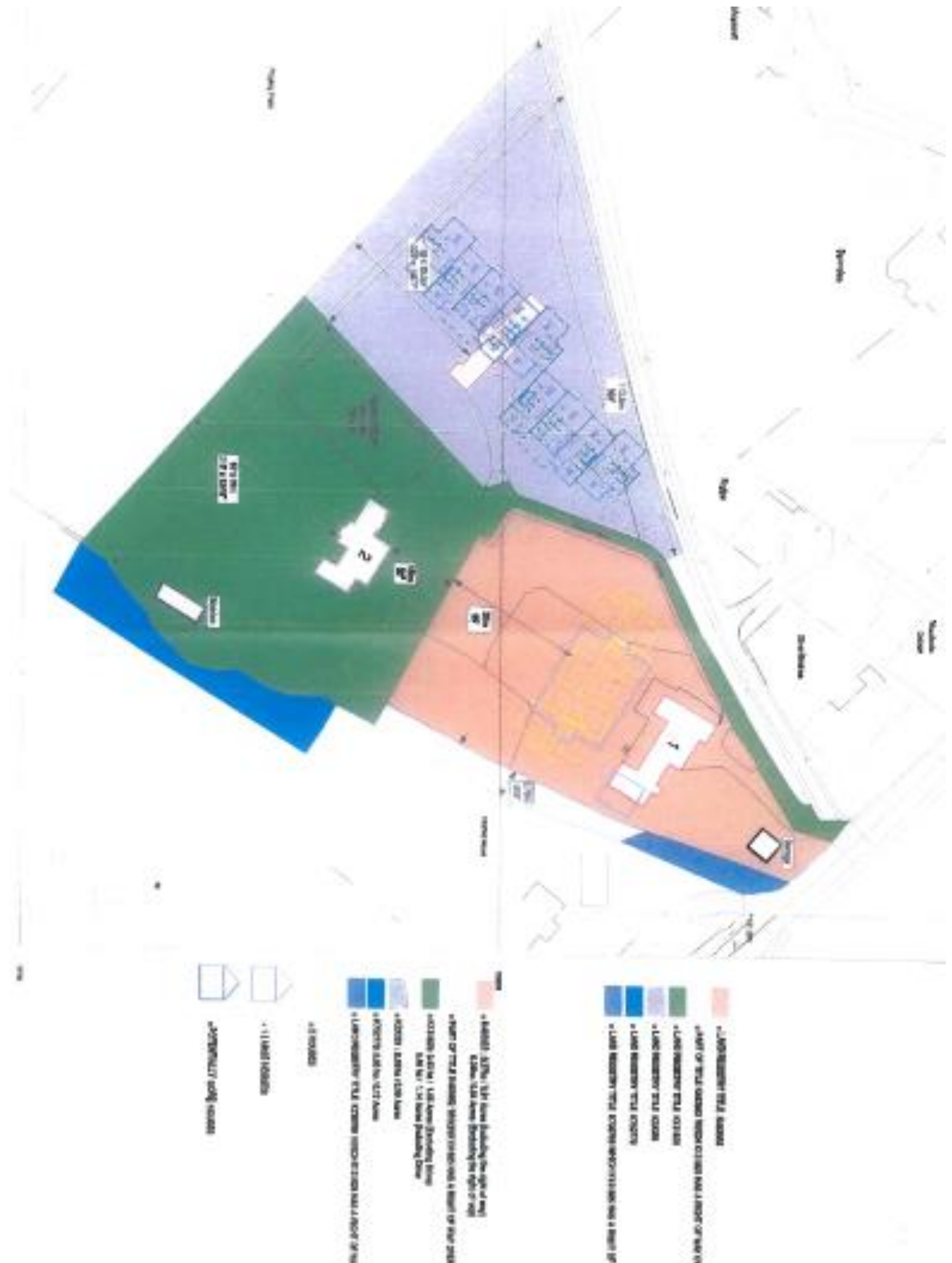
The restrictive covenants

20. By a conveyance dated 24th March 1958, Joyce Cynthia Wood sold numbers 1 and 3 Hollyshaw Close and retained number 2 and the private road. The objector, Mrs Jenner, is Ms Wood's successor in title. The 1958 purchaser gave the following covenants:

    i) "That not more than one dwellinghouse shall be erected on each of the said plots coloured pink, yellow and green on the said plan.

    ii) Not at any time hereafter to erect upon any of the said plots or part thereof any additional erection of any kind having a height of more than eight feet at the eaves within thirty feet of the boundaries of either of the adjoining plots.

    iii) Not to use or occupy the dwellinghouses erected on the said land or permit or suffer the same to be used or occupied otherwise than as one single private dwellinghouse nor the said land otherwise than as garden ground appurtenant to the said dwellinghouse provided that nothing herein contained shall be deemed to prevent the said dwellinghouse being used as the professional residence of a doctor dentist solicitor or other professional person."



iv) Not to dig or remove any sand or gravel from the said land except in the way of excavating for the foundation of and for the use in the buildings to be erected thereon or in preparing or laying out gardens drives and paths to be used and occupied therewith.

v) To maintain suitable fences or hedges along the boundaries of the said land marked T within such boundaries of said plan.

21. The vendor gave the same covenants; accordingly, the proprietor of number 2 can enforce the covenants that bind numbers 1 and 3, while numbers 1 and 3 have the benefit of number 2's covenants. It is agreed that the proposed development would be in breach of covenants i and iii above and that the alternative development, being a single dwelling, would not.

The law

22. Section 84 of the Law of Property Act 1925 reads as follows, so far as relevant:

> "(1) The Upper Tribunal shall … have power from time to time, on the application 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 … 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 Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; … or
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either -
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either -

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall 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."

23. The applicant seeks to have the covenant discharged or modified, to permit the proposed development, both on ground (c) and on ground (aa); however, all the argument was focused on ground (aa) and it is accepted that if the application were to fail on ground (aa) then it would fail on (c).

24. In the light of the relevant provisions of section 84, therefore, in deciding whether to modify or discharge the covenants that prevent the proposed development we shall be considering:

1) Whether the proposed use of the application land is reasonable;

2) Whether the covenants impede that use;

3) Whether the impeding of the proposed use secures practical benefits to the objector;

4) Whether, if so, those benefits are of substantial value or advantage;

5) If they are not, whether money would be an adequate compensation.

25. The applicant does not rely on the public interest point in sub-section (1A). Crucially therefore, if the covenants, in preventing the proposed development, give Mrs Jenner any practical benefits of substantial value or advantage, then they cannot be discharged or modified. If they do not, then they can be discharged or modified only if the applicant can show that money will be an adequate compensation for any loss she will suffer from that discharge or modification.

26. We remind ourselves, first, that the applicant was entitled to demolish the original house. and second, that the alternative development would not breach the covenants. Whatever our decision, a new house will be built on the site; whether or not it is built in accordance with the planning permission for the alternative development, it may well overlook number 2, and the covenant does not prevent that.

The factual evidence

27. Mr Saunders is a director of Blue Angel Properties Limited, a company he founded with his wife. The company acquired the site in October 2015 with a view to redeveloping it as a new home for Mr and Mrs Saunders after Mr Saunders retired. Meanwhile the house was let to a succession of tenants. In December 2016 a decision was taken to redevelop the site for profit; architects were appointed, and Savills were consulted. Mr Saunders' objective was to maximise value, in other words to design a building that would maximise the applicant's profit. The terrace design took shape. Although no decision on tenure has been taken, Mr Saunders explained in cross-examination that he thought the five purchasers would share the freehold of the building, and would form a management company, with each having a long lease of their own houses.

28. Mr Saunders explained in his witness statement that he has planted a hedge of chestnut holly trees on the southern boundary of the site. They are currently 21 feet (6.5 metres) tall and will grow to about 26 feet (8 metres); they are to be pleached, which means that they will be trained on wires to form a screen (rather than growing in a conical shape). We saw the trees on our site visit; they look well, and are covered in berries.

29. Mr Saunders explained that if the Tribunal does not accede to the application, the applicant would sell the site with the benefit of the planning consent for the alternative development; if a buyer could not be found, the applicant would build the house and sell it. When questioned about the cost of construction he said that he had not sought any advice beyond providing the architect with a brief to maximise the value. He conceded that a smaller house could be built nearer the front of the site.

30. Mrs Jenner gave evidence about her concerns about the proposed development. She has lived in number 2 since 1973 and has altered and extended the property within the limits of the restrictions imposed by the covenants. She values the feeling of privacy, safety and openness that its surroundings provide. In a letter from her former solicitors dated 23rd July 2019 to Mr Saunders solicitors, Mrs Jenner's position was stated as applying in equal measure to the proposed and alternative developments. However, in evidence before the Tribunal she stated that her greater concern was the effect that the proposed development of five houses would have on her enjoyment of her home. She is worried about the

prospect of noise and disturbance from the proposed development; she confirmed at the hearing that she is not troubled by noise from the nearby houses and school.

The expert evidence

Evidence about amenity

31. Expert evidence on amenity was given, for the applicant by Professor Bob May and for the objector by Ms Louise Hooper.

32. In terms of methodology to assess visual impact Professor May had used an 'Extent of Visible Development' approach whilst Ms Hooper had adopted Guidelines for Landscape and Visual Impact Assessment (GLVIA3) and Residential Visual Amenity Assessment (RVAA), both published by the Landscape Institute. Professor May regarded those methods of assessment as inappropriate in this context, and said they were suitable for larger schemes requiring Environmental Impact Assessments. Ms Hooper took the view that they were tried and tested industry standard methodologies applicable to all scales of development and pointed out that Professor May had provided no clear methodology for his approach.

33. We do not think it would be useful to conduct a detailed analysis of the suitability of each method. There appear to be benefits and compromises in each. What we have to consider are the substantive issues with which each expert engaged. They were:

    i) Outlook and views

    ii) Overlooking and loss of privacy

    iii) Light pollution

    iv) Noise and disturbance

34. Professor May used a 'before and after' approach to views, comparing the visible frame prior to and after development. He defined a view as being along a particular line of sight. The starting point he said, was to assess the quality of the outlook presently experienced, take account of what may be built and then to assess the degree of change and judge whether the change is adverse and significant. It was not clear from his evidence whether his starting point was the site of number 1 with the original house in place or after demolition. Given the orientation of Mrs Jenner's house it is self-evident that views to the south will be unaffected. His conclusions in relation to the northerly views were that it was only to the north east that the views would change and that the clearest views of the proposed and alternative developments would be from a landing window. In his report Professor May provided montages showing the visible extent of both the developments from bedroom 1, the landing, the middle bedroom and the lounge. He did not comment on the degree of change except in relation to the lounge where he said that there is a limited outlook change and a very limited impact. It is unclear whether he included both the

proposed and the alternative developments in this assessment. He said that the planting at the southern end of number 1 will, once established, very effectively screen the application land from number 2.

35. Ms Hooper had visited Mrs Jenner's house in August 2020 prior to the demolition of the original house on the application site, and she noted that filtered views of the upper part of the property visible were through the vegetation. From the first floor windows there were "clear filtered" views of the property. She thought that during the winter months, with less leaf cover, more of the existing property would be visible. Her view was that the proposed development would have a greater impact on number 2 than the alternative development because it would be wider, with more windows on the south western elevation and would be five properties rather than a single property. Her report categorised the change in the number of windows and doors in the south west elevation as being a medium magnitude of change in a townscape of high sensitivity, which would give rise to a major adverse impact.

36. In addition, the experts considered three further aspects of visual amenity:

    i) change in visual amenity experienced when approaching and entering Hollyshaw Close – the sense of arrival;

    ii) change in visual amenity experienced when passing the application site using the shared driveway; and

    iii) change in visual amenity experienced when entering the private driveway to 2 Hollyshaw Close.

37. In relation to the first of these Professor May concluded that the demolition of the original house and garage as part of the proposed and alternative developments would 'greatly enhance' the visual amenity afforded to Mrs Jenner. In contrast, Ms Hooper believed that there would be a medium magnitude of change owing to the new gated entrance, and the set back position of the new building. It would be higher and wider in scale; these changes would be noticeable in the view, affecting its character. She stopped short of saying whether this would be an improvement.

38. Regarding the second aspect Professor May noted that the original house was very close to the driveway and clearly visible when travelling along it. He also noted that the landscaping on the boundary would be extensive and good quality, which would improve visual amenity for Mrs Jenner. Ms Hooper's analysis was that there would be a low magnitude of change as the existing boundary planting would be replaced.

39. Finally, Professor May concluded that there would be no change to the views in to Mrs Jenner's site when arriving at the entrance. Ms Hooper categorises the situation as being a low magnitude of change.

40. Turning to overlooking and loss of privacy, it will be recalled that the rear garden of the application land slopes down towards number 2. We referred above (paragraph 28) to the chestnut-leaved holly trees. They are 21 feet high at the moment; they will grow up to 26 feet in height and should reach maturity in 5 years. In the meantime, an irrigation system and pleaching wires have been installed. The intention is to create a continuous, evergreen high-level hedge to screen the proposed or alternative developments from the windows of Mrs Jenner's house. Ms Hooper agreed, at the hearing, that the trees would be fast growing, likely to survive and would form a continuous pleached hedge within the timescale envisaged. Taking the planting into account, Professor May thought that the outlook from Mrs Jenner's house would not significantly change. But because of the loss of mature trees in the application site and the increase in the proportion of evergreen plants in the boundary planting, Ms Hooper's view was that the proposed development would lead to a moderate to major adverse impact, and the alternative development to a moderate adverse impact.

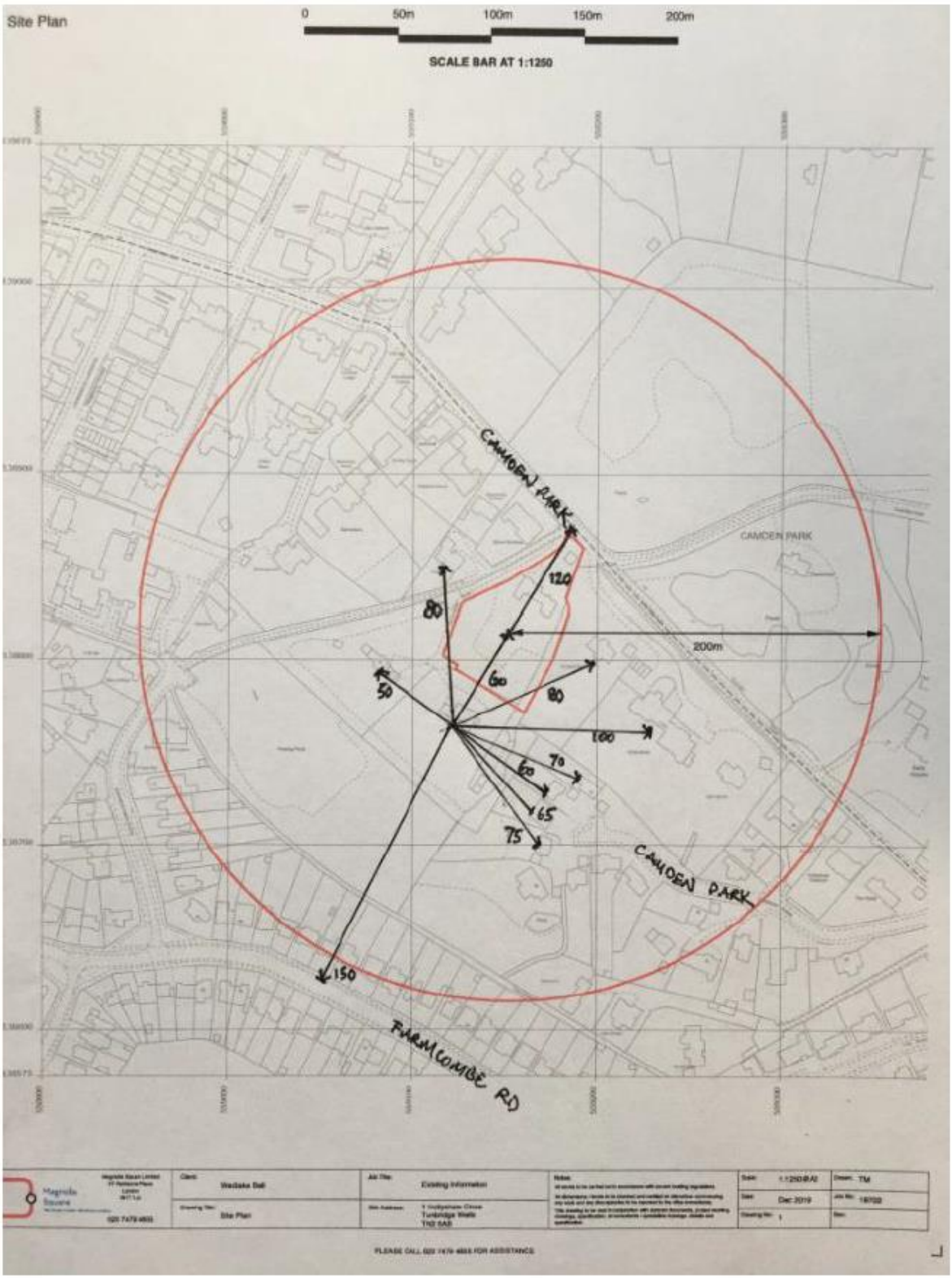
41. The proposed development has small balconies at first floor level on each of the two outer houses; the alternative development has a second floor balcony leading from the gym, which could be used for entertaining. Professor May calculated that it could accommodate 37 people for a social function and would, by virtue of its height, have views over the boundary landscaping.

42. As to light pollution, Professor May thought that because the eastern end of the proposed development would not be seen from number 2, light spill only needed to be considered from the three dwellings at the western end of the proposed development. He had calculated the 'visible outlook of the two schemes' using the areas of visible elevations and windows. This enabled him to determine that from the window in Mrs Jenner's house with the clearest view of the application site, the impact would be less from the proposed development than from the alternative. Neither, he said, would have a material impact on light pollution partly because most of the upper floor rooms of the former would be bedrooms which would normally be screened by blinds or curtains. The upper floor of the alternative development is intended to be used as a gym, where blinds and curtains would not be needed.

43. Ms Hooper, on the other hand, took the view that light spill from a window can be visible even if the window cannot be seen. She thought that an increase in the number and size of windows and glass doors facing Mrs Jenner's house which would give rise to an increase in evening light spill/pollution.

44. Professor May made a number of observations about noise and disturbance. He had visited the site at different times of the day and on no occasion had he found traffic noise, the use of gardens or the local primary school to be intrusive. He said that the prevailing wind direction at Hollyshaw Close is from the west and would carry noise away from number 1, in the opposite direction to number 2. He noted that in planning terms a distance of 21m (69 feet) between elevations is regarded as providing reasonably quiet gardens. He provided a plan (reproduced below) showing the distances (in metres) from the patio of number 2 to neighbouring properties and roads, demonstrating that the distance between the rear wall of number 2 and the south wall of the proposed development would be about 200 feet and that a number of nearby properties are not a great deal further away.

45. From his observations taken during site visits Professor May found that cars using the surrounding roads in Camden Park (outside number 1) and in Farmcombe Road, could not be heard. He concluded that cars entering and leaving the proposed development will not be heard, especially as much of the manoeuvring will take place in the basement level car park.



46. Professor May commented in his report that it is normal for occupiers to make use of outside seating areas, especially those that are close to their home, level and south facing. The proposed development has five patios ranging in size from 193ft^2 to 258 ft^2. These are to be separated by low hedging, with the communal garden beyond. The alternative development has a single terrace of 1,011ft^2. Professor May thought that it was very unlikely that each of the 5 residents would all choose to have social events at the same time but if they did the maximum aggregated capacity would be 108 people dining or 360 standing. The comparative numbers for the alternative development are 96 and 320 people respectively. He concluded that the potential for disturbance from noise arising from social events would be significantly higher from the alternative than from the proposed development.

47. Ms Hooper's report did not address the issue of noise.

Valuation evidence

48. For the applicant, expert valuation evidence was given by Mr Andrew Highwood, a director of Savills, based in the London Head Office. He has 30 years' experience of property valuation. While compiling his report he had spoken to Mr Robert Jacobs, a fellow director who is based at Savill's Tunbridge Wells office, other staff at that office, and colleagues in the Sevenoaks, Guildford and London offices.

49. He described his instructions as follows:

> "What development would be carried out on the land in the event that the application is dismissed, and the land is sold by the applicant as a vacant plot. In this context he should:
>
> i) assess and opine upon the likely market for the land if sold as a vacant plot with the benefit of planning permission for the alternative development;
>
> ii) consider how likely it is that the alternative development will be built by a purchaser from the applicant of the land;
>
> iii) if he does not consider it likely that alternative development will be built by a purchaser from the applicant of the land, then I should give my opinion about what other developments such purchaser would be likely to build on the land.
>
> In light of my conclusion about the development that will be undertaken if the Tribunal dismiss the application and the site was sold as a vacant plot, the impact (if any) that modifying the covenant so as to permit the proposed development would have on the value of the of the objector's land at 2 Hollyshaw Close."

50. In the light of those instructions Mr Highwood's evidence was focused on whether the alternative development was likely to be built, rather than upon the loss in value of Mrs Jenner's property if the covenant were discharged.

51. Mr Highwood agreed the following valuations with Mr Tibbatts:

    i) The site of 1 Hollyshaw Close with permission for the alternative development is worth £1,800,000.

    ii) 2 Hollyshaw Close in its present condition and layout is worth £2,000,000.

    iii) 2 Hollyshaw Close in its present condition and layout and with the benefit of planning consent to replace the existing house with a new house would be worth £2,500,000.

52. Mr Highwood noted that Mr Saunders had stated in his evidence that if the Tribunal refused to modify the covenants, he would sell the plot with the consent for the alternative development. Mr Highwood thought that such plots rarely come to market and there would be considerable interest from developers but also from individuals seeking the opportunity to create something to their own designs and taste, who would bid more than a developer.

53. He had not been able to identify any recent instance in Tunbridge Wells where a developer had built and sold a single large house. He had found three cases where the owner had demolished an existing house and replaced it with a large house for their own use. All three were in Nevill Park (see paragraph 11 above).

54. The first of these is at 11 Nevill Park. The original 5 bedroom house was purchased without consent for redevelopment. It had a gross internal area of 3,192 ft^2 and occupied a site of an acre. Work is now under way to build a house of 7,642 ft^2.

55. The second is Albury at Nevill Court, a road leading off Nevill Park itself. Here the acquiring owner has obtained consent to replace the existing house of 2,408 ft^2 with one of 6,900 ft^2. The site is 0.75 acres and Mr Highwood says that density implies that a one acre site would support a house of 9,200 ft^2.

56. Finally, at Spring Walk, Nevill Court a house of 12,131 ft^2 has planning consent but work has yet to start. The design includes a pool, cinema, wine cellar, gym, sauna and changing rooms at basement level. However, the 'above ground' element of the house only extends to 7,610 ft^2.

57. He also identified two houses in Nevill Park (numbers 4 and 10) where consent has been granted to increase the size of the existing dwellings to a level comparable to the three described above.

58. With these properties in mind, Mr Highwood took the view that if the application to modify the covenants is dismissed then the house that will be built is unlikely to be smaller than the alternative development and might even be larger. He said that there is demand for

large houses on plots of this type and the likely purchaser is a high net worth individual who will be constrained by what the planning authority will allow, rather than by cost.

59. Mr Highwood took the view that the existing consent is likely to be viewed as establishing what can be achieved within the plot, and that an owner buying for their own use would devise their own project with the existing consent as a fall back. He thought that they would want to make their own mark and create a sense of arrival leading him to the conclusion that they would build something on a similar scale, and at least as imposing: "it is not in the nature of high net worth individuals to be modest".

60. Mr Highwood also looked at the possibilities open to a developer purchaser looking to build and sell on at a profit. He calculated the notional profits from a development to show that the margin from a house of 9,114 ft^2 would be considerably more than from one of 80, 60 or 40% of the size. Mr Highwood provided two analyses, based on various Gross Development Values (GDV) and build costs. They result in a very similar outcome with a positive margin of 20% for the largest property and a negative figure of -19% at the smaller end. He used the same site value regardless of the building size in this analysis. We will return to these calculations later in this decision.

61. He then turned to the question of where on the plot a single house might be built. Having considered the shape of the plot, the advice of the architect about the setting of the house at the widest point and Professor May's comments about the house being set back further in the plot than the original house, he concluded that any new house would be in the approximate position of the proposed development.

62. Finally, on the question whether modifying the covenants to allow the proposed development would have any impact on the value of Mrs Jenner's property, Mr Highwood took the view that there would be no effect on value, noting that there was 'quite a distance' between the application site and Mrs Jenner's house which is oriented away from the application site. He endorsed Professor May's view that neither development would cause loss of amenity to Mrs Jenner. He justified his position that no mitigation is required on the basis that Mrs Jenner's house is worth more as a development site than in its existing use.

63. We now turn to the evidence of the valuation expert for the objector. Mr Tibbatts is a consultant to Scrivener Tibbatts, a firm based in Wimbledon, which he founded. He has more than 20 years' experience of providing valuations of residential property. He has appeared as an expert witness in three cases before the Upper Tribunal relating to the modification of restrictive covenants under Section 84 of the Law of Property Act 1925.

64. Mr Tibbatts said that he had consulted Mr Ross Davies, a partner in the Tunbridge Wells office of Knight Frank, and provided a detailed description of Hollyshaw Close and number 2 in particular. He pointed out that the site area of number 1, at 0.84 acres, is nearly 21% smaller than the area of number two and that the rear part of the plot has a one in seven gradient; these factors combine to make number 1 the least desirable of the three plots in Hollyshaw Close.

65. He agreed that a purchaser of the site would be willing to pay a premium to build a house to his personal requirements but did not think that they would build to the same size as the alternative development. In his view the purchaser of the site would build a smaller, 6,000 ft^2 house and add facilities such as a swimming pool and tennis court. This could be built he said, at a cost of £250 per square foot. He did not think that a purchaser would build the alternative development at a cost of around £2,000,000 in the knowledge that the end value would not exceed £3,700,000. In support of this view he relied on the opinion of Mr Davies who says that the residential market in Tunbridge Wells is strong and active up to £3,500,000 but much less certain beyond this point. He identified five reasons why the alternative development will not be built:

i) it is too large for the site;

ii) it has none of the facilities that a buyer would expect for a house of that size;

iii) it will be located at the apex of the site and will have an inadequately sized and sharply sloping rear garden offering impracticable recreation space;

iv) it will be uneconomic to build;

v) if the covenant remains in place a developer would not be able to 'chance his arm' by building it and if it didn't sell, revert to a fall back position of applying for planning consent to split it into separate houses.

66. His view was that the alternative development is a false comparator from which to assess the harm caused by the proposed development. The correct comparator is a smaller, yet-to-be designed house which would have no more impact on Mrs Jenner's house than the previous house.

67. Mr Tibbatts agreed with Professor May that number 1 would be developed for housing and that the most likely arrangement for a single large house would be to locate it to face northeast with a large southwest facing garden. He also agreed with Professor May's view that assuming a 'substantial' south facing garden the plot could accommodate a swimming pool.

68. However, he disagreed with much of Professor May's evidence. In particular, he did not agree that a house larger than the alternative development could be built. Mr Tibbatts had already concluded that the alterative development would not be economically viable, and it followed that a larger house would be even more so. He also disagreed with his view that planning permission could be granted for a single house that could be worse for the objector than the alternative development; Mr Tibbatts felt that no one would make an application for a larger house and therefore the prospect of permission does not exist.

69. Mr Tibbatts identified seven benefits secured to number 2 by the restrictive covenants:

i) the preservation of the covenant scheme. If the covenants are modified to permit the proposed development, the factual position and the context on the ground will be so altered that it will be almost impossible to refuse a similar application from No. 3. The covenants prevent a modern housing estate being built at Hollyshaw Close and the value of this substantial practical benefit cannot be accurately expressed in money;

ii) the arcadian context will be destroyed by the proposed development;

iii) the preservation of the views, outlook and privacy;

iv) The preservation of one house per plot density. Mr Tibbatts pointed out that the proposed development represents a 450% increase in housing density and the prevention of this, and of the prospect of these houses being occupied by five families on the smallest of the three plots at Hollyshaw Close, is a very clear practical benefit of substantial value or advantage.

v) Peace and quiet. Mr Tibbatts took issue with Professor May's assertion that one house would create more noise than five. Applying simple logic, he said, this cannot be right.

vi) Protection from complaints in the future. Mr Tibbatts thought that the use of the driveway by people living in the proposed development would be likely to cause complaints as pedestrians (including children) vied for space with vehicles using it for access.

vii) Ability to grant or refuse consent in the future. The covenant provides, in the view of Mr Tibbatts, benefits of substantial value and practical advantage in preventing the intensification of the use of the site by 'the back door' involving sub-division of the houses.

70. Mr Tibbatts used these headings to inform his opinion of the diminution in value that the house at number 2 would suffer if the covenants were to be modified to allow the proposed development. He quantified this using first the original house as a comparator and then the alternative development; for each heading he gave a range, and said that it would be reasonable to use the midpoint in each range, as follows:

	Item	Existing House as Comparator	Alt. Development as Comparator
1.	Character of the area	3% - 4%	1½% - 2%
2.	Views, outlook and privacy	3% - 4%	1½% - 2%
3.	Density of housing	2% - 3%	1% - 2%
4.	Noise, traffic movement/peace and quiet	1% -1½%	¼% - ½%
5.	Protection from complaints in the future	½% -1%	¼% - ½%

6.	Ability to be able to grant or refuse consent	¼% - ¾%	¾% - 1%
7.	Compensation for construction works	¼% - ½%	0% - ¼%
	TOTAL	10% - 14¾%	5¼% - 8¼%

71. Mr Tibbatts viewed the preservation of the covenant scheme as paramount. He could not assess its loss in terms of monetary value to any degree of accuracy but thought that it would cause a further 10% to 20% diminution in value of the objector' property. This was because a development of number 3 in addition to the proposed development would dominate number 2 and cause even more harm in value terms to number 2. It seems to us that this is to some extent already included in his third item, density of housing. At the hearing, when questioned about the accuracy of the adjustments he defended his approach as being, in effect, an endeavour to quantify the unquantifiable. He suggested that there should also be compensation for disturbance in a range of £5,000 to £10,000.

Discussion and conclusion

72. Faced with the familiar dispute where the objector finds the proposed development wholly unacceptable, and the applicant regards this as a case where "the prospect terrifies while the reality will prove harmless" (*Re Zopa Developments' Application* [1966] 18 P & CR 156), the Tribunal treads again the familiar path along through five questions set out at paragraph 24 above.

Is the proposed use of the application land reasonable?

73. This is often uncontentious where the proposed use has planning permission. However, for Mrs Jenner it is argued that the proposed development is not a reasonable use of land, being out of keeping with Camden Park.

74. The planning application was certainly contentious: 87 people objected to the 2017 application and 78 to the 2019 application, and a petition with 2127 signatures was presented in opposition to the 2017 application. Most of the objectors were residents of Camden Park. Mr Saunders accepted in cross-examination that the seven supporters of the application recorded on the Planning Portal were all his friends and acquaintances, none living in Camden Park.

75. However, this is not a case where our reaction is, as Mr Rainey QC put it, "How on Earth did that get planning permission?". In Camden Park itself the proposed development will not be visibly inappropriate. Much depends on how the entrance is managed, but the passer-by on Camden Park will be aware of a large and imposing building but may not be conscious that it is in fact a terrace of houses. An important design feature is that the proposed development is intended to look like a single house. Hollyshaw, just a little further along the road, does so too. It does so rather more successfully, being set back and

invisible from the road and being only two storeys high. But it stands as a precedent for the proposed development and we are not convinced that the latter will change the character of Camden Park, particularly in view of the presence of other significantly large dwellings such as Perreys on the northern arm of the road.

76. Ms Hooper expressed the view that the local planning authority has underestimated the impact of the proposed development on Hollyshaw Close. That is perhaps the inevitable consequence of the secluded nature of Hollyshaw Close. Overall, looked at from the point of view of Camden Park, of passers-by, and of potential development in Camden Park the proposed development is on the large side but not wholly inappropriate, and we think that that will have weighed far more heavily with the local planning authority than did the concerns of the two other households in Hollyshaw Close. Indeed, this case illustrates very well the different points of view of the town and country planning regime and the considerations relevant to an application under section 84.

77. On balance, therefore, we regard the proposed development as a reasonable use of the application land.

Does the restrictive covenant impede that use?

78. It is agreed that the proposed development would breach the "one house one plot" covenants set out at paragraph 24 above.

Does the prevention of the proposed development secure practical benefits for the objector?

79. We look at this question under the following heads:

(1) What is the point of comparison?

(2) The effect of the proposed development on Hollyshaw Close

(3) The loss of amenity to number 2

Practical benefits (1): what is the point of comparison?

80. In looking at whether the restrictive covenants secure practical benefits to the objector we have to have in mind what will happen if the application fails. If there is going to be other development that will not breach the covenants but is, from the objector's point of view, just as bad, then the benefits that the covenant secures may be minimal (*Re Fairclough Homes Ltd* [2004] EWLands LP_30_2001, at paragraph 30). And it is not in dispute that if the covenants are not discharged or modified then another single dwelling will be built on the application site. The original house is demolished, there is planning permission for a single dwelling, and the applicant argues that the comparison should be between the proposed development and the alternative development.

81. For the objector, Mr Rainey QC argues that the alternative development will not be built. It is too big, larger than any other house in Tunbridge Wells except for Spring Walk (where 37.25% of the space is underground, see paragraph 56 above). It does not blend with its surroundings (despite the planning authority's views, see paragraph 17 above) and it will leave the purchaser with a sloping and inadequate garden and no room for facilities such as a swimming pool or tennis court. A purchaser with that much to spend will buy in Nevill Park where they can have a great deal more useable land and amenity than is available in Hollyshaw Close. In other words, the plan to build the alternative development is unrealistic and is put forward in an attempt to intimidate the objector.

82. There is force in the objector's argument, but we make no finding as to whether the alternative development will be built. The permission for the alternative development serves as a reminder that change is coming, that a new house will be built on the site, that it is likely to be large (Mr Tibbatts suggested 6,000 square feet), and that it will probably to some extent overlook number 2. There is likely to be some loss of amenity for number 2, great or small, when a new house is built compared with the position as it was when the original house was in place (unless it stands in a similar position to that occupied by the original house, which may be unlikely given the Conservation Officer's preference for a house that stands away from the road (see paragraph 19 above)).

83. Accordingly, our point of comparison is between number 2 with a single dwelling built on the application site, and number 2 in the presence of the proposed development. The planning permission for the alternative development provides a worst-case scenario. That leaves some uncertainty, but Mr Saunders' instructions were for a design that maximised value (see paragraph 29 above) and therefore we find that it is unlikely that anything bigger than the alternative development will be built. If the covenants secure a practical benefit of substantial value or advantage to No.2 when we compare the proposed development to a new single dwelling even of the size of the alternative development, then the case for maintaining the covenants unmodified will be strong indeed.

Practical benefits (2): the effect of the proposed development on Hollyshaw Close

84. The secluded nature of Hollyshaw Close may have made it a peripheral concern to the local planning authority, but it is central to what we have to consider in determining this application. Mrs Jenner's objections to the application are first that the proposed development would destroy the character of Hollyshaw Close and second that it would cause her a significant loss of amenity.

85. Mr Weekes QC in closing characterised that as an embarrassing position, saying that it is a sign of weakness in the objector's case that it rests principally on the "thin end of the wedge" argument that the relaxation of the covenants will damage the scheme for Hollyshaw Close as a whole, rather than on the direct harm to her own property. We do not read the argument for Mrs Jenner in that way. True, her statement of case starts with the setting and moves on to the effect on number 2 specifically, and Mr Rainey QC organised his closing in the same way, but we do not understand the "principal case" to be about Hollyshaw Close rather than about Mrs Jenner's own property. The two are closely linked

and of equal importance. We look first at the effect on Hollyshaw Close and on the covenant scheme.

86. Hollyshaw Close is part of Camden Park, with its two residential roads surrounding a wooded area. On both sides of the two roads we find houses in a range of values; it would be hard to describe any as small, and some could be said to be massive. Many are built in an imposing neo-classical style. What they have in common is that they tend to make full use of the width of the plot and therefore the roads seem quite densely developed even though the properties have spacious rear gardens.

87. Set in that context, Hollyshaw Close is a very different environment. Until recently it was home to three large but unpretentious 1950s houses in a spacious setting, surrounded by trees with a rural aspect to the south-west. Numbers 2 and 3 are the larger plots, far wider than any conceivable single dwelling; the application land is less extensive, and perhaps a little awkward because of its slope, but the flat area at the apex of its upturned saucer shape provided a very pleasant garden area for the original house.

88. All three properties in the Close are subject to the same restrictive covenants. Because of the way the conveyancing was managed in 1958 this is not a symmetrical scheme (see paragraph 16 above), but there is nevertheless a scheme designed to preserve a special environment.

89. Professor May placed no value on the preservation of the low density of housing in Hollyshaw Close. In his view five houses on an acre was very low density. This reveals his perspective as a planning expert, looking at houses across the broad context of urban development. In terms of what was intended to be built on Hollyshaw Close and what is still found there, five houses on the application site is not low density.

90. If one of the three properties steps out of the scheme that the covenants (on all three properties) are designed to create and preserve, it is changed forever. The secluded enclave of three single households would be gone, leaving the much smaller enclave of numbers 2 and 3 alone, approached no longer by a private road that passes a single dwelling on the application road, but by a road that passes a terrace of houses, which we find would be clearly visible above the 1.8 metre hedge planned for the roadside boundary, and that may at times be busy with pedestrians from the new houses. The density of housing on Hollyshaw Close will have more than doubled.

91. The avoidance of that outcome is a practical benefit to the owners of number 2.

92. It is further argued that the relaxation of the scheme for the application site will lead to the relaxation of the scheme for number 3 and inevitably to the development of more than one house there. Developers have, as Mr Rainey QC put it, been circling around Hollyshaw Close for some time, and they will close in if the chances of success appear to be increased. This is the "thin end of the wedge" argument, although that label is more apt to a case where a development is innocuous in itself but is feared because of the knock-on effect on other properties subject to the same restrictions, which is not what is argued here.

93. Multiple housing on number 3 would have a disastrous effect on the peace and privacy of number 2, and would finally destroy the character of Hollyshaw Close. Numbers 2 and 3 are on the same level, and are approached along the shared private road. Traffic, noise and disturbance would inevitably have an impact. Number 2 would be directly overlooked (whereas at present the only windows in number 3 that overlook number 2 are the frosted windows of the bathroom). Professor May thought that there could be permission only for two houses on number 3 because of the need to avoid cutting down trees. We think that is manifestly unrealistic. It is a large site of about an acre and there is plenty of room; it is an easier site to develop than is the application site. Mr Tibbatts took the view that up to nine houses could be built on number 3. Access might be an issue since Hollyshaw Close is single-track, so nine houses might be unrealistic, but a small number, more than two, is not.

94. For the applicant it is argued that the relaxation of the covenants on the application site will not have any adverse effect on the likelihood of development on number 3. A development causing little or no harm will not set a precedent for any seriously harmful development. Each application is judged on its merits, and if the development of more than one dwelling on number 3 would mean the loss of practical benefits of substantial value or advantage to number 2 then it will not be permitted.

95. We agree that the relaxation of the covenants for the application site does not inevitably mean that they have to be relaxed for number 3. As the impact on number 2 would be higher the arguments for retaining the covenants would be stronger. But the context of the application would have changed. Hollyshaw Close would already no longer be an enclave of single dwellings. It would, realistically, be very difficult indeed for the objector to resist a relaxation that permitted two, three or perhaps more houses on number 3 when five had been built on the application site. The unique character of the Close would already have been lost, leaving an island of two single houses rather than a group of three, and the arguments available to the objector would be weakened. Of course, if the covenants on number 3 still secured to Mrs Jenner a practical benefit of substantial value or advantage then the covenants would not be relaxed; but the changes to the application site would mean that it was far more difficult for Mrs Jenner to demonstrate that level of practical benefit.

96. Accordingly, we take the view that a practical benefit secured by the prevention of development on the application site is the avoidance of that change in context, which would make it harder to resist the relaxation of the covenants that burdens number 3.

Practical benefits (3): the loss of amenity to number 2.

97. We turn now to the evidence about loss of amenity, which we consider under the headings discussed above (see paragraph 33).

98. The proposed development would be 197 feet from the north face of number 2. Professor May observed that that is more than twice the minimum separation distance required by the planning system between habitable rooms in adjacent houses. We question the relevance of standard planning requirements in the very different context of an application

under section 84. However, we note that the alternative development would be closer by about 18 feet, as might any other single dwelling.

99. As to the outlook from number 2, we found the poles put up on the application site by Mr Saunders very helpful. The proposed development occupies the width of the plot. Even though it is set further back than the alternative development it would be visible from more of the objector's property than would any single dwelling, in particular from the tennis court on one side of the house and from the garden and shrubbery to the east. Some windows will be visible, although partially screened by the chestnut holly hedge, which we come back to shortly in the context of overlooking. Part of the attraction of number 2 is its seclusion. Any new single dwelling on the application site may be visible from number 2, but a practical benefit will be lost if a much bigger building can be seen.

100. We referred above to Professor May's montages showing the view from inside number 2; the proposed and alternative developments were clearly visible in each of these montages, and in some to a surprising extent. Mr Tibbatts also produced some very useful pictures showing the outline of the proposed development and of the alternative development as they would be seen from the first floor windows on the north side of number 2. Both would be visible, and we think they would be more than "glimpsed" as Mr Weekes QC put it, and more than "just visible" as the Tribunal said of gables in *Dean v Freeborn* [2017] UKUT 203 (LC) at paragraph 78. The covenants do not prevent a single dwelling being built and being visible from number 2; but they do prevent the additional bulk of the proposed development, with its 49% wider footprint, being seen.

101. Turning to overlooking and loss of privacy, these are serious concerns for Mrs Jenner. She said that when she and her husband moved in, in 1973, they felt that the covenants would protect them from ever being overlooked.

102. Of course, they cannot do that. The covenants restrict the height of buildings near the boundary; but that does not prevent a five-storey building further away. And as we understand it, Mrs Jenner's house was visible from the original house on the application land, and vice versa.

103. However, the covenants prevent the building of anything other than a single dwelling on the application land. And that brings with it an inherent restriction on size; a five-storey single dwelling would not get planning permission, and even if it did it is unlikely to sell, and so the covenants do reduce the extent to which number 2 can be overlooked.

104. The proposed development will have 40 windows in the south face; even a house as big as the alternative development will have only 18 (and a second-floor balcony). It will have patios at the rear, and five families using the steeply-sloping garden from where it will be possible to see the north elevation of number 2 and its front (northern) garden.

105. The applicant relies heavily upon the chestnut holly hedge which, as we said above, to our inexpert eyes is looking good at the moment. The trees were 21 feet high when planted in spring 2020 and will grow to about 26 feet in their first five years. The plan to pleach it is a good one to ensure that the trees form a screen rather than individual pyramids. The

difficulty is that pleaching is going to require careful and regular work. The proposed development will be owned, it is suggested, by the five house-owners together, and they will have to operate a management system. The hedge is to some extent a benefit for them, but is far more important for number 2 because of the relative heights of the two plots and whilst the owners of the terraced houses may all want the hedge to be maintained, wanting it done is not the same as getting it done and getting all five owners to contribute to the cost. It may not be a high priority for them.

106. Condition 10 of the planning permission requires the replacement, in the next planting season, of any trees shown on the site drawing that die or are removed or damaged during the five years from the completion of the development. That does not protect the trees for very long, and the owner of number 2 has no control over the enforcement of that condition.

107. A positive covenant requiring the owner of the application site to maintain the hedge cannot be enforced once the freehold changes hands. Arrangements can be made with a chain of indemnity covenants, but such arrangements are not reliable. It was suggested that the Tribunal might make the modification of the covenants conditional upon the proper maintenance of the hedge, a solution adopted in *Re Surana's Application* [2016] UKUT 367 (LC). But that is not going to be a practicable way for the owner of number 2 to enforce the obligation. It would require her to take proceedings for a mandatory injunction to maintain the hedge against the freehold owner of number 2, and the difficulties in obtaining such an order are well-known. If a tree dies, the court cannot make an order that produces a quick and effective solution.[1]

108. In summary, the proposed development will have a noticeable effect upon the outlook northwards from number 2. More seriously it will cause number 2 to be overlooked by the members of five families, and we do not think that the chestnut holly hedge can be relied upon to mitigate that problem.

109. Turning to light, 40 windows on the rear face of the proposed development is going to generate noticeable light, whether it is described as spill or as pollution. We are unimpressed by Professor May's view that the light from the proposed development will be less noticeable than from the alternative development because the latter will be nearer to number 2. The number of windows and the number of people in five separate households is, as a matter of commonsense, going to have a greater impact.

110. Finally we turn to noise and disturbance. Number 2 Hollyshaw Close is not a silent place. There is a school to the south-west, and when we visited we could hear the sound of the children in the playground. There is a school field, nearer to number 2 (it backs on to number 3) and noise from there will be louder than from the playground. Mrs Jenner

[1] The point of the condition in *Surana* was not primarily to ensure the maintenance of the hedge, but to ensure that of two alternative planning permissions, the one implemented would be the one that left the hedge intact. The condition did require the hedge to be kept at a height of 2.5m, and enforcement would have been against freehold owners living at the property, whereas in the present case the families living in the terraced houses would be leaseholders sharing the freehold and there would be no single freeholder who could ensure that the condition was complied with.

accepted that she had always been able to hear children playing outside in the surrounding gardens and was not troubled by that. We referred above to Professor May's diagram showing the distance between number 2 and the houses to east and west. It is true that the proposed development is not much closer.

111. However, what we have to compare is the noise from a single dwelling and a single family's vehicles, noise and activity with what will be heard from five households. We are wholly unconvinced by Professor May's view that social gatherings from the alternative development will involve more people and be noisier than those from five households. Again, we focus on the number of households who will be using the patios and back garden of the proposed development and we take the view that five households are noisier than one.

112. We heard some evidence about the likely purchasers of the proposed development. The six dwellings at Hollyshaw, two properties away, are (according to Mr Tibbatts, who has taken some time to observe the comings and goings there) largely occupied by retired people. For the applicant it is said that the same will be true of the houses in the proposed development, particularly since they would all have a lift. We find that it is impossible to predict who will buy the houses in the terrace, and we have to take into account that there may be families with children. Adults can be noisy too.

113. So can vehicles. The proposed development includes ten underground parking spaces, two for each household, as well as space for visitors and deliveries on the drive and turning space above ground, there will inevitably be more traffic noise from five households than from one.

114. Under the heading of disturbance, we can also consider the likely impact upon the shared private road, Hollyshaw Close itself. The proposed development (and any single household with vehicular access at the north end) would have little or no effect on traffic in the Close. But the plans provide a way in and out for pedestrians on to the road, half-way down, enabling them to avoid the vehicular access at the north end. We think it unlikely that children will be allowed out to play on the road, but inevitably there will be more pedestrians using it, with associated safety implications.

115. There is no doubt that the covenants secure a practical benefit to number 2 in the avoidance of the changed outlook, the overlooking and lack of privacy, and the noise and disturbance from more than one household on the application site. We are unconvinced by Professor May's arguments, which seemed to us to proceed from the perspective of an expert in planning, for whom the density of the housing proposed was negligible compared with that in a less unusual townscape. We find that there would be a considerable loss of amenity to No. 2 as a result of the proposed development.

Are those practical benefits of substantial value or advantage?

116. We turn now to the fourth question. Our answer must to some extent be clear from what we have already said. The covenants protect number 2 from loss of amenity caused by the building of the proposed development; we think that loss of amenity, particularly the

change of outlook, the overlooking, and the noise and disturbance, would be a serious loss for the occupier of number 2 and we therefore take the view – without the need to traverse the jurisprudence on the meaning of the word "substantial" - that the covenants confer a substantial advantage. They confer a further substantial advantage in the preservation of the character of Hollyshaw Close, both by preventing the proposed development (which would itself spoil that character), and by not making it any easier to obtain the relaxation of the covenants that burden number 3.

117. That is to some extent a subjective judgment. We make it on the basis of our impression of number 2 – which is, as Mr Weekes QC put it, an exceptionally pleasant home - and of the value that its occupants must place on their environment, both in terms of what is built on the application site, directly overlooking their entrance and their front garden and visible from their windows, and in terms of the character of the Close as a whole and its very different atmosphere from that of Camden Park itself.

118. A different way of assessing the benefits conferred by the covenants is in terms of their value, and we turn to the valuation evidence.

119. Bearing in mind the loss of amenity that would be caused by the proposed development, what would be its effect on the value of number 2? We reiterate that we are comparing the value of number 2 next door to a single dwelling on the application site (which might be as big as the alternative development), with its value next door to the proposed development. We are not looking at the value of number 2 next door to a bare site as it presently stands.

120. Moreover, we are looking at the value of number 2 as a single dwelling house. It is subject to the same covenants as number 3 and as the application site, which can be enforced by the owner of either plot. As matters stand there is no question of number 2 being developed for multiple houses. We are satisfied that there is no prospect whatsoever of Mrs Jenner seeking to build multiple houses on her land. Its value to her is as a plot with a single dwelling on it. Change is coming, as Mr Weekes QC said; but not yet. For now, this is a single home.

121. Number 2 might of course be sold and a replacement single dwelling built on it. Helpfully the experts have agreed that the plot is currently worth around £2 million, and could be sold with planning permission for a new single house for around £2.5 million, and both those values are relevant to our analysis.

122. Neither expert is active in the residential market in Tunbridge Wells and to a large degree they both rely on anecdotal evidence from established estate agencies in the town to inform their valuations. They expressed opposing views about whether the construction of the proposed development would cause a diminution in value to number 2.

123. Mr Highwood, for the applicant, considers that the value of number 2 lies in its development potential, and that if sold it would be worth more as a site than in its existing use. In his view no mitigation of the loss of amenity caused by the proposed development is necessary. There may be some truth in the proposition that in due course the house will

be redeveloped into something larger, but we are dealing with here and now, not when and if.

124. We are unconvinced by Mr Highwood's assertion that the purchaser of number 1 might well build a house even larger than the alternative house. We have observed that the largest houses at Nevill Park all have sites that are regular in shape and have topography that make the gardens suitable for swimming pools and tennis courts. Siting the alternative development at the widest part of the site at number one would lead to a compromise whereby the inclusion of a pool or tennis court would leave an undesirably small remaining garden.

125. We are similarly unpersuaded by the use of his illustrative figures to demonstrate that the greatest margin is produced by building the largest house possible. It is self-evident that the margin will increase with size where the other elements of the calculation are fixed. In reality, the site value will be a function of what can be accommodated on the site and while we acknowledge Mr Highwood's comment that the GDV figures needed to be treated with caution, the lack of detail and degree of supposition lead us to conclude that the analysis is not reliable.

126. Mr Tibbatt calculated the impact by reference to a group of factors and provides a range of percentages to accompany each. He agreed that the analysis was subjective, but he has identified several matters that would arise if the proposed development were built and would have a significant effect on the enjoyment of number 2. Ignoring the compensation for disturbance from the construction works, his view is that using the existing (now demolished) house as a baseline the impact of the proposed development the diminution in value of number 2 would be in the range 9.75% to 14.25%. That of course is, not the comparison we have to make. Using the alternative development as a comparator Mr Tibbatts thought the loss in value of number 2 would be in a range of 5.25% to 8%. In other words, he considered that the proposed development will have a significantly greater impact on number 2 than the alternative development; on his figures, the diminution in value of number 2 if the proposed development rather than the alternative development were built would be in a range of 4.5% to 6%; using the midpoints the difference between the two comparisons is 5.37%. However, it is of course far from certain that the alternative development will be built in the format that has planning consent. Mr Tibbatts thinks that to be viable a single house will need to be smaller and we can see good reasons why that might be so. It follows that the impact on number 2 would likely to be less and the gap between a development with five houses and one with a smaller single house would widen.

127. Mr Tibbatts also addresses the question of the effect on the value of number 2 through the potential redevelopment of number 3, a prospect that would be more likely if the proposed development is permitted at number 1. He is cautious about assessing the effect with any degree of accuracy but thinks that the diminution caused by that prospect could be in the range of 10% to 20%.

128. We agree with Mr Tibbatts that the alternative development will have less of an impact on number 2 than will the proposed development and we agree with his assessment that the loss of value to number 2, using that comparison, will be between 5% and 6%.

129. Turning to the other element in his assessment, the effect on the likelihood of development at number 3, we agree with Mr Tibbatts that this is hard to assess. We think that a separate diminution of 10% to 20% is unrealistic. We find that the further diminution in value caused by the effect on number 3 would be 4% to 5%.

130. Accordingly the overall effect on the value of number 2 if the covenants were modified would be in the region of 10%.

131. The valuers have also agreed the value of number 2 with consent for redevelopment as a single new house or for multiple houses, but neither figure is relevant to our deliberations as it is not a realistic prospect during Mrs Jenner's ownership. Furthermore, we do not agree that the development value of number 2 would be enhanced by the presence of the proposed development and even if it were, it too would not be relevant because we are concerned with its current value. That is agreed to be £2 million, and therefore the diminution in value caused by the building of the proposed development, compared with the building of a single house on the application site, at 10% would be £200,000.

132. We are mindful of the fact that there is no particular level of reduction that is always regarded by the Tribunal as substantial. There is no tariff. In *Willis v Rollins* [2019] UKUT 315 (LC) the Tribunal (Judge Cooke and Peter McCrea FRICS) observed at paragraph 62 that a diminution in value of between 5% and 11% has been regarded as substantial, and we have no hesitation in saying in this case that a 10% reduction in value of the objector's property is substantial, and that the prevention of that diminution is a practical benefit of substantial value.

If the practical benefits are not of substantial value or advantage, would money be an adequate compensation

133. In case we are wrong about that, we would add that the practical benefits of the covenants in preventing the proposed development, to Mrs Jenner – and specifically to Mrs Jenner who has lived here for decades and raised her family here – could not be compensated in money.

Conclusion

134. For the reasons we have given the application fails.

135. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Judge Elizabeth Cooke **Mr Mark Higgin FRCIS**

18 December 2020