



Dealing with restrictive covenants on development land

Successful property developers have a good eye for a promising opportunity but they must also navigate the complexities of legal restrictions on how land may be used. What looks like a perfect site could be subject to restrictive covenants that could stop a development in its tracks.

What are restrictive covenants?

Restrictive covenants are binding obligations over property, typically agreed at the time of a change of ownership, that place restrictions on how the 'servient' land may be used. They are potentially capable of preventing specific activities or developments indefinitely unless steps are taken to remove them one way or another.

The right to enforce a restrictive covenant can pass from one owner to another when the 'dominant' land which benefits from it is sold. This means that what looks like an archaic restriction on activities common in the 19th century might still stop a development in the 21st century. Even planning permission for a development could be trumped by a restrictive covenant.

Examples of typical restrictive covenants include:

- not building on certain parts of a site;
- not building more than a specified number of dwellings on a site;
- not building above a specified height or beyond a specified building line; and
- not using the land for specific trades or businesses.

Some restrictive covenants require consent from the landowner with the benefit of the covenant. These can cause particular problems if it is not clear who currently has that benefit, especially where land has been sub-divided and sold on.

What are the penalties for breaching a restrictive covenant?

If a landowner simply ignores a restrictive covenant and carries on with development in breach of it, then they risk court proceedings for an injunction halting the work. The owner might even be required to demolish completed buildings, especially if the court considers that the restriction has been deliberately ignored without attempts to negotiate a release or use the proper statutory process (see below). In some cases, the court will order payment of financial compensation instead of granting an injunction, but it would be unwise to take a risk on that outcome.

What can you do about restrictive covenants?

If you own or are purchasing land subject to a troublesome restrictive covenant, your solicitor will start by investigating whether it is still enforceable. The rules on this are complex and depend on when the covenant was entered into, how it was worded, who still enjoys the benefit of it and whether it has been correctly registered.

Assuming the covenant is enforceable, there are three options for dealing with it.

- **Applying to court** - there is a statutory process for getting covenants altered or removed if the court is satisfied that they are obsolete or prevent a reasonable use of the land, or that the person with the benefit has agreed or will not be adversely affected. This really depends on the specific situation you should take legal advice on how likely you are to succeed with a court application and how much court action it is likely to cost..
- **Negotiation** - if you know who has the benefit of the covenant, you may be able to negotiate with them to release it, usually in return for a payment. Sometimes adjacent plots of land are subject to matching or reciprocal covenants and if this is the case, you may be able to agree a mutual release.
- **Insurance** - depending on how old the covenant is, you may well be able to take out indemnity insurance to cover costs and losses you would incur if you developed the land in breach of the covenant and it was enforced against you. The premium will depend on the insurer's assessment of the risk and it is vital that you disclose all material information. Most insurers will refuse to give cover if you have already approached the person with the benefit of the covenant, so you must discuss with

your solicitor in advance whether insurance is likely to be a better solution than negotiation.

Building in breach of a restrictive covenant or buying land without realising that it is subject to restrictions could be extremely costly. Getting good legal advice at the outset will help you avoid costly mistakes and, in many cases, will enable you to cover yourself against the risk of losing a great development opportunity.

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Our key contact at DMP for further advice and assistance on restrictive covenants is:

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