LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964

PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF A REFERENCE

R/63/2003

BETWEEN

SPRUCE ENTERPRISES LIMITED – APPLICANT

AND

RICHARD PALMER & OTHERS – RESPONDENTS

Re: Land at Danesfort, Stranmillis Road, Belfast

Lands Tribunal – Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 19th April 2004 & 4th May 2004

1. Spruce Enterprises Limited ('the applicant') has obtained full planning permission for a development of 120 dwelling houses on land at Danesfort ('the Danesfort land'). This comprises 10 detached dwellings; 58 semi detached dwellings; and 52 townhouses (generally in blocks of 4 units with one block of 6 units, the Tribunal uses the term 'townhouses' to also include terrace houses).

2. The Danesfort land is affected by a covenant ('the 1911 covenant') contained in a deed, dated 27th December 1911 ("the 1911 Deed"). Richard Palmer and others ('the Respondents') are entitled to the benefit of the covenant by virtue of their interests in the benefited, adjoining lands and object to the development.

3. The 1911 covenant provides:

   "No new building shall be erected on the subject land except detached or semi-detached dwelling houses of an annual Poor Law Valuation of £35 at the least or coach houses, stables outhouses or greenhouses to be used in connection with any such dwelling house or dwelling houses or boundary or other walls belonging thereto and no such dwelling house shall have its [rear] towards Stranmillis Road and no coach house, stables or outhouse shall be built within 50 feet of or so as to

front towards the said road or so as to be between the dwelling house to which it may belong and the said road."

4. Mark Orr QC instructed by C & H Jefferson appeared for the Applicant. Brett Lockhart BL instructed by Peden & Reid appeared for the Respondents. Christopher J Callan and Nicholas J Rose, experienced Chartered Surveyors, gave expert evidence. They had carried out extensive research both in the locality and in the old valuation records of the Valuation & Lands Agency in the Public Records Office. John O'Connor, a Chartered Architect explained features of the intended development by reference to a model.

Grounds of objection

5. A number of local residents objected; Mr Rose summarised their grounds:

   "The development would lead to a detrimental change in the appearance, amenity and character of the area in the following aspects:

   1) Increased traffic generation on an already busy road, particularly at peak times.
   2) Loss of visual amenity – the new houses will overlook the existing houses on the north and south sides of Stranmillis Road. The houses in the proposed development fronting Stranmillis Road all have living rooms at first floor level and bedrooms at second floor level within the roof space. The "backland" houses are mostly three storey (plus bedrooms in the roof space) and also having living rooms at first floor level. This is particularly relevant to Mr Palmer (owner of 229 Stranmillis Road) because a proposed house is only around 26 feet from his boundary.
   3) Diminution in the character of the area – the Respondents purchased houses in an upmarket, low density residential area of South Belfast and this cachet will, to an extent, be lost if the proposed development proceeds in its current form."

6. However the covenant otherwise places no limit on the numbers of detached and semi-detached dwellings that may be built. Mr Rose added:

   "I acknowledge that the Applicant could develop a residential scheme on the subject land strictly in accordance with the 1911 Covenant and the Respondents would still encounter these problems to a degree. However, the houses in the revised scheme would have to be larger, the density of the development would be lower and the impact on the respondents would therefore be minimised."

7. The Danesfort land and the covenant have been the subject of a previous application (see R/45/1999 Part I [2001] and Part II [2002]) under the Property (NI) Order 1978 ('the 1978 Order') but neither the parties nor the issues are the same. That was an application by Danesfort Developments Limited and the Respondents then were Mr & Mrs M Morrow and Richard Palmer. The Respondents in this application now include others who were not a party to the previous application but all of whom are accepted to be entitled to the benefit of the covenant.

8. In R/45/1999 Part I the Tribunal determined a preliminary point, namely, the identity of the person or persons entitled to the benefit of covenants contained in the 1911 Deed. Among other things, the Tribunal determined that, while it was not strictly necessary for the Tribunal's decision, it would appear that a persuasive argument could be made out in favour of a scheme of development. The content and reciprocal nature of the covenants in the conveyances of 1911 and, subsequently, 1920 strongly support an intention to create such a scheme.

9. In R/45/1999 Part II the Tribunal was invited to modify the 1911 covenant so as to permit the development of 70 apartments in three 'City Villa' apartment blocks. The application was dismissed.

10. The Poor Relief (Ireland) Act 1838 was an Act 'for the more effectual Relief of the destitute Poor in Ireland'. It remains on the statute book and is the foundation for valuations for Rating. The actual Valuations for Rating, which originally were made for these purposes, were known colloquially as "Poor Law Valuations" ('PLV'). These were and still are estimates of Net Annual Value i.e. an estimate of the net rent that would be achieved on a letting on the statutory terms. Much later, possibly reflecting the reorganisation of Local Government and highlighting the changes in functions and application of Rates revenue, in the 1970s the usage changed to "Net Annual Value" ('NAV'). The basis of valuation was set out in Section 11 of the Valuation (Ireland) Act 1852. It was and continues to be defined as:

   "the rent for which one year with another the same might in its actual state be reasonably let from year to year, the probable average annual cost of repairs, insurance and other expenses (if any) necessary to maintain the hereditament in its

actual state, and all rates, taxes [or public charges (if any)] being paid by the tenant."

(See the Rates (NI) Order 1977 Articles 39, 50 and Schedule 12)

11. From time to time the relativity of valuations for rating at different locations and between different locations will get out of step. This is rectified by carrying out a general revaluation sometimes of all hereditaments, sometimes of only one sector or location. There was no general revaluation prior to 1900 but Section 65 of the Local Government (Ireland) Act 1898 made provision for an application for a general revaluation of the rateable hereditaments in any county borough and Belfast Corporation carried out a revaluation at some time between 1900 and 1906.

12. Since 1911 there have been a number of general revaluations. These have reflected the rise in property rental values. The expert's estimates of the valuation at which the various proposed types of dwellings would now be entered into the current List lie in a range from about £275 to £535. So all of the proposed 120 dwellings (or any dwelling) would have a modern valuation for rating well in excess of the figure in the covenant of £35. But, if they had been built around 1911, some or many might then have been valued at less than £35, and a dwelling that had a valuation of £35 in 1911 would have a valuation of between £290 and £450 today. (The experts had diligently researched the options but disagreed on the figures.)

13. In this case there were a number of interventions by the Tribunal both after the lodging of expert reports and after the oral hearings. In the first, the Tribunal relied on its own general knowledge to suggest to the experts an interpretation of a valuation method used about 1911 and which was disclosed by documents they discovered in the Public Records Office. They produced revised reports. In the second the Tribunal drew attention to proposals for drastic reform of the domestic rating system and suggested that, if appropriate in all the circumstances, it might produce a formula that would survive those reforms. In the third the Tribunal invited and received further written submissions on the date for the application of meaning (see Lewison 2004 *The Interpretation of Contracts* 3rd ed at 5.14). Finally, the Tribunal discovered statutory schemes for the modification, following general revaluations, of rateable values in restrictive covenants. It invited and received written submissions on their relevance.

14. The parties accept that Article 4(1)(b) of the Order permits the Tribunal to declare the nature and extent of the relevant impediment.

15. When considered against the relevant background the Tribunal concludes that the parties who used the chosen words would reasonably have been understood to mean that the threshold is to be applied so as to measure whether dwellings constructed or reconstructed over time on the relevant lands on both sides of Stranmillis Road are of a standard of value or quality equivalent to that represented by dwellings with a PLV figure of £35 in 1911 (see Investor's Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, Bank of Credit & Commerce International v Ali [2002] 1 AC 251 at 269 and Dano Ltd v Earl Cadogan [2003] 2 P&CR 136). The reasons are as follows:
    1) Both the strict words and the underlying object must be given careful consideration (see Scamell *Land Covenants* (1996 Edition), Rolls v Miller (1884) 27 Ch D 71, 87, CA, and C and G Homes Ltd v Secretary of State for Health, (1990) 62 P&CR 69, 79 CA)
    2) The object plainly is intended to endure for a long time as one is contemplating future construction or reconstruction at an unspecified date and which may not take place for generations. The Tribunal accepts the conclusions of the experts that this covenant is intended to preserve the amenity and character of the lands on both sides of the Stranmillis Road. Although Mr Rose suggested there were other effects and the Tribunal will return to these, the object is control of the quality of any dwellings to be erected in the future:
        a. Mr Callan said:
        "In effect, only good quality houses could be built. And finally, to present a pleasing aspect for residents on both sides of Stranmillis Road … Fundamental to this application, in the 1911 deed the vendor also bound himself to the same restrictions on his retained lands, known as the 'adjoining lands', as those he had just imposed on the Danesfort land."
        b. Mr Rose, quoting Mr Callan's evidence in R/45/1999 Part II, said
        "[the purpose was to] "preserve the exclusiveness of the location by controlling the nature, size and quality and location of any new buildings,"
    3) The choice of a PLV rather than a cost basis as a threshold indicates that the object was that this threshold of quality would remain stable and be preserved

4) The Tribunal does not accept that the covenant considered in Grant v Derwent (1928) Ch 902 is of the same kind as the subject covenant. Here, as there, the parties could have chosen building cost (or market value). But as men of business, able to get protection and advice (see Scamell *Land Covenants* (1996 Edition) at page 207/08 and the judgment of James LJ in Kemp v Bird (1877) 5 Ch D 974), these parties choose something different from cost. They chose a Poor Law Valuation threshold with its essential characteristic of uniformity i.e. the tone of the List remains constant despite changes in building costs and/or local market values.

5) The meaning of the words "an annual Poor Law Valuation of £35" has changed. In 1911 they would have meant a dwelling of substantial value, in today's terms they would have no meaningful relevance to house values. It is possible in various ways to construe the relevant words in the way in which commercial men would have interpreted them in 1911 when used in relation to a commercial transaction of this kind (see Rearden Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, 995-996, and Southland Frozen Meat and Produce Export Co Ltd v Nelson Brothers Ltd [1898] AC 442 PC, per Slade J at 900). It is wholly possible and practical to apply the covenant so as to give the expression "an annual Poor Law Valuation of £35" the meaning it had in 1911 in a 2004 context. In contrast, the result of treating the £35 PLV threshold as a petrified or fixed figure would be that it now would be of no effect whatsoever. That plainly could not have been the intention of the parties and would flout business common sense (see Investor's Compensation Scheme v West Bromwich Building Society, and Dano v Cadogan). The maintenance of a

6) The Tribunal disagrees with Mr Orr's suggestion that the covenant is most unusual. He pointed to the absence of any precedent for any such covenant in the *Encyclopaedia of Forms and Precedents* Volume 13(1) of the 1996 Re-Issue and to the section entitled "Covenants in relation to Development Land". That may well represent current thinking. But, as the Tribunal said at the Hearing, although the interpretation of such covenants had never been in issue, the Tribunal did come across them from time to time (for examples where such provisions appear in published decisions see McMullan & Ors [1992] R/20/1992 – a 1929 covenant and Farquaharson & Anr [1994] R/1/1994 – a 1952 covenant).

7) The Tribunal agrees with Mr Lockhart that the figure of £35 PLV was not intended as a fixed figure in perpetuity. It would have been reasonably expected that, in the event of a sea change in the basis or level of assessment of net annual values for rating, such PLV thresholds would have been adjusted so as to maintain a continuing uniform threshold of quality (see Dano v Cadogan*).*

8) Apart from the Interpretation acts, "Where an Act … was repealed, it was formerly regarded, in the absence of provision to the contrary, as having never existed, except as to matters past and closed." *Maxwell on Interpretation of Statutes* 9th ed., p. 404. So far as statutory interpretation is concerned "to repeal an Act is to cause it to cease to be a part of the corpus juris or body of law" (see Halsbury's Laws Vol. 44(1) para 1296). Mr Orr suggested that, in construing the covenant, the Tribunal could have no regard to repealed legislation. The Tribunal does not agree. In this case:

    a. Whereas legislation is treated as 'speaking', in contrast, a question of interpretation of contract is different in that a subsequently repealed legislative background may be part of the relevant background knowledge at the time the contract was made.

    b. Article 63 paragraph (2) of the 1977 Order and Schedule 16 Part III paragraph 7 make savings from the repeal of s13 of the Revaluation (Consequential Provisions) Act (NI) 1936 or s19 of the Revaluation (Consequential Provisions) Act (NI) 1957 of certain changes made

c. There also may remain what may be accrued rights (for instance in the event of a suggestion that a building completed between 1936 and 1972 did not comply with a pre-1936 rateable valuation limit).

9) The Tribunal's conclusion that the threshold would reasonably have been understood to mean a continuing uniform threshold of quality is supported by subsequent events in legislation. Following the first general revaluation, Section 13 of the Revaluation (Consequential Provisions) Act (Northern Ireland) 1936 made specific provision for covenants such as this. Broadly, the lessor and lessee could agree the change (if any) to rateable valuation. If a change was not agreed, a dispute resolution mechanism allowed determination by the Commissioner of Valuation with an appeal to the County Court etc. Following the second general revaluation, Section 19 of the Revaluation (Amendment and Consequential Provisions) Act 1957 made similar provisions for modification. Subject to savings, Section 13 of the 1936 Act and Section 19 of the 1957 Act were repealed by the consolidating Rates (Northern Ireland) Order 1972. It would appear that, in their place, Article 45(7) was intended to give power to the Ministry to make by order (among other things) a similar provision. The 1972 Order was repealed by the Rates (Northern Ireland) Order 1977 but the power to make such provisions was re-enacted, again in Article 45(7). There has been a third general revaluation. The Tribunal has been unable to find any new consequential arrangement with respect to covenants. The Tribunal has reservations about Mr Lockhart's suggestion that there were no new consequential arrangements made after the third general revaluation because none were needed. But it may be that shortly afterwards the 1978 Order was considered to give appropriate jurisdiction to the Lands Tribunal. Care must of course be taken over the weight to be attached to such later events, even if they do confirm an impression based on pre-existing evidence.

16. Having reached this conclusion as to the nature of this element of the covenant the Tribunal now turns to the question of the extent of the restriction. Having considered

1) In Mr Callan's opinion the figure of £35 PLV should be updated to a modern NAV figure by taking a sample of local dwellings, comparing their valuations in 1911 and today and adopting a modern NAV based on an average increase as the threshold ('the Callan Approach').

2) Mr Rose advocated applying the contractor's method that was commonly used in 1911. The old valuation records show that a percentage yield or return on the cost of erection of the building (based on the volume of the house) was taken along with either the estimated rent of the site (in this case the evidence was of a site rent based on length of frontage) to give the Net Annual Value. He applied 1911 pricings directly to the proposed modern houses ('the Rose Approach') to check each to see whether a house of that volume and frontage would have resulted in a PLV greater than £35 in 1911.

3) Later Mr Rose advocated a modified approach ('the Hybrid Approach'). This was a table of combinations of site frontages and gross external areas that would reasonably have been expected to meet the threshold in 1911. It was based on a contractor's method, including an adjustment for central heating – something that was not recorded in the old valuation records.

4) For the following reasons, the Tribunal broadly prefers Mr Callan's approach.

   a. In response to a request to assist the Tribunal, on behalf of the Commissioner of Valuation, Ms Sharon Magee BSc Dip Rating MRICS helpfully had set out the current scheme for the Rating of residential property in the Malone/Stranmillis area, Belfast:

      "I enclose a schedule of rates for the Malone and Upper Malone wards of Belfast, for dwellings built post 1990. I have included two schedules showing the additions made to the NAV for full central heating systems and garages. To save time and preserve data protection issues I have offered you a range of prices for the various property types you highlighted in your letter of 30 April 2004. These are based on NAVs currently in the Valuation List."

b. Both experts accepted this scheme as accurately reflecting the current scheme. The schedule showed that a consistent approach to pricing is adopted on both sides of the Road (and throughout the two wards). That allows a PLV threshold to be fixed which would maintain the object and reciprocity of the restriction i.e. a standard of value or quality on both sides of the road.
c. Mr Callan's approach is more relevant as it more directly addresses this effect of the restriction.
d. In both the Rose and the Hybrid approaches, Mr Lockhart advocated their use because they directly reflected frontage or density. The Tribunal does not agree that to be an object of the restriction.
    i. The Tribunal has determined that the nature of this element of the covenant is that it is concerned with maintaining a standard of value or quality on both sides of the road.
    ii. The Tribunal accepts that the quality threshold could have some effect on density but it does not accept that it was the intention of the covenant to control the size and density of future residential development as such.
    iii. The Tribunal does not agree that in 1911 the choice of valuation method was limited to the "contractors method" or some other variation of that and which would also reflect frontage and/or density. Other 1911 methods of valuation would not have that effect. It is clear from the cases of that era that other approaches were permissible and, depending on the evidence, should be preferred. In Napier and McVeigh (1935) *The Law of Valuation,* the authors noted that, in the absence of other means of fixing the probable rent, the "contractors method" is sometimes used. That is in accord with the evidence in this case. However they go on to say it must be remembered that no so-called method of valuing is obligatory. At the time it had been criticised as 'nothing more or less than a rule of thumb' (see eg Fletcher and Ors v COV [1907] 2 IR 112 and the cases referred to therein). The valuers have

        "to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they

shall arrive at it. It is not a question of law at all – it is a question of fact."

per the Earl of Halsbury L C in Mersey Docks and Harbour Board v Birkenhead [1901] AC 175 HL.

iv. If the draughtsman had wanted to specify frontage or volume he could have said so.

v. The Callan approach achieves the object of the covenant, without petrifying the effect on value of frontage, volume or other elements of design. For example, if the Rose approach were adopted, an extra foot of ceiling height could add some 10% to value and modern conveniences such as central heating would be disregarded.

vi. In the previous Application, the Tribunal referred to density but that was in the context of the effect of not permitting apartment blocks.

vii. These conclusions are supported by subsequent events in legislation (i.e. the machinery in the Consequential Provisions legislation referred to earlier).

viii. Mr Rose protested too much about density.

5) The Callan approach was this. He identified dwelling houses in the locality for which NAVs were known both around 1911 (1900 to 1925, and where there was more than one figure he used that closest to 1911) and in 2004. He disregarded a number of obviously inconsistent results and dwellings more than about 500 metres from the entrance to Danesfort. That left a sample of 32 properties. Looking at the growth factor between 1911 and 2004, which ranged from a multiplier of 5.00 to 28.13, he rejected the upper and lower quartiles. The range then became 7.14 to 9.31. He adopted the arithmetic mean of 8.25 and by applying that to the 1911 threshold of £35 arrived at a modern threshold of £290 NAV.

6) Mr Rose criticised this approach (and in his report Mr Callan had accepted it was not a wholly reliable approach). Mr Rose pointed out that the average of the whole sample was higher – 9.09. He expanded the geographic sweep of Mr Callan's search and arrived at an average of 10.06. He also produced a different sample, that on which he had relied for analysis of the 1911 PLV's, and that gave an average of 11.54. Finally, excluding the townhouses in Malone Road from that, he arrived at an average of 12.80. Mr Lockhart

7) In the absence of precise information (including information about alterations to dwellings over the years) there is much to be said for the adoption of a broad brush.
8) Taking a step back from Mr Callan's analysis and looking at the data, it is apparent that he may have restricted the sample too much in two ways. The first is that the majority of the 1911 PLV figures for detached and semi-detached houses cover a wide range from £34 to £83, with some outside that range. But at the lower end of this range the results actually are in the upper quartile of Mr Callan's sample (e.g. for £34, the multipliers are 9.56 and 11.62, and for £36, they are 9.31 and 12.64). Different sectors of the market may have grown at different rates. The second is that the Tribunal does not see why any dwelling house that met the PLV threshold during the era before the next general revaluation came into force, would not have passed the threshold and have been a potentially helpful benchmark for the future.
9) Despite the industry of the experts in assisting the Tribunal, where so much is of indeterminate relevance and reliability it is unable to arrive at any precise basis for its answer. It is just a matter of judgment. But accepting that its answer should be broadly based, it concludes that its answer should be flavoured by both Mr Callan's approach and Mr Rose's constructive and quantified criticism of it. On that basis it arrives at a multiplier of 11 and so a modern PLV of £385 NAV.
10) The Rose Approach depended significantly on attaching value to frontage and so it does not readily provide a check for the Tribunal's conclusion. But, on the contractor's method there was an alternative more broad-brush *Shorthand Approach* to 1911 values. There was no agreement on the pricing that should be applied and neither expert adopted that as a primary method. However, as a broad check, the figure adopted by the Tribunal would appear to be satisfied by a dwelling of a gross external area of about 204 square metres (based on Mr Callan's Estimated NAVs) and depending on the pricing of 13.75p or 15.00p that would put the 1911 valuation of such a dwelling at either £33 or £36 (based on Agreed PLVs produced by Mr Rose).

17. Having regard to the matters set out in Article 5 (5) of the 1978 Order, the Tribunal now turns to the question of whether and to what extent the covenant ought to be modified. A number of these matters have already been discussed both in this application and the earlier application (R/45/1999). But fresh points have been made in regard to change in the character of the neighbourhood, whether the persons entitled to the benefit of the impediment have agreed either expressly or by implication, by their acts or omissions, to the impediment being modified or extinguished and/or other material circumstances.

18. Mr Rose explained that the residents in the vicinity had experienced a problem with the drains and sewerage system for many years and the Respondents believe the proposed development will place undue pressure on the system. The group is concerned that the Planning Service and Water Service will not ensure that adequate measures are taken by the Applicant to protect their position. However, these clearly are matters for the relevant statutory authorities and the Tribunal cannot assume that they will not comply with their statutory obligations.

19. To aid in the protection of privacy and amenity the Applicant made two concessions:

    1) The Planning conditions in regard to amenity and landscaping (i.e. Conditions 2 to 5 of Permission Z/2003/0158/F approved 30th September 2003) shall be incorporated so as also to become obligations; and

    2) With particular reference to 2 above and Mr Palmer's house, the glazing of all upper floor windows of any dwelling, in any wall adjacent to the shared boundary with no 229 Stranmillis Road (Palmer), shall be and remain opaque.

20. The applicant does not propose to construct any outhouses or greenhouses and, in the event that domestic garages are added, the Applicant accepts that they cannot be situated within 50 feet of Stranmillis Road, or positioned between the related dwelling and that Road.

21. The Tribunal concludes that the covenant should be modified but only to include the concessions and also:

    1) To substitute the expression
    "dwelling houses of a Net Annual Value of £385 at the least "

for the expression

"dwelling houses of an annual Poor Law Valuation of £35 at the least";

2) To permit detached, semi-detached or terrace dwelling houses of a Net Annual Value of £365 at the least and such dwelling houses may have their rear towards Stranmillis Road provided always:

   a. No part of any such dwelling, other than a separate garage, outhouse or greenhouse shall be built within 60 metres of the centreline of the Stranmillis Road nor within 55 metres of the western boundary of the Danesfort land with the adjoining lane to and No 229 Stranmillis Road (Palmer); and

   b. Not more than 10% of the total number of dwellings on the Danesfort land shall be townhouses; and

3) An assessment of Net Annual Value prepared in accordance with the Schedule of rates attached to Ms Magee's letter of 5 May 2004 shall be deemed to be correct.

22. The reasons are set out below.

1) The first modification modernises the threshold without tightening or loosening the restriction.

2) In the previous reference, the Tribunal found strong evidence for the existence of an estate scheme. This estate scheme extended to the area of land conveyed by the Conveyance ("the 1920 Conveyance") dated 1st December 1920 and made between William Howard Murphy Girmshaw (1) Lister Kaye and Charles Edward Luard Freeling (2) and William Strachan (3). When the covenant was imposed the beneficiary, as well as imposing onerous restrictions on the purchasers of the Danesfort land, made those same restrictions binding on himself and his successors on the remaining "adjoining lands". These covenants were reiterated in the 1920 Conveyance when he sold off approximately 20 acres of land that now comprises Broomhill Close, Manor, Court and Park and a section of Hillside Drive.

3) The Tribunal has accepted in the earlier application (R/45/1999) that the character and appearance of development on the southern side of the Stranmillis Road has remained generally consistent with the purpose of the covenant. But, as Mr Callan pointed out, the initial values on some of the dwellings that have been built and permitted (expressly or otherwise by persons

4) The Respondents in this application include others who were not a party to the previous application (R/45/1999) but the Respondents to that application agreed that "suitably constructed and designed townhouses" could be acceptable and the Tribunal accepted that the "development of detached, semi-detached or townhouses, at a suitable density, would be much more in keeping with the character of the Stranmillis Road". However, the Respondents in this case are firmly of the view that the proposed development is not at a suitable density and is not in keeping with the character of the Stranmillis Road. Although density control is not, in the view of the Tribunal, directly relevant to the question of the nature and extent of the restriction, it is at the heart of the respondents' objections to modification and they are entitled to rely on it for that purpose. The Tribunal accepts that density control can provide a significant practical benefit to those who enjoy the benefit of the covenant (see e.g. McKillen & Anr v Ferguson [2003] R/35/2002). Accepting that townhouses permit a greater density of development and the merits of the objectors reliance on density considerations, including their effect on traffic generation, but having regard to the small number of townhouses (and apartments) that already have been built and permitted to be built on part of the benefited adjoining land, at Broomhill Manor and Court, and some regard to the concession in the earlier application the Tribunal concludes that some minor relaxation to permit a small proportion of townhouses is appropriate.
5) Without making any formal concession on the point, the Respondents indicated that they would not be opposed to permitting houses in the development to have their rear facing towards Stranmillis Road, provided they were not those adjoining or close to that Road.
6) The third modification is for the avoidance of doubt and the convenience of design consideration.
7) At one stage the Tribunal was minded to substitute a scheme that would survive proposed changes to the Domestic Rating system in the near future.

22nd July 2004 **Mr M R Curry FRICS Hon.FIAVI IRRV MCI.Arb**

LANDS TRIBUNAL FOR NORTHERN IRELAND

<u>Appearances</u>

Applicant: Mark Orr QC instructed by C & H Jefferson

Respondents: Brett Lockhart BL instructed by Peden & Reid