Painshawfield and Birches Nook Estate Estate Committee

Having successfully contested the application by the owners of 21 Cadehill Road to modify the Deed of Mutual Covenant (DOMC), the current Estate Committee (EC) decided to conduct a full review of the duties, policies and procedures used by the EC with a view to publishing the results for all householders to see, and to inform future practice.

1. **Introduction and History**

The Deed of Mutual Covenant dates back to 1895, when a group of 53 people decided to purchase land for the development of housing away from the noise and dirt of the industrial cities. Until recently, there were 301 properties on the Estate, there are now 302.

The objective of the original 53 people was to establish a local law to govern development across the Estate. They aimed to use two simple principles: the exercise of mutual respect for the interests of others and democratic governance. These principles were enshrined within the Deed of Mutual Covenant (DOMC). The DOMC may be viewed on the Painshawfield Estate website.

The DOMC applies to each and every property on the Estate. Accordingly, one vote is allocated to every household to use at the AGM when voting for new members, or for resolutions that affect the management of property across the Estate. The DOMC requires that applications for developments that range from new houses to the erection of sheds and greenhouses should be considered and agreed by the EC, taking into account the views of neighbours.

S 14 of the DOMC lays down how the management of the business of the estate should be carried out. The role of an estate committee of no less than 9 members elected by the mutual covenantors living on the estate, will have a duty to:

''*inspect plans of dwelling houses and other buildings proposed to be erected and no dwelling house or other building shall be erected unless the plans thereof have first been submitted to and approved by a majority of such committee*.''

The DOMC goes on:

"Where it is thought desirable to obtain the consideration or wishes of the mutual covenantors on any subject affecting the enjoyment or ownership of the said land or in connection therewith or to appoint or discharge a secretary, a treasurer and other officers, a meeting shall be called of which not less than two clear days' notice in writing shall be given at the request of any two or more of the mutual covenantors by their secretary or if there shall at the time be no secretary or he shall refuse or neglect to act on the request within seven days of its being made to him a meeting may be called by any two or more of the mutual covenantors and at every meeting nine votes shall form a quorum. At such meetings each of the mutual covenantors shall have one vote and no more except where hereinafter it is otherwise stated. Any vote may be given by proxy properly appointed in writing if notice of the appointment of such proxy be presented to the secretary or chairman of the meeting before the time fixed for its commencement or during the meeting."

2. **The Estate Committee**

Once elected by a majority of covenantors attending an AGM, the EC's role is to approve or reject applications for development as set out in the DOMC. Once elected, the EC is a lawfully legitimate

body that will continue for as long as it has the support of a majority of covenantors. That support is demonstrated by contributing financially and voting in new members.

The authority of the EC has been upheld in the three legal cases since 1895.

3. **The Management of the Estate**

You will see from the above extract that a quorum of 9 is required by the DOMC for the Estate Committee. The number of people serving on the EC has varied in recent years between 10 and 15. EC members come from a range of working backgrounds, all provide their time voluntarily and bring their expertise to bear in considering developments and solving problems. There are usually 11 meetings annually depending on the amount of business.

The intention of the current EC is to continue to continue to receive applications to extend, alter or replace properties in accordance with the terms of the DOMC and maintain the current density of housing on the Estate. By doing so, the character and amenity of the Estate will be protected for the mutual benefit of all covenantors.

4. **The Mutual covenantors**

The EC requests an annual contribution of £60 from each household to fund the costs of its operations. This pays for secretarial costs, upkeep of the common land and the cost of insurance etc.

The EC will hold an Annual General Meeting (AGM), to which all covenantors are invited. At the AGM, the EC will account to covenantors for the work carried out in their name and for the money spent. The EC will also seek elections of new members, and put forward resolutions for voting.

5. **Making Changes to the Estate**

Should a covenantor (or a group of covenantors), wish, to make changes to the Estate, for example, building against the requirements of the covenant or build more houses, they will need to persuade a majority of home-owners and this will mean voting in a new EC members. It will also mean that any proposed amendments to the DOMC will have to be agreed by a majority of covenantors.

However, most, if not all, covenantors purchased properties on the Painshawfield Estate, knowing of the existence of the DOMC. Most accept that, whilst the existence of the DOMC brings benefits, it also brings restrictions on what they can do with their properties. Most people also have a legitimate view that the restrictions apply to everybody on the Estate. So, whilst many owners purchased their property with a view to enjoying the special amenity of the area based on the protection of the DOMC and do not wish to see change, there are others who believe that they should be able to develop their properties regardless of the terms of the DOMC. So far, those seeking to develop against the wishes of the covenantors, have been unable to take action on their plans as the EC, acting for the majority, has been successful in upholding, in court, the terms of the DOMC.

6. **Litigation**

The EC has only been involved in litigation on three occasions since the DOMC was put in place in 1895. On each occasion, it has been successful. *Lakeman v Moat* (1911) and *Price v Bouch* (1987 were both heard in the High Court: extracts from the judgements are appended.

The third, Colleen Cairns and Kim Moore (Applicants) v The Committee of the Painshawfield, Batt House and Birches Nook Estate, was decided in May, 2023, in the Upper Tribunal (Lands Chamber). At the time of writing, we are waiting for the Registrar to assess the final value of the costs to be paid by the applicants. Extracts from the judgement are appended.

Any litigation is funded via an appeal to covenantors for funds. This last case was funded in this way. It may, in future, be necessary to ask covenantors again to contribute financially to a Litigation Fund should a party decide, once more, to challenge the covenant. Litigation is expensive and the EC will always aim to get to a satisfactory conclusion by negotiation.

7. **The Applications Process**

Before submitting an application, covenantors are advised to read the Planning page and to view the flow chart, on the Painshawfield Estate website. This lists, firstly, the mandatory building lines as set out int the 1895 DOMC. There is also a list of the Discretionary Criteria that successive Estate Committees have put together to use when considering applications and which are designed to preserve the character and amenity of the estate. These discretionary criteria are intended to provide guidance to prospective applicants on whether their application is likely to receive approval, demonstrate a consistency of approach to applicants and ensure that Committees take a structured and consistent approach.

The Discretionary Criteria are guidelines, and it is possible that an application will receive approval if it is considered that it would not adversely affect the character and amenity of the Estate and would not set a precedent which may be detrimental. Equally, the Committee may decide not to approve an application that conforms to the guidelines if, by granting approval, it is considered that it would be detrimental to the character and amenity of the estate or set a precedent. Also, on the Planning page, there is a diagram to show how the application process works. The Committee's aim is to ensure that all applicants are treated in the same way, and without bias.

The usual process involves:

- an applicant submits an application to the Secretary along with proposed plans. An inspector is appointed to carry out a survey and P1 forms are provided to neighbours. The purpose of the P1 is to give the immediate neighbours who may be affected by the proposed development, and other interested people, an opportunity to object or agree to the proposals. Usually, people living either side of the applicant will receive a P1 but those living opposite or behind a property may also receive them.
- the inspector will prepare a report with a recommendation for consideration by the EC, taking account of the comments of P1 recipients
- the outcome will be relayed to the applicant after the meeting via a formal letter from the secretary. It is not usual if an application is rejected, to give reasons: this follows legal advice given to the EC. The applicant is then free to modify their plans and try again. Occasionally, applicants ask for reasons for the rejection, and informal advice may be provided in order to allow the applicant to resubmit plans that may be more likely to be approved
- if an application is approved by the Committee, the Estate Secretary would send out two documents known as P2 and P3 to the applicant. The P2 allows relevant building work to be undertaken and upon completion the owner would notify the Committee that the work had been completed and return the P3. The Estate's secretary would ask the original inspector to check the work. If the Committee is satisfied that the work carried out is in accordance with the approval, a copy of the P3 is returned to the applicant for their records, retaining a copy for the Estate records.

Advice available on the website is that applicants should seek EC approval prior to going to the expense of submitting plans to Northumberland County Council. Once the EC has given approval of an application, the applicant would then submit those plans to the local authority if planning permission is required.

Anyone considering a development may contact the Committee before submitting plans, in order to obtain a view on whether their plans were likely to be approved before committing to the expense of engaging an architect etc.

The EC considers three issues when considering an application. The first is the size of the plot of land. A plot of land must be half an acre in normal circumstances and one third of an acre in special circumstances. Special circumstances include where a house has previously stood on a small plot.

The second issue, is the density of housing within the Estate as this defines the special character and amenity of the area.

The third issue is that home-owners would not receive permission to build in their back gardens: this means that home-owners who have land-locked rear gardens may not build on this land with an access road running past the existing house. This would not comply with the covenant's requirements on frontage. It also prevents over development, that would change the character and amenity of the estate.

8. **Rejected Applications**

Where an applicant's proposals for development have been rejected they can take the following courses of action:

i. they can request an explanation: legal advice to the EC over the years, is that formal explanations should not be given. However, the Secretary can usually provide informal advice so that the applicant can amend their plans so that they then meet the requirements of the DOMC and try again.
ii. The Covenant provides a remedy for an aggrieved party, under the 1889 Arbitration Act. In Price v Bouch, Millet J. said "In my judgment, the remedy of a disappointed owner, who does not challenge the honesty or good faith of the committee, but who wishes to challenge their decision, is not to invoke the jurisdiction of the court but to requisition a general meeting of the mutual covenantors under clause 3 of the deed and to seek to persuade a majority of them either to pass a vote of no confidence in the committee or to reverse the committee's decision." So, the EC would organise an EGM of covenantors so that the applicant may present their plans to the meeting for discussion and a majority of covenantors can decide whether to uphold the Committee's decision or reject it.

9. **Conclusion**

The original 53 covenantors envisaged creating a special environment in which to live and bring up their families. That vision has survived for over 100 years. Their objectives and the DOMC are as relevant now as it was in 1895. So, it remains the case that no one party can impose their will on the majority of people living on the estate, the majority, through the medium of the Estate Committee will decide how the estate will develop in the future.

Extract from the EC's The Statement of Case 2022

Lakeman v Moat 1911

The rationale for the decision in Lakeman v Moat is that the Estate Committee was entitled to refuse to pass plans on the grounds of the siting of a proposed building. The court stated:

"that under the covenant contained in the said Deed of Mutual Covenants dated the 30th of May, 1895, the Plans Committee appointed pursuant to Clause 14 of the said Deed are justified in refusing to pass Plans in consequence of objection to the position of the buildings proposed to be erected."
12. The judgment of Neville J. contains observations upon the effect of the mutual covenant in clause 14: (1) "with the exception of imposing a general building line which was to be ascertained by the votes of the covenantors themselves, they appear to me to have delegated all other questions relating to the development of the estate to a Committee which must be assumed to fairly represent the views of the covenantors who elected them".

the question is whether the Committee were right in refusing to pass plans, otherwise unobjectionable, because of the impropriety in their opinion of their position. It seems to me that they are. I think, if I were to hold otherwise the very object of the appointment of this Committee and of the entering into the covenants which have been entered into, would be defeated, inasmuch as the estate might develop higgle de piggledy, and the erection of buildings put upon one plot by an owner might have the effect of prejudicing the value of all the plots within a very considerable distance. I think these provisions are expressly intended to guard against any such misfortune overtaking the owners of the estate".

The transcript also includes exchanges between counsel for the disappointed plaintiff and Neville J. These include the following observations by Neville J. which are pertinent to the scope of the Estate Committee's powers: (1) (of the criteria governing decision-making by the Committee): "I do not think it is a question of reasonableness ; I think it is a question of good faith".

(2) (of the consequences of the Committee's options on reconsideration following correction of its erroneous belief that the building lines could be satisfied): "'If they thought it could not, they would not have passed the plan at all. They might have said, "There is no room for a pair of houses; you can only have one, or a smaller pair"

(3) (of the suggestion that there had been other instances in which the committee had failed to enforce the covenant on other occasions): "You must get another Committee elected, Mr. Davis. That is the answer to that. If they acted in this vacillating way - imposing conditions on one person which they did not impose on another, you had better get another Committee ... That is for the Covenantors. They can get another Committee if they are not satisfied with this"

Price v Bouch 1987

Price v Bouch concerned an application to the Estate Committee for consent to a proposal for further sub-division of part of an original 10 acre allotment. The plaintiffs had owned a part comprising a house and garden and had sold off the house with part of that garden. They sought consent for the erection of a new house on the retained part of that garden, comprising c. ½ acre. Their original plans and subsequent amendments were all rejected by the Estate Committee, without reasons. Millett J. was invited to determine preliminary questions of law as to the powers of the Estate Committee.

15. Millett J. described the constitutional position as follows:
(1) “Thus for 90 years the stipulations in the deed of mutual covenant have formed a private, local law, democratically administered by a committee elected by a majority of the owners of land comprised in the estate, the committee itself having an express power to act by a majority.”

(2) “... the object of clause 14 was to enable the committee to preserve the character and amenity of the estate by withholding or granting approval, or by imposing proper conditions on the grant of approval, and ... they might properly take into consideration any matter, such as the precise location of any proposed new building, which might affect the character or amenity of the estate”;

(3) “it was suspected that their application was refused on the grounds of density and it was submitted that, since clause 14 of the deed of mutual covenant contained no provisions as to density, this would be an improper ground for their refusal. Although this is not a question which is strictly before me, I ought to observe that, in my view, this is a consideration which, on any view, the committee could properly take into consideration, for the reasons given by Neville J.”;

(4) “In the present case the decision to approve the plans or not is vested not in a common vendor or his successors in title but in the mutual covenantors themselves, who have delegated the decision to a majority of a committee elected by themselves. It was conceded that the committee had a duty to inspect and consider any application submitted to them, to reach a decision themselves and not to delegate it to others, and to act honestly and in good faith and not for some improper or ulterior purpose. It was also accepted that, if the committee took into account irrelevant considerations or failed to take into account relevant considerations, or reached a perverse decision such that no reasonable committee could possibly reach, then their decision could be impugned, for it would be *ultra vires.* This, however, was not enough for the plaintiffs. They insisted that the committee must act reasonably and that they must give reasons for their decision, so that it could, if necessary, be challenged, when the court would adjudicate and decide, in the light of the evidence, whether those reasons were justified.

If this were the case the result would be most unfortunate and one which the original parties to the deed of mutual covenant are most unlikely to have intended. Control would be removed from the committee and vested ultimately in the court, which would be called upon to adjudicate, presumably on the basis of expert evidence, on the very question which the parties had created their own domestic tribunal to decide.”

(5) “In my judgment, the remedy of a disappointed owner, who does not challenge the honesty or good faith of the committee, but who wishes to challenge their decision, is not to invoke the jurisdiction of the court but to requisition a general meeting of the mutual covenantors under clause 3 of the deed and to seek to persuade a majority of them either to pass a vote of no confidence in the committee or to reverse the committee's decision.”

Colleen Cairns and Kim Moore v The Committee of the Painshawfield, Batt House and Birches Nook Estate (2023)
The applicants applied to the Tribunal for modification of clause 14 of the DMC to provide that the two houses for which they have planning permission are exempt from the requirement to obtain the Committee’s approval. The application was brought under section 84(1) of the 1925 Act, primarily relying on ground (aa).

The judges commented:

> ‘’ In this application the central issue on ground (aa) is, as is so often the case, whether the restriction which is proposed to be modified secures for the objectors any practical benefits of

substantial value or advantage. Although the expression 'practical benefits of substantial value or advantage' is a composite one, the Tribunal has frequently distinguished between benefits conferring substantial value capable of being measured in monetary terms and benefits conferring a substantial advantage on the covenantee, notwithstanding that it may not be possible to quantify in money. The central issue in this case may therefore be said to have three aspects: whether the DMC secures practical benefits at all, and, if it does, whether those are of substantial value when measured in financial terms, or if they are incapable of such measurement whether they nevertheless confer a substantial advantage on the objectors (all of whom, it is agreed, have the benefit of the restrictions).

We begin by considering whether the need to obtain the approval of the Committee secures to the residents of the Estate, acting through their elected Committee, practical benefits of substantial value or advantage; to succeed the applicants must show that neither are so secured. Mr H (barrister for the applicants) accepted that if the issue between the parties is one in which there is no right answer, and that reasonable parties might validly hold differing views, the Committee's policing of development on behalf of the residents might be said to constitute a practical benefit. We have no doubt that it does.

The preservation of a long-standing scheme of mutual covenants has long been recognised as capable of being a practical benefit in its own right. In such cases weight has been given to the sincere and well-founded views of individual covenantors that a development contrary to the scheme would be prejudicial. (S66).

In this case the need to obtain Committee approval provides an additional layer of development control which would not otherwise be available. As a result of the DMC the Committee is in a position to prioritise the interests of residents of the Estate over considerations which might carry weight in the statutory planning process but which the Committee is not obliged to take into account when it considers development proposals. Through the process of election to the Committee individual householders are in a position to influence the Committee's decisions, which are themselves then open to the possibility of further democratic scrutiny through a vote at an Extraordinary General Meeting of the whole body of mutual covenantors. We are satisfied that these are practical benefits secured by clause 14 of the DMC.

In our judgment the ability of the mutual covenantors to control development, through an elected Estate Committee, is a benefit of substantial advantage to them. Without it, decisions about development on the Estate would be made applying the statutory development plan and national planning policy. We have no doubt that there are many plots on the Estate capable of subdivision and further development consistent with the development plan and that the opportunity to 'release the potential value hidden at the bottom of the garden' (as it was unguardedly put by the Committee Secretary) would prove irresistible to many. Mrs Rae's fear that if the protection afforded by the DMC ceased to be effective the Estate would be susceptible to what she and other residents see as over-development seems to us to be a realistic one. It cannot be said to be unreasonable that the Committee takes a different view from planning officers on what is appropriate for a particular site, and the respect which is afforded to the views of the mutual covenantors, formulated through the Committee, is the essence of the benefit which the DMC provides.

The issue of plot density is a prime example of one on which the views of planning officers and the wishes of local residents may diverge. The fact that the Committee's own policy has varied from time to time shows how this issue is one on which a variety of perfectly reasonable views is possible. The current policy of permitting development on sites of half

an acre and resisting it on sites of less than a third of an acre, while being open to the possibility of development between those limits, is a relatively flexible one, more oriented towards development than previous policies.'