

Key Considerations When Dealing with a Restrictive Covenant

Reviewing the restriction and your proposed use of the land at an early stage can help identify risks before significant costs or contractual commitments are incurred.



The Precise Wording

Review exactly what the covenant prohibits and whether the proposed activity falls within it. Restrictive covenants are interpreted according to their wording and the relevant legal and factual context.



The Burdened Land

Identify the property that is subject to the restriction. The covenant will usually appear within the registered title or an underlying deed referred to in the register.



The Benefiting Land

Establish which neighbouring land was intended to benefit from the covenant and who now owns it. Although the burden will often be apparent from the affected title, the benefiting land may be more difficult to identify.



The Original Purpose

Consider why the covenant was imposed and whether it continues to provide a practical benefit. The character of the property and surrounding neighbourhood may have changed considerably since the restriction was created.



The Proposed Development or Use

Assess how the project or change of use would affect neighbouring land. Matters such as privacy, overlooking, noise, traffic, appearance and loss of amenity may be relevant.

 Planning Permission

Treat the planning process and the restrictive covenant as separate matters. Obtaining planning permission does not authorise a breach or prevent a person with the benefit of the covenant from taking private legal action.

 Enforceability

Consider whether the covenant was correctly created, whether its benefit has passed to the current owner and whether any past conduct affects the ability to enforce it.

 Negotiated Consent or Release

Identify whether the beneficiary may agree to the proposed activity in return for conditions, compensation or another commercial arrangement. Any agreement should be formally documented.

 Modification or Discharge

An owner of freehold or leasehold land may apply to the Upper Tribunal under section 84 of the Law of Property Act 1925 to have a restrictive covenant discharged or modified. This jurisdiction does not extend to positive covenants or easements such as rights of way.

 Evidence and Expert Advice

Gather title documents, historic conveyances, plans, planning information and evidence about the surrounding area. Valuation or planning evidence may be required where the impact of a development or potential compensation is disputed.

 Injunction Risk

Do not assume that compensation will be the only consequence of a breach. A person entitled to enforce the covenant may seek an injunction stopping works or requiring completed development to be altered or removed.

 Timing and Project Commitments

Investigate covenants before completing a purchase, commencing construction or entering into commitments with funders and contractors. Tribunal proceedings and contested negotiations can affect development programmes.



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