[2021] JMSC Civ 187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00014

IN THE MATTER OF ALL THAT parcel of land part of **ACADIA** now known as **NUMBER TEN ROSEBERRY DRIVE** in the parish of **SAINT ANDREW** being the Lot numbered **ONE HUNDERED AND FORTY-EIGHT** on the plan of Acadia aforesaid deposited in the Office of Titles on the 5th day of May, 1959 of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in the Certificate of Title registered at **Volume 1202 Folio 746** of the Register Book of Titles **also known as** 10 Roseberry Drive, Kingston 8, St. Andrew;

AND

IN THE MATTER of the subdivision of the said land;

AND

IN THE MATTER of the restrictions affecting the use thereof;

AND

IN THE MATTER of the Restrictive Covenants (Discharge and Modification) Act.

TRIAL IN CHAMBERS

Ms. Jacqueline Cummings, Mr. Clifton Campbell and Mr. Matthew Palmer instructed by Archer, Cummings & Company for the Applicant.

Mr. Gavin Goffe and Mr. Matthew Royal instructed by Myers, Fletcher & Gordon for the Objectors.

Heard: 1st, 22nd, 27th, 28th October and 20th December, 2021

Application to modify restrictive covenants – Whether covenant obsolete – Whether the existence of the covenant impedes the reasonable use of the land – Whether modification injures the persons entitled to the benefit of the restriction

HART-HINES, J

INTRODUCTION

[1] "*'Tis an unweeded garden, that grows to seed; things rank and gross in nature*" – William Shakespeare, Hamlet, Act 1, Scene 2.

[2] The garden metaphor in Hamlet was used by Shakespeare to represent the decay of a country when it becomes lawless and corrupt because those who are tasked with the responsibility for pruning and managing it, fail to carry out their responsibility. In this case, it seems that the Kingston and St. Andrew Municipal Corporation ("KSAMC") and the National Environment and Planning Agency ("NEPA") have been dilatory in their mandate to enforce local planning laws and regulations and to promote sustainable development, in respect of the building situated in the property which is the subject matter of this application. I have observed that the property is 1705.281 square meters or 0.421 of an acre in size, which means that the property was unsuitable for development as a multi-family residence. Notwithstanding, NEPA granted the requisite environmental permits and licences on September 17, 2019 and by letter dated September 18, 2019, submitted recommendations to the KSAMC, which in turn granted building approval on October 3, 2019. Armed with these permits, the applicant proceeded to commence construction, ostensibly unsupervised by the KSAMC. At this time, the building is in breach of the general conditions in the building approval, since the building consists of 32 bedrooms (contained in 15 units) instead of the 12 one-bedroom units which were approved. It would seem, at the very least, that the

Building Inspectorate at the KSAMC failed to inspect the building at critical stages of construction, including the pouring of the concrete decking for each floor of the building. Had such an inspection been done, the breaches would have been apparent.

THE PARTIES AND THE APPLICATION

[3] The application before the court is an application for the modification of certain restrictive covenants in respect of the property comprised in certificate of title registered at Volume 1202 Folio 746 of the Register Book of Titles, known as 10 Roseberry Drive in the parish of Saint Andrew ("the property"). The application is contested by the registered proprietors of a contiguous lot which benefits from the restrictive covenants. The application is made pursuant to section 3(1) of the **Restrictive Covenants (Discharge and Modification) Act** ("the Act"), which provides as follows:

> *"3(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or 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 (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) 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 Judge may think material, the restriction ought to be deemed obsolete; or*
> >
> > *(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or*
> >
> > *(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by*

> *implication, by their acts or omissions, to the same being discharged or modified; or*
>
> *(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;*
>
> *Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss".*

[4] Belgravia Development Company Limited ("Belgravia"), the applicant, is a land developer. Its principal officer is Cliff Rochester-Butler, the director. Belgravia purchased the subject property to erect a multi-family residential complex thereon. It obtained the requisite environmental permits and licences from NEPA (on September 17, 2019) and building approvals from the KSAMC (on October 3, 2019) to construct a multi-family development comprising of twelve (12) one bedroom apartments.

[5] By Fixed Date Claim Form filed January 3, 2019, Belgravia applied to the court for a modification of restrictive covenants numbered 1, 2, 3, 5 and 7. They read:

> *"1. There shall be no sub-division of the said land.*
>
> *2. No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out-buildings shall in the aggregate not be less than One Thousand Five Hundred Pounds.*
>
> *3. The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than Thirty Feet to any road boundary which the same may face nor less than Ten Feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building.*
>
> *5. No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.*
>
> *7. No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted within Fifteen Feet of any road intersection."*

[6] The modifications being sought are:

> *"1. There shall be no sub-division of the said land save and except with the approval of the relevant authorities.*
>
> *2. No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith any other buildings or strata units approved by the relevant Authorities shall be erected on the said land.*
>
> *3. Any building erected on the said land shall be no nearer than Thirty Feet to any road boundary nor less than Ten Feet from any other boundary, or any other distance which may be approved by the relevant building authority thereof provided that this covenant shall not apply to the guard-house utility rooms or the common internal boundaries of any lot or building erected on the said land and all gates and doors in or upon any fence or opening upon any road shall open inwards.*
>
> *5. No building erected on the said land shall be used for the purposes of a Shop, School, Chapel, Church or Nursing Home or for racing stables or any part thereof save and except any other use approved by the relevant authority.*
>
> *7. No fence hedge or other construction of any nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted within Fifteen Feet of any road intersection save and except with the approval of the relevant authorities."*

[7] Belgravia's application to modify the restrictive covenants was initially opposed by several residents in the area, namely Gladstone Rose of 15 Roseberry Drive, Ivan and Marsha Nicholson of 1 Acadia Circle, Cyril Gordon of 18 Wickham Avenue and Jaleel and Guilda Handal of 22 Wickham Avenue. However, three of the objections were withdrawn on the basis that their properties fell within a different subdivision leaving only Mr. and Mrs. Handal as objectors.

[8] Mr. and Mrs. Handal objected to the proposed modifications on the grounds that:

1. Belgravia is unable to satisfy any of the grounds set out in the Act.
2. The restrictions have preserved the nature, character and aesthetics of the community as single-family residences with spacious lots resulting in the proprietors within the community enjoying the peace, security and serenity of a well-kept residential community of the highest order.

3. Modifying the covenant would result in a radical, sudden and unwanted shift in the character of the community. There would be an untenable increase in population density, traffic, noise and other environmental concerns.

4. The restriction on boundary distance is designed to promote privacy due to the comfortable distance between homes. If removed, there would be a serious risk to the security and privacy each residence is expected to enjoy.

5. The value of their property and other proprietor's properties will be negatively impacted as the modification would make it possible to erect any other buildings or strata units and not limit it to the construction of solely private dwelling houses.

6. As for covenant 5, which limits the use of premises, should this restriction be modified, there is no way to prevent undesirable commercial activities thereby resulting in there being a radical mutation of the character and user of the community.

[9] The Notice of objection and Mr. Handal's affidavit filed on July 3, 2020 sought to explain the purpose for the relevant restrictive covenants.

[10] After the first hearing directions were given in relation to the modification application, and while the final hearing of the application was pending, Belgravia began construction in January 2020. By February 28, 2020, it was apparent to Belgravia that the registered proprietors of a contiguous lot located at 18 Wickham Avenue, St. Andrew, objected to the development. Notwithstanding the fact that there was an objection from Mr. and Mrs. Handal and the fact that a contested hearing was scheduled for July 2020, Belgravia continued construction.

[11] Before commencing the hearing of the application, a visit to the locus in quo was arranged and carried out on July 17, 2020. On my visit to the location on that date, it was observed that there were two floors built, the ground and first floors. I warned the developers not to continue construction until the application was heard. On July 27, 2020, the hearing of the application was adjourned to February 3, 2021.

This was due to observations made at the locus in relation to breaches of restrictive covenant 3 as a large structural column in the basement garage area, a beam and a wall were observed to be too close to the boundary wall, and an expert report would be required in relation to the removal of the column. On July 27, 2020, counsel for the applicant was told by the court that the applicant should cease building until the restrictive covenants were modified. Notwithstanding this warning at the locus and in court, construction continued. The application was next fixed before me on October 1, 2021. On that date, Mr. Rochester-Butler indicated in his evidence that the building is “about 70% complete”.

THE ISSUES

[12] The questions for the court’s consideration are:

1. Are the objectors entitled to the benefit of the covenants?
2. Is Roseberry Drive a neighbourhood or part of a neighbourhood?
3. Has there been a change in the character of the property or neighbourhood, or are there other circumstances which render the covenant obsolete?
4. Does the continued existence of the covenant hinder the reasonable use of the land by the applicant, and does it secure no benefit to any proprietor sufficient to justify its continuance?
5. Have persons who are entitled to the benefit of the restrictive covenants agreed expressly or impliedly to their discharge or modification?
6. Would the proposed modification injure the objectors?
7. Is it just and equitable in the circumstances to grant the application?

THE EVIDENCE

[13] I considered the evidence presented in this case. For the applicant the written evidence relied on were:

1. Affidavit of Cliff Rochester-Butler in Support of Fixed Date Claim Form filed on January 3, 2019;
2. Further Affidavit of Cliff Rochester-Butler in Support of Fixed Date Claim Form filed on December 12, 2019;
3. Supplemental Further Affidavit of Cliff Rochester-Butler in Support of Fixed Date Claim Form filed on June 5, 2020;
4. Affidavit of David McLeod filed on June 9, 2020; and
5. Expert Report of Norma Breakenridge, Chartered Valuation Surveyor.

[14] The Objectors have relied on the following:

1. Notice of Objection to application filed on February 28, 2020; and
2. Affidavit of Jaleel Handal filed on July 3, 2020.

[15] The affiants were cross-examined. For the sake of brevity, I will outline the relevant areas of their evidence in my analysis.

The expert evidence

[16] Mrs. Norma Breakenridge, Chartered Valuation Surveyor, in her report prepared in December 2020 considered the neighbourhood in which 10 Roseberry Drive is located to be a part of a large geographical area exhibited by Deposited Plan 1961. At section 4.1 of her report, she indicated the boundaries of the Acadia subdivision and stated that it is bounded by residences in

> "*Earls Court to the north, a natural gully course to the east (forming the eastern end of Earls Court), Enman Avenue, Crawford Avenue, Evans Avenue, Nicks Avenue, Elliot Avenue and Torrie Avenue : a section of Barbican Road to the south; behind residences on Acadia Drive, part of Wickham Avenue and to the rear of residences in Earls Court to the north west."*

[17] Mrs. Breakenridge sought to set out the history of the subdivision and to explain the purpose for the relevant restrictive covenants. She stated that the character of the houses within this area of Acadia was originally single-family residence. However, she spoke generally of increased demand for housing in the Kingston Metropolitan area, and stated that there is now a precedence of multi-family developments. She concluded that the land use pattern has gradually shifted to a mixed residential use of both single and multi-family residences, changing the tone of the neighbourhood from being exclusively single-family residences.

[18] At section 6.1 she outlined five (5) properties within the Acadia neighbourhood that had modified the covenants and had the properties redeveloped or converted to accommodate multi-family complexes. These properties are located on Evans Avenue, Nicks Avenue and there are three (3) complexes on Acadia Drive. She acknowledges, however, that the majority of properties still have single-family homes. Despite her acceptance that the Acadia subdivision predominantly comprises single-family houses, she was of the opinion that a new shift has resulted in the obsolescence of several restrictive covenants imposed on the subdivision at the inception. She has said that the continued existence of the covenants would impede Belgravia's private use of the land and the benefit to the wider society.

[19] Mrs. Breakenridge conceded that the changes in the character of the neighbourhood could create some social costs in terms of increased density, traffic congestion and noise pollution. However, she concluded that as the development was believed to be of a "small-scale", the social costs would be minimal and the new changes would contribute positively both economically and aesthetically to the area.

[20] Although she indicated had not visited the property herself, Mrs. Breakenridge expressed the opinion that the rear of the objectors' property was not overlooked

by the development. I will indicate my own observations, having been to the locus myself.

The visit to the locus in quo during the hearing

[21] The court visited the locus on October 27 and 28, 2021. As regards Roseberry Drive and the immediate surrounding roads, the following observations were made on the visits:

1. There are only single-family homes on Roseberry Drive, save for the current development at 10 Roseberry Drive. Roseberry Drive has been untouched by any multi-family development. Across the road a plot of land surrounded by zinc sheets. However, no first hand evidence could be led to what was being built there. Directly behind 10 Roseberry Drive there is also another multi-family apartment complex, located at 2 Acadia Drive. Part of this property can be seen from the rear patio in 22 Wickham Avenue, but it does not to overlook the objectors' property.

2. Single-family houses are also the prevailing feature on other roads in the area including Acadia Drive, Wickham Avenue, Roxburgh Avenue and Earls Court.

3. Properties along Roseberry Drive and Wickham Avenue appear elegantly designed and are generally fairly well maintained.

4. The houses are setback at least 30 feet from the road. The stipulated setback from the road and the distance between each building guarantees privacy and allows the proprietors the opportunity to have attractive gardens or well-fruited yards.

5. Acadia Drive and Roseberry Drive appear to be heavily traversed roads. Notwithstanding the presence of vehicular traffic on Roseberry Drive,

Roseberry Drive and Wickham Avenue have the appearance of a quiet suburban area with relatively large lots measuring approximately half an acre.

[22] As regards the development at 10 Roseberry Drive, the following observations were made on the visits:

1. There is an area for underground parking on the property. To the rear of the property, there appears to be an area designated for their private sewage disposal. It was the evidence of Mr. Rochester-Butler and Mr. McLeod that should the complex be able to access the National Water Commissions ("NWC") main sewage line on Evans Avenue, the private sewage treatment plant (reed bed system) would not be necessary and additional parking spaces might be created at the rear of the property.

2. The structure itself consist of three (3) floors. The structure appears to have been built approximately ten (10) feet from either side boundary wall. However, the objectors contend that there is a distance breach of approximately two (2) feet on the side of their property. It does not appear possible to drive around the property from the front to the back, but instead, one must go through the underground parking area.

3. As aforesaid, I observed areas which seemed to represent thirty-two (32) bedrooms situated in fifteen (15) units instead of the twelve (12) one-bedroom units approved. These spaces had at least one window and either appeared to be detached from the open living room space, or could be reconfigured to demarcate the bedroom space. Each bedroom was large enough to accommodate bedroom furniture including an armoire or freestanding closet where no built-in closet was seen. In an effort to conceal the true purpose of the space, Mr. McLeod described some areas as "storage room" or "study".

4. There are five (5) units on the ground floor and six (6) units on the first floor. On the two lower floors unit 1 to 5 are constructed similarly. Unit 6 on the first floor is referred to as the "Type E" unit, which is right above the parking area.

It has been observed that it is possible for units 4 and 5 on these floors and unit 6 on the first floor to accommodate two bedrooms. Some of the units here are even seen with two (2) full bathrooms instead of the one full bathroom and powder room as approved. Piping for a shower was observed in most of the bathrooms seen, which suggested that there were two bathrooms being built for each unit.

5. The second floor, which is the top floor, is designed differently from the floors below. It is said to be the intended private quarters of Mr. Rochester-Butler and the Project Manger Mr. David McLeod. There first appeared to be two (2) three-bedroom penthouses on this floor and a unit capable of having two (2) bedrooms. However, on further examination another unit was discovered but never pointed out by Mr. McLeod. This was accessed through the first penthouse by going out on the balcony. Therefore, the overall amount of rooms capable of being bedrooms observed on this floor was approximately ten (10), comprised in four (4) units. The approved building plan delineated open space for balconies facing the rear of the property. However, on site it was clear that this area was converted into bedrooms and bathrooms.

6. The development is beside the objectors' property. However, about 35 feet from the road (Roseberry Drive), the gully which runs between the objectors' property and the applicant's property becomes visible and it widens to approximately 30 feet or more at the back of each property.

7. From the development there is plain view of the objectors' front yard and verandah from the open passageway on the ground floor and the penthouse on the top floor. From the balconies on the top floor, I was also able to see the objectors' backyard and their hot tub attached to the pool. However, I also note that the balconies of the fourth unit on the ground and first floors were blocked up to prevent any occupier from seeing into the objectors' backyard from this angle. I also observed some trees and shrubs along the boundary of both

properties which would also restrict seeing over the objectors' property from the ground and first floors.

[23] As regards the property located at 22 Wickham Avenue, the following observations were made:

1. The property located at 22 Wickham Avenue is a corner lot, located on the corner of both Wickham Avenue and Roseberry Drive.

2. At the front of the property is a separate carport or area for vehicles to be parked, large lawn area with a fruit tree, and a walkway leading to the rear of the property. There is a small veranda at the front. It seems possible to drive around to the rear of the property from the right side of the property.

3. On the left side of the property as one proceeds to the rear, there is a doghouse and several other fruit trees including mango trees. There is also a wooden fence or door leading to the back patio area, which seems designed to ensure the privacy of those using the rear patio area.

4. As one passes through the wooden fence or door, there is a medium sized outdoor waterfall feature or fountain on a small decked area, before one steps down unto the brick-paved patio. This brick-paved patio at the rear of the property seems to be a tranquil oasis with plants, shaded and unshaded lounging areas, and a kidney-shaped or lagoon-shaped pool with a built in hot tub at the apex of the pool. The pool is built approximately ten (10) feet from the boundary wall. There appears to be a shaded outdoor kitchen area.

5. The walls along the pool deck (on the side bordering the gully and to the rear of the property) are approximately six (6) feet high and then there is a chain link fence at one section, and a wooden fence erected above the concrete wall, presumably to provide cover or privacy from the development at 2 Acadia Drive. The wooden fence is erected in a "L-shape" above the concrete wall and is approximately seven (7) feet high at one side and eight (8) feet high on the

other side where the concrete wall is six (6) feet tall. The estimated total height of these structures is approximately fourteen (14) feet.

6. It is possible to observe large windows on the building in issue, which might allow neighbours to overlook the objectors' property. The size of these windows are approximately five (5) feet long by three (3) feet wide. The balconies on the second floor are visible.

7. A neighbouring house on Wickham Avenue also has two (2) windows which could potentially provide an occupant a vantage point to look into the objectors' property but there are vines and shrubs growing on the chain link fence which could also obscure the neighbour's view of the objectors' back patio.

THE SUBMISSIONS

[24] Counsel Ms. Cummings submitted that the applicant has demonstrated that the covenants are obsolete having regard to the presence of multi-family complexes in the community, which, she opined, indicated that the character of the neighbourhood had changed. Counsel placed much reliance on Mrs. Breakenridge's report and on the fact that there are other multi-family residences in close proximity to the objectors' property, namely at 2 and 4 Acadia Drive.

[25] Ms. Cummings submitted that the objectors have not come to the court with clean hands as they too have breached some of the restrictive covenants, and submitted that the court should give consideration to their conduct when determining the application. As regards the conduct of her client, she opined that any breach or issues arising from the development are due to a misunderstanding by the applicant's representatives.

[26] Counsel Mr. Royal submitted that the applicant has not satisfied any of the conditions in section 3(1) of the Act.

[27] Counsel asked that the court observe that Policy MP H 1 is also violated by the applicant's proposed development, as it seeks to erect a multi-family dwelling on land which is 0.42 acres in size. Further, Mr. Royal submitted that should give consideration to the conduct of the applicant's representatives in building a thirty-two (32) bedroom development, in violation of the density requirement for the area, when only twelve (12) one-bedroom units were approved by the KSAMC.

[28] Finally, Mr. Royal submitted that the objectors would suffer significant injury if the covenants were modified for the reasons set out in the Notice of Objection and affidavit of Mr. Handal.

THE LAW

[29] Section 3(1) of the Act gives a judge in chambers the power to wholly or partially discharge or modify any restrictive covenant which affect the user of any land or building on it. The onus is on the applicant to show that the restriction under the covenant should be discharged or modified by satisfying the judge that any one or more of the grounds set out below has been established. These are:

1. due to changes in the character of the property or the neighbourhood or other material circumstances of the case, the restriction ought to be deemed obsolete; or

2. the continued existence of the restriction would impede the reasonable user of the land without securing to anyone such practical benefits that would justify retention of the restriction; or

3. there has been express or implied consent to the discharge or modification of the restriction; or

4. the proposed discharge or modification will not injure any beneficiary of the restriction.

[30] In ***23 - 25 Seymour Avenue and 14 Upper Montrose Road*** Claim Nos. 2008 HCV 03060, 2008 HCV 03061 and 2008 HCV 03062, Supreme Court Jamaica, judgment delivered on 7 September 2011, Brooks J (as he then was) adopted some key principles to be applied when giving consideration to applications made pursuant to section 3 of the Act. The learned judge said this at paragraph 25:

> *"In **Hopefield Corner**, Anderson, J., cited several well established authorities, which, in my view, outline, among others, the following principles:*
>
> *a. the term "neighbourhood" was not necessarily restricted to the lands affected by the covenant in question;*
>
> *b. the neighbourhood need not be large; it may be a mere enclave;*
>
> *c. the test to determine what was the neighbourhood in any given case is the "estate agent's test". That test asks the question "what does the purchaser of a house in that road, or that part of the road, expect to get?"*
>
> *d. the character of a neighbourhood, for these purposes, is derived from the style, arrangement and appearances of its buildings and from the social customs of its inhabitants, and,*
>
> *e. in determining whether the covenants have been rendered obsolete, pragmatism is the watchword. I respectfully accept these principles as accurately stating the relevant law."*

[31] In the recent decision in ***Chin Jen Hisa and others v Martin Lyn and others*** [2020] JMSC Civ 5, J. Pusey J relied on Preston and Newson's, Restrictive Covenants Affecting Freehold Lands (7th edition), where the test to be applied in resolving the extent and nature of a neighbourhood is defined citing the following quotation from in ***Re Davis Application*** [1950] 7 P & C R 1:

> *"Provided a neighbourhood is sufficiently clearly defined as to attract to itself and maintain a reputation for quality and amenity, the size of the neighbourhood and within reasonable limits, the process and nature of the development outside its boundaries is of little consequence."*
>
> ***The test is thus essentially an estate agent's test: what does the purchaser of a house on that road, or that part of the road, expect to get?.....***
>
> *The neighbourhood need not be large: it may be a mere enclave. Nor need it, so far as this definition goes, be coterminous with the area subject to the very restrictions that is to be modified or other restrictions forming part of a series with that restriction.....*

> *The test is a pragmatic one: if the events in the vicinity have stultified the covenant, those events may be considered even if they are on land never affected by the restriction in question or any related restriction.....*
>
> *.... this part of the subsection seems to be directed not to matters of title and the right to enforce the restriction, but to the question whether the restrictions affecting a given property, situated where it is situated, have been stultified by events on the surrounding premises.* ***(My emphasis)***

[32] The evidence and my observations made in this case will be considered against this background.

DISCUSSION AND ANALYSIS

1. Is the objector entitled to the benefit of the restriction?

[33] It is agreed between the parties that both the objectors' and the applicant's properties are part of the same subdivision. They are a part of the subdivision of Acadia registered at Deposited Plan Number 1961. Belgravia's property at Number 10 Roseberry Drive is registered as Lot 148 on the plan and the objectors' property at 22 Wickham Avenue is registered as Lot 149. The objector is therefore entitled to the benefit of the restrictive covenants in question.

2. Is Roseberry Drive a neighbourhood or part of a neighbourhood?

[34] It is necessary to determine the scope of the neighbourhood and whether Roseberry Drive is a neighbourhood in itself or part of a neighbourhood.

[35] In her report, Mrs. Breakenridge adopted a large geographical area to delineate the relevant neighbourhood. For the purposes of this application, she describes the neighbourhood as the entire area covered by the Deposited Plan numbered 1961, that is the subdivision of Acadia. She indicated that she does not consider Roseberry Drive a distinct neighbourhood. She based this on three grounds:

1. It is a long road;

2. It cuts across more than one deposited plan which means it would have different restrictive covenants covering various factors; and
3. It is not unique to the area meaning, it is not exclusive, it does not stand out by itself.

[36] In ***Hopefield Corner Limited v Fabrics De Younis Limited*** Claim No. 2003 HCV 0961 Supreme Court Jamaica, judgment delivered on 15 June 2011, R. Anderson J applied this test. At paragraph 33 he held:

> *"…. The authorities seem to suggest that a 'neighbourhood' is a relatively homogenous area insofar as the physical appearance and socioeconomic definition are concerned".*

[37] Having regard to the law cited above, I accept Mrs. Breakenridge's account in relation to Roseberry Drive, and find that it is not a distinct neighbourhood and that the relevant neighbourhood for the purposes of this application is the subdivision of Acadia. However, although part of Roseberry Drive falls in a different subdivision, by applying the principles enunciated by Brooks J in ***23 - 25 Seymour Avenue*** and R. Anderson J in ***Hopefield Corner***, and by taking a pragmatic approach, I am able to look at that entire road, as well as the general Acadia area, to determine the character of the neighbourhood. It has not escaped my notice that save for the apartment complex being built by the applicant, all the properties along Roseberry Drive are single-family residences, and the style and arrangement of the buildings along that road are in keeping with the subdivision of Acadia. Roseberry Drive is similar to the other roads within the Deposited Plan subdivision of Acadia in its physical appearance and socio-economic characteristics.

3. Has there been a change in the character of the property or neighbourhood, or are there other circumstances which render the covenant obsolete?

Changes in the character of the neighbourhood

[38] I will first examine whether there are any changes in the character of the neighbourhood which have rendered restrictive covenants 1, 2, and 5 obsolete.

These are the covenants which restrict sub-division of the land, the development of multi-family dwellings, and the erection of a building for the purpose of a shop or other trade or business. The remaining covenants (3 and 7) which are sought to be modified relate to the distance of the building or outbuildings from the boundary walls and the height of the boundary walls, fence, hedge or trees. I will address these separately below.

[39] In her expert report Mrs. Breakenridge identified the properties in the Acadia area where single-family residences have given way to multi-family residences. Three (3) of these multi-family residences are on Acadia Drive, one (1) is on Evans Avenue and one (1) is on Nicks Avenue. I have noted that the apartment complex known as “Palms of Acadia”, located at 2 Acadia Drive (with title reference Volume 1511 and Folio 458) is contiguous with and immediately behind 10 Roseberry Drive. In driving to the locus in quo, the court observed the apartment complex located at 4 Acadia Drive (with title reference Volume 1180 and Folio 647), which is beside 2 Acadia Drive. However, the fact that there are five (5) multi-family residences within the Acadia subdivision, inclusive of two (2) apartment complexes which are in close proximity to 10 Roseberry Drive and 22 Wickham Avenue, does not render the restriction obsolete.

[40] I find support for this conclusion in the case of ***Re 48 Norbrook Avenue Drive*** Claim No. ERC 80/90 Supreme Court Jamaica, judgment delivered on 27 July 1994, cited to me by counsel Mr. Royal. There, Harris J (Ag) (as she then was) held that although applications for modifications had been granted in respect of nine (9) properties in the subdivision to permit multi-family residences to be built, there was still a predominance of single family residences, and the restriction against multi-family residences was not obsolete. She said at page 20:

> *“The court also observed that the discharge or modification of covenants on some lots have not caused the area to have lost its private residential character, which affords the owners of lots in the neighbourhood the benefit of privacy, tranquillity, peace, seclusion and a view”.*

[41] In ***Re Shaw Park*** [2016] JMSC Civ 120 where Bertram-Linton J in delivering the judgment stated the following at paragraph 15:

> *"The language of the statute does not suggest that a change in the character of the neighbourhood necessarily means that the restriction is obsolete.*
>
> *This consideration requires a look at whether the type of activity in the area is the same as what has occurred from the beginning of the subdivision or has new activity taken place which makes the area seem different to an observer that would have come back after being away for some time. Further does the new activity now render a restriction as to use for private dwelling obsolete?"*

[42] Mrs. Breakenridge's report does not appear to indicate the total number of lots within the Deposited Plan subdivision of Acadia, but by looking at the plan, it appears to me that there are at least 160 lots in the subdivision. The expert stated that there are only five (5) multi-family residences within the subdivision, and that these were all built prior to 2017. At section 4.4 of her report, Mrs. Breakenridge states:

> *"this neighbourhood of Acadia, which is at a transitional stage of its life cycle is still characterised by mainly middle income single family residences and the area has not been blighted by commercial incursion or infiltration of alien uses.... In the immediate area forming the Deposited Plan 1961, the majority of properties still have single family dwellings.... "*

[43] So then, what would a purchaser in this subdivision expect to receive? In my opinion, a purchaser would expect a single-family dwelling house on a lot measuring approximately half (½) acre in size, with sufficient distance from the roadway and boundaries to ensure privacy.

Other circumstances

[44] Are there other circumstances which render covenants 1 and 2 obsolete? I have noted that Mrs. Breakenridge has expressed the opinion that the subdivision of Acadia is "changing" and that reference was made in her report at section 4.3 and 4.4 to the **Town and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development Order, 2017** ("the Provisional Development Order") and to the Planning Authority relaxing "*the densities in*

neighbourhood such as Acadia to allow for developments with higher densities". Mrs. Breakenridge has expressed the opinion that the KSAMC has discretion to grant building permission for multi-family developments on lands which are less than half (½) an acre in size. She provided no basis for this statement, which seems not to pay homage to the purpose of the Provisional Development Order, as set out in the Fifth Schedule, which is to, *inter alia* make provision for the orderly and progressive development of the parishes of Kingston and Saint Andrew and to prevent activities or land uses that could harm the environment or the amenity of the residents.

[45] The KSAMC is not to grant approvals on an *ad hoc* basis or without compelling reasons, and without regard for the objectives and policies which are clearly stated in the Provisional Development Order. Page 229 of the Provisional Development Order states:

> *"**The main aim is to provide the basis for sound decisions on planning applications in accordance with the planning strategies, objectives, policies and proposals outlined in the document**. The Town and Country Planning Act require that all applications are to be determined in accordance with the provisions of the Order unless material considerations indicate otherwise. **An applicant who proposes a development that does not accord therewith, except those falling within the categories outlined in the second and third schedule will need to demonstrate compelling reasons why it should be allowed**." **(My emphasis)***

[46] The Provisional Development Order was promulgated to change the density requirements in Kingston and St. Andrew and so address the issue of declining land space there, and to set out the framework, guidelines and policies for planning and development there. However, there has been no change in the character of the Acadia subdivision, despite the Provisional Development Order. It is noteworthy that the drafters of the Provisional Development Order did not envisage that parcels of land which are under one-half (½) acre in size would be impacted. According to pages 166 and 167 of the Provisional Development Order, Roseberry Drive (which is misspelt as "Rosebery Drive") falls within the Manor Park Local Planning Area. Of note, at page 402, the Provisional Development Order states:

> *"POLICY MP H 1* ***Multi-family (apartments/town house) development may be permitted on parcels of land which are 0.2 hectare (0.5 acre) and over in area*** *which adhere to the required planning standards as outlined in this Order for such developments. …*
>
> *POLICY MP H 3 Density shall not exceed 125 habitable rooms per hectare (50 habitable rooms per acre), with building heights not exceeding four (4) floors in areas as indicated on Figure 7. …*
>
> *POLICY MP H 7 The amalgamation of smaller residential lots to allow for multifamily development will be encouraged where the individual lot does not meet the minimum size required for multifamily development. …" (****My emphasis****)*

[47] Having regard to the clear policy statements referred to above, I do not accept Mrs. Breakenridge's evidence that the half (½) acre rule applies only to townhouses and that "infill developments" may be established to develop an apartment complex on a quarter (¼) acre of land.

[48] Further, despite Mrs. Breakenridge's opinion that the subdivision of Acadia is changing, I have noted that none of the five (5) multi-family developments referred to in her report were built post-2017, and no evidence has been led to indicate that there are any other multi-family developments under construction in the Acadia subdivision, which have had the restrictive covenants modified to allow for said construction. I find that even post-2017, a purchaser in this subdivision would still expect to receive a single-family dwelling house with the attendant benefits.

[49] So what then was the original purpose of the restrictions in covenants 1, 2, 3 and 5, on (1) sub-division of the land, (2) the development of multi-family dwellings, (3) the distance between buildings, and (4) the erection of a building for the purpose of a shop or other trade or business? In my opinion, these covenants served the purpose of preserving the character of the area as a residential area with relatively large lots with the attendant benefits of privacy and tranquillity being conferred on the proprietors and occupiers of the lands.

[50] In ***Re: Constant Spring Estate*** (1986) 23 J.L.R, 543 at page 546, Downer J. (as he then was), sought to define the term "obsolete" for the purposes of the Act and

he adopted the approach of Romer LJ, in ***Re: Truman, Hanbury, Buxton & Co. Ltd's Application*** (1956) 1 QB, 261 who stated the following at page 271:

> *"It seems to me that the meaning of the term 'obsolete' may very well vary according to the subject matter to which it is applied. Many things have some value, even though they are out of date in kind or in form – for example, motorcars of bicycles or things of that kind – but here we are concerned with this application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898 for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate as a residential area or subsequently buy them. It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended to be a residential area has become either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84(1)(a)".*

[51] Can the original purpose of the restriction on sub-division of the land and the restriction on the development of multi-family dwellings still be achieved in the Acadia subdivision area despite developments in the wider Kingston and St. Andrew residential areas? My answer is yes. Single-family residences remain predominant in the Acadia subdivision area. Mrs. Breakenridge has herself accepted that there is a preponderance of single-family residences in the neighbourhood. It is therefore the prevailing feature of the area, making it eminently feasible for a purchaser to buy or build a single-family home, which will not be out of place in the Acadia subdivision. The five (5) multi-family dwellings have not changed the character of the neighbourhood so as to render restrictive covenants 1, 2, and 5 obsolete.

[52] Restrictive covenant 3 relates to the distance of the building or outbuildings from the boundary walls. The applicant is seeking to build a guard house, garbage receptacle, and utility rooms against the boundary wall(s). While these outbuildings might seem relatively innocuous, it is for the applicant to demonstrate that these outbuildings will not impact the objectors' privacy and tranquillity negatively and that the covenant is obsolete. The applicant has not done so. It is observed that

the approved building plans (Exhibit 2) only showed a few apartments with in-unit laundry areas. It would seem that the occupiers of other units would use a communal utility room or laundry area, and depending on its location, this facility might add to the noise level coming from the complex. Even if I am wrong in my assessment of this issue, it is noted that during cross-examination Mr. McLeod conceded that the approved building plans showed a distance of 8 feet and 1 inch from the boundary wall.

[53] When I consider this in tandem with the fact that two (2) two-bedroom apartments would overlook the objectors' back patio and hot tub, it is apparent that the objectors' privacy and tranquillity are likely to be diminished. While there would still have been a chance that the objectors' privacy and tranquillity would be impacted by the presence of persons residing in a single-family house, the intrusion or interference would be significantly less than in the case of a multi-family complex where there would be at least ten persons (occupying five units on the left hand side) in close proximity to the objectors' home.

[54] Restrictive covenant 3 was designed to provide the residents with some level of privacy and tranquillity and these remain important features and are part of the character of the neighbourhood. I do not find that that covenant is obsolete.

[55] Likewise, I do not find that the restrictive covenant 7 is obsolete. It serves the purpose of ensuring visibility and preventing the obstruction of the view of motorist at intersections, thereby contributing to road safety in the neighbourhood. Having regard to the fact that 10 Roseberry is not located at an intersection, I do not believe that modification of this covenant would be required in any event.

4. Do the restrictive covenants impede the reasonable user of the land?

[56] In attempting to establish this ground, the applicant must show that:

1. the restrictions impede reasonable user of its land, and

2. secure no practical benefits to any person sufficient to justify its continuance.

[57] This ground was considered in the case of ***Stannard v Issa and Others*** (1986) 34 WIR 189, in which the Judicial Committee of the Privy Council said that the applicant should demonstrate that the restrictions "*have sterilized the reasonable use of the land*". Lord Oliver of Aylmerton quoted a portion of the dissenting judgment of Carey JA's as regards what the applicant needs to satisfy, at page 195 d-h:

> *"An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in section 3(1)(b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded … Lord Evershed MR in* ***Re Ghey and Galton's Application*** *[1957] 3 All ER 164 at page 171 expressed the view that in relation to this ground – „* ***… it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants.***
>
> ***Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions prevent the land being reasonably used for purposes the covenants are guaranteed to preserve?*** *Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the [respondent's] proposals are reasonable and the restriction impedes that development …"* ***(My emphasis)***

[58] In the instant case, the applicant has not proven that the existing covenants "*have sterilized the reasonable use of the land*" and that the purpose, objects or benefits of the covenant cannot still be achieved or are unreasonable.

[59] Mrs. Breakenridge's Report at section 6.2 lauds that *"a multi-family development at 10 Roseberry Drive would satisfy the most probable use of a property which is physically possible, legally permissible, financially feasible and which would result in the land being put to its highest and best use."* However, as counsel Mr. Royal opined, this does not satisfy the test set out it in the authorities. It seems that a modification of the covenant sought purely in the pursuit of financial gain ought not

to be granted. The following statement by Harris J (Ag) in ***Re 48 Norbrook Avenue Drive*** is profound:

> *"It is evident that there is a desire and intention on the part of the Applicant to erect six town houses to satisfy their own financial exploits. This could not be regarded reasonable user of the land. A party is not free to expropriate the private rights of another merely for his own advantage".*

[60] The current permitted use of the land is reasonable and is the predominant use to which the land has been put. From as far back as 1959 the reasonable use of land in the Acadia neighbourhood has been the retention of the single-family houses with appropriate outbuildings. This goal is still viable despite the construction of a few multi-family residences in the area. The applicant could have developed the land as a single-family residence in line with the purpose of the covenant, as this would still be a reasonable use of the land today, given the overall character of the neighbourhood.

[61] I am also required to address the aspect on the practical benefits secured by the covenant. Panton P in ***Sagicor Pooled Investment Funds v Robertha Ann Matthies et al*** [2017] JMCA Civ 35 in discussing the Privy Council's decision in ***Stannard v Issa*** said at paragraph 39:

> *In dealing with the question of whether the existence of the restrictions conferred a practical benefit on the objectors sufficient to justify their continuation without modification, the Privy Council said that the question is not "what was the original intention of the restriction and is it still being achieved?" but "**does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?"***
> ***(My emphasis)***

[62] It is clear the restrictions secure practical benefits to the objector which include low density of occupation, privacy and security, peace and quiet, orderly development of the community and the maintenance of high property values. No doubt a modification of the covenant imposing a multi-family residential complex will impact these and result in reduced privacy and more traffic, noise and inconvenience, as more persons will be in the small land space. I adopt the position of J Pusey J in

Chin Jen Hisa at paragraph 84, in saying these are real benefits which "*home buyers are willing to pay for, and those who own, including the Objectors, have preserved*".

[63] The applicant has failed to show that the existing covenants impede the reasonable use of the land and has also not shown that the current restriction would not secure any practical benefit sufficient to justify its continuation.

5. Have persons agreed expressly or impliedly to their discharge or modification?

[64] At section 6.3 of her report, in addressing section 3(1)(c) of the Act concerning acquiescence to the modification, Mrs. Breakenridge said this:

> *".....Considering that there is now only one objector imply [sic] that the other proprietors who are entitled to the benefit of the same covenants have agreed to the modification of the covenants."*

[65] Counsel for the applicant makes a similar submission at paragraphs 27, 28, 33 and 34 of her written submissions in relation to the allegation by Mr. McLeod that Mr. Handal did not object to the application for the modification of the covenant until he saw the building being built.

[66] I will address these two issues separately.

Lots 4 Acadia Drive and 2 Acadia Drive

[67] There is insufficient evidence before me to conclude that the objectors and other proprietors in the area expressly or impliedly agreed to the discharge or modification of covenants 1, 2, 3, 5 and 7 as regards the developments at 4 Acadia Drive and 2 Acadia Drive. I cannot come to such a conclusion when there is no evidence before me to indicate that the proper processes set out in the Restrictive Covenants (Discharge and Modification) Rules 1960 and Practice Direction No SC 2003-1 dated 13th February 2003 were followed prior to the modification of the covenants in 2006/7 and 2016 respectively, and prior to the apartment complexes

at 4 Acadia Drive and 2 Acadia Drive, being built. It is Mr. Handal's evidence of that he never received notification of the application for the modification of the covenants in 2006/7 in relation to 4 Acadia Drive and he did not see the advertisements published in the newspaper. I accept Mr. Handal's account that he was never served with a notice in respect of the application for the modification of the covenants. I found him to be a credible witness. I have noted that he was forthright when asked whether he saw construction being done at 2 and 4 Acadia Drive. He indicated that he did see the construction, but did not regard them as his "neighbour". He was not asked whether or not he received notification of the application for the modification of the covenants in relation to 2 Acadia Drive or whether or not he saw the advertisements published in the newspaper.

[68] In the case of ***Hopefield Corner Limited v Fabrics De Younis Limited*** Supreme Court Civil Appeal No: 7/06, Court of Appeal Jamaica, judgment delivered on 24 October 2008, it was held that if a notice ordered by the court was sent to an incorrect address, or if the advertisements of the notice of modification did not assist a layman to easily identify the lot in question, then a person entitled to the benefit of the covenant would have been deprived of his opportunity to object to the proposed modification, and any order modifying said covenant would be invalid or irregular.

[69] In the instant case, if an order was made that Mr. Handal be served with the notice of the application for modification in respect of 4 Acadia Drive, and if he was not served with the notice, then he could not know of the application and could not object to it.

Lot 10 Roseberry Drive

[70] As regards the development at 10 Roseberry Drive, Mr. McLeod has sought to make much of Mr. Handal's conduct in discussing the development, and his statement that he would buy townhouses from the applicant had the applicant built townhouses instead. The suggestion is that Mr. Handal has impliedly agreed to the

discharge or modification of covenants 1 and 2 by indicating that he would buy townhouses from the applicant. This contention does not find favour with me. Mr. Handal is objecting to the development of an apartment complex on the basis that it would increase the density, traffic and noise in the area, and that it would impact on his privacy. It seems reasonably clear that, given the size of the land and the average square footage required for a townhouse, there would have been fewer townhouses than apartments erected there, and it seems reasonable to conclude that Mr. Handal's concerns regarding density, traffic, noise and interference with his privacy might have been assuaged. However, I accept that Mr. and Mrs. Handal are objecting to any modification of covenants 1 and 2 whatsoever.

[71] In ***Gainsborough Development Company Limited's Application*** [1990] 27 J.L.R 491, Bingham J (as he then was) said at page 495 F that the words in section 3(1)(c) referred to "***all***" the covenantees who benefit from the covenant, and once there were proprietors who objected to the application, reliance on this ground would be "*unmeritorious and must fail*".

[72] However, the law is clear that the court must examine the conduct of the objectors to determine whether they had, by their conduct, acquiesced in the modification or discharge of the covenant. In the case of ***Re No. 13 Norbrook Crescent*** Claim No. 2005 HCV 1767, Supreme Court Jamaica, judgment delivered on 30 July 2009 in which Brooks J (as he then was) considered the delay and conduct of the objectors to determine whether an objection could stand. The learned judge held that the applicant had demonstrated that the objectors had agreed to the modification or discharge of the covenant by their conduct in cordially discussing aspects of the development or by remaining silent, and in failing to indicate any objection to the project during the 15-month period of construction. Justice Brooks cited the case of ***McMorris v Brown and another*** (1998) 53 WIR 261, as authority for the position that a short delay in filing an objection did not imply consent to the subdivision sought, and found that, having regard to the lengthy delay on the part of the objectors in the case before him, they had agreed to the modification.

[73] In this case, I do not find that Mr. Handal delayed in filing his objection, or that he misled the applicant to believe that he would not object to the application. Even on the account of Mr. McLeod, Mr. Handal was clear that he did not approve of apartments being built beside him, and that he had concerns about the impact of the development on his privacy.

[74] I found Mr. Handal to be credible and prefer his account to that of Mr. McLeod in relation to Mr. Handal's objection to apartments being built. Further, the court's finding that there are three-bedroom penthouses built on the second floor of the development lends credence to Mr. Handal's account in relation to a discussion with one Brian Morris, architect, and Mr. McLeod in relation to the existence of a three-bedroom penthouse. I accept that the objectors indicated their objection to the development, before and after construction commenced.

6. Would the proposed discharge or modification cause injury?

[75] The type of injury contemplated by this section is that which affects the beneficiary to the covenants, including the objector, as it relates to their interest in the land to be benefitted. This injury can be physical, for example, being subject to noise or traffic. The injury may be of an economic kind, for example, the reduction in the value of the land. The injury might be of an intangible kind, for example the "*impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood*" (per Campbell J in the New South Wales Supreme Court in the case of ***Lolakis and another v Konitas*** [2002] NSWSC 889).

[76] In this case, the objectors defined the likely injury in similar terms, namely that they have had concerns about the impact of the development on their privacy, the value of their property, noise nuisance and increased traffic in the neighbourhood.

[77] It seems that the applicant's officers have tried to address Mr. Handal's concerns in relation to the infringement on his privacy, but stepping back the first and second

floors from the boundary wall and by blocking up the balconies on the first floor. However, it is still possible to see Mr. Handal's hot tub from the second floor balconies. I heard evidence about the installation of sound reduction windows. However, it is foreseeable that the occupants of the thirty-two (32) bedrooms on the property may choose to leave their windows open. Further, there will be the attendant noise from the numerous cars which would be parked on the property. The issues of additional traffic and density are also not issues which the applicant can address after the apartments are sold.

[78] Having regard to all the circumstances, I find that there would be a reduction or an erosion of the objectors' privacy and the tranquility they currently enjoy on their property. Further, there would be increased traffic and noise nuisance and increased population density. The applicant has not shown how peace and tranquility in the community might be maintained. I accept Mr. Royal's submission that Mrs. Breakenridge has made concessions at sections 7.2 and 8.1 of her report in relation to the reduction in personal enjoyment and amenity value to the existing occupants, and that traffic congestion and noise pollution will increase in the neighbourhood. It is noted that Mrs. Breakenridge admitted to the court that she did not herself visit the subject property. Consequently, her opinion that the "*scheme is small*" and that the social cost of the development would "*have little impact*" must be rejected. An expert is to indicate the basis of her opinion, and in this case, the basis is flawed, since the complex consists of thirty-two (32) bedrooms and not twelve (12).

[79] Further, at this time the applicant has not produced any authorization from NEPA and the NWC to allow the sewage from the complex to be diverted to the NWC's main sewage line on Evans Avenue. Consequently, at this time, the area at the rear of the property has been designated for a private sewage treatment plant and the twenty-three (23) parking spaces on the property are insufficient for the expected number of occupants of the thirty-two bedrooms and other habitable rooms. This then potentially means that there is a real risk of on-street parking and

congestion in the area along Roseberry Drive and neighbouring roads. The nuisance this would cause to the community is untenable.

[80] Mrs. Breakenridge has also accepted that there may be a reduction in the personal enjoyment or amenity value to the objectors in the ways discussed above. However, she disagreed that the development would affect the market value of the objectors' property. Mrs. Breakenridge did concede however, that the presence of the development might cause the objectors' property to take longer to sell, as it might be considered "less appealing" to have the development beside it. In essence then, this concession supports the objectors' contention that the proposed modification will be injurious to them.

[81] I therefore find that the applicant has also failed to establish this ground.

[82] As an aside and by way of observation, I have also noted that as part of the process for application for building approval, the NWC would have agreed to provide the complex a certain amount of liters per day. However, the construction of extra rooms and the significant increase in the number of occupants on the land is likely to adversely impact the supply of this vital amenity to the complex or the area. It is also questionable whether or not NEPA and the NWC would authorize the applicant to pipe sewage from the complex through a gully to the NWC's main sewage line, with the attendant risk that the pipes might corrode or burst and result in the discharge of effluent into the gully.

7. The Judge's discretion and other considerations

Conduct of the Objectors

[83] At paragraphs 54 to 64 of her written submissions, counsel for the applicant, Ms. Cummings, submitted that the objectors have not come to the court with clean hands, since they have allegedly breached three (3) of the restrictive covenants which the applicant has sought to modify, namely restrictive covenants 2, 3 and 7.

[84] Counsel opined that the objectors have breached covenant 2 on the basis that there home appears to have two different parking areas and two verandah areas. Counsel posits at paragraph 56 of her submissions that the objectors have divided their property and that it is not a single dwelling house. However, there is insufficient evidence before me to make that determination.

[85] Ms. Cummings asked the court to note that the objectors erected a doghouse constructed of blocks with a timber roof, which appears to be less than 10 feet from the boundary wall between the applicant's and the objectors' properties. Counsel submitted that the erection of the doghouse is in contravention of restrictive covenant 3. Consequently, she opines that the court should give weight to this when in determining this application. However, since the obvious purpose of restrictive covenant 3 is to provide the beneficiaries with some amount of privacy and since the presence of the doghouse does not affect the neighbour's privacy, I do not find that this breach to be so egregious as to exercise my discretion in favour of the applicant.

[86] I am also guided by the decision in ***Re Lots 12 and 13 Fortlands*** (1969) 11 J.L.R 387, where Parnell J held that the mere fact that the objector is guilty of a breach of one covenant does not prevent him from taking steps to restrain action which tends to prejudice his right under any other covenant which runs with the land.

[87] Even if I am incorrect in my assessment of the merits of the application under section 3(1), having regard to all the circumstances of this case, it is not just or equitable to grant the application to modify the relevant covenants. My decision would be based on the fact that the applicant's officers and project manager have acted inappropriately in this matter.

Conduct of the Applicant and its officers and project manager

[88] In ***Re Lots 12 and 13 Fortlands***, Parnell J said that the application may still be refused even if the applicant discharges the burden of showing that at least one of

the matters stipulated under section 3(1)(a) to (d) has been established, if, in the court's discretion, there is proper or sufficient ground for refusing the application.

[89] In ***23 - 25 Seymour Avenue and 14 Upper Montrose Road***, at paragraph 20, Brooks J (as he then was), cited dicta of Theobalds J in ***Re Covenant Community Church*** [1990] 27 J.L.R. 368, and observed:

> *"Even if the applicant satisfies one or more of those requirements, it must also satisfy the court that it is just and equitable, in the circumstances, that the court should grant an application for discharge or modification of the relevant covenant. This is because the discharge or modification of restrictive covenants falls within the equitable jurisdiction of the court. In* ***Re Covenant Community Church*** *[1990] 27 J.L.R. 368, Theobalds, J., in considering an application for the modification of restrictive covenants affecting lands situated at Old Hope Road, addressed this additional requirement."*

[90] At paragraphs 71 to 73 of her written submissions, counsel Ms. Cummings has in essence submitted that the court need not be concerned by the applicant's breach of the KSAMC's building approval. Counsel said this:

> *"71. The fact that on a visit to the locus it appears that top floor of the Applicant's development herein has not been built in accordance with their approved plan is a problem for the Applicant to resolve with the relevant authorities.*
>
> *72. We put this issue that they created down to a misunderstanding by the Applicant's representatives who have no plans to sell any part of the top floor but occupy to it themselves with their family and erroneously decided to rearrange the layout of those units without permission. They have since realised the error they made and will abide by any order this court, and/ or the relevant authorities makes in relation to retrofitting that part of the building to conform to the approved plans.*
>
> *73. If the covenants are modified the Applicants will still have a herculean task to satisfy all the relevant authorises before they can actually complete their development and obtain certificates of title for these units. They will be inspected for code violations, and they would still need approval from several other stakeholders before they are able to complete this project and sell any of these units."*

[91] I strongly disagree with Ms. Cummings' submission on this point. The conduct of the applicant, firstly in commencing construction while the application was pending, and secondly, in building in breach of the building approval must be relevant considerations for the court. As an aside, on the issue raised by counsel of the

need for the applicant to retrofit "*that part of the building to conform to the approved plans*", I should indicate that although counsel Ms. Cummings was not present during the visit to the locus on October 28, 2021, and therefore did not see the full extent of the development and the location and number of bedrooms, counsel Mr. Clifton Campbell was present, and he would have observed that the breaches of the building approval were not limited to the second floor (as Ms. Cummings seems to believe).

[92] The authors of Preston and Newson's, Restrictive Covenants Affecting Freehold Lands (7th edition), at page 210 indicate that in exercising its discretion, the court may take into account public considerations. Such considerations include the need to ensure compliance with and respect for the rule of law, the protection of rights and the need to ensure that there is general order in this country. Compliance with building approvals and orderly development are therefore considerations for this court when exercising my discretion.

[93] The visit to the locus revealed deliberate attempts to hide the true state of the development design and layout from the court. Areas leading to other units were boarded up with fresh concrete present, thereby preventing the access of the court to these rooms. Some areas were only accessible by the balcony which made the units not easily detectable. The court had to return on the following day to gain a full picture of the true size and layout of the building. At that time, it was revealed that there were several other rooms that are not part of the plan approved by KSAMC. Pipes were observed which appeared to be for showers, indicating a second full bathroom in most units. When identifying some bathrooms, Mr. McLeod himself referred to some bathrooms as "*Jack and Jill bathrooms*" which essentially is a bathroom shared by two bedrooms.

[94] It seems clear that the applicant's officers did not intend to comply with the requirements of the KSAMC building approval, as the number of units and bedrooms far exceeds that approved by the KSAMC. I find that there are fifteen (15) units and the number of bedrooms or rooms which might easily be converted

to bedrooms totals thirty-two (32). From my observation, there are five (5) units on the ground floor and six (6) units on the first floor and four (4) units on the second floor, and each unit consists of at least two (2) bedrooms plus a living room space. This far exceeds the amount of habitable rooms recommended in the Provisional Development Order for a lot with an estimated size of less than one-half (½) acre.

[95] The applicant has therefore violated the terms of the building approval granted on October 3, 2019 which stipulated therein that if there is non-compliance with the approval, said approval would be "null and void".

[96] Having regard to this issue and all the factors referred to above when considering section 3(1) of the Act, I therefore refuse the application.

Other observations – the approvals given by NEPA and KSAMC

[97] At paragraphs 66 to 70, counsel Ms. Cummings submitted that KSAMC and NEPA were aware that the size of the lot was less than half (½) an acre, that they were asked to exercise their discretion to allow for 3 additional habitable rooms, totalling 24, and that they granted the relevant approvals based on the drawings dated June 17, 2020 (Exhibit 2). Consequently, counsel opines that "*[i]f the Objectors has [sic] a problem with this exercise of the discretion by these relevant authorises, the place to raise their objection is with those bodies and not with the Applicant in an application to modify the covenants*."

[98] Counsel also remarks that this court was not asked to examine whether or not the development was in conformity with the Provisional Development Order, or to examine the power of the KSAMC or NEPA to grant the approvals which they did. Counsel is correct in her observations that there is no formal application by the objectors for the court to examine these matters. However, it would be remiss of me to not make observations, even if no orders are made in respect of these matters.

[99] In ***Michael Young et al v Kingston and St Andrew Municipal Corporation et al*** [2020] JMSC Civ 251, G. Fraser J considered, inter alia, section 12(1A) of the **Town and Country Planning Act** ("TCPA") and held that the KSAMC lacked the statutory authority to exercise any discretion to vary the minimum standards specified in both the 1966 Development Order or the 2017 Provisional Development Order as regards the density of a development on a plot of land at Birdsucker Drive, when the lot size disqualified it from being appropriate for multi-family development. At paragraphs 171 to 181, the learned judge considered the authority of the KSAMC, as well as its duty to consider the 2017 Provisional Development Order when granting a planning permit, and to consider the Draft Guidelines of the Variation in the Density and Parking Standards for Development Application, and the consideration for the *de minimis* waiver, set out at page 5 of the guideline. Justice Fraser opined that compelling reasons ought to be stated as regards why the development should be allowed despite the clear policy in relation to density indicated in the 2017 Provisional Development Order, and observed that none was stated.

[100] Similarly, in this case, the building approval makes no reference to any compelling reason for the grant of the approval. Added to this concern, is the fact that the Building Inspectorate at the KSAMC ought to have been aware of the concern about "overbuilding" referred to in the Fifth Schedule of the Provisional Development Order, at page 252, which states that:

> *"**There is a tendency in high density residential development such as apartments to overbuild by creating large rooms which can later be converted into smaller ones. The result of this is an increase in density which is calculated on a per habitable room basis creating a strain on the facilities and amenities which have been provided for the development or area** as more people are allowed to occupy it than was intended. While architects, owners and tenants have a right to the size unit they desire, **control has to be placed on the size of rooms in this type of building** by way of density to prevent exploitation of the system and protect the facilities that have been provided from being overloaded and ultimate failure". (My emphasis)*

[101] The Provisional Development Order was made after consultation with the KSAMC. It stands to reason that the Building Inspectorate at the KSAMC was required to

scrutinize the submitted drawings and assess the square footage and layout of each proposed habitable room to ensure that each unit contained space befitting but not exceeding a standard-sized one-bedroom unit. The Fifth Schedule sets out the objectives and policies which should guide development in the entire area covered by the Provisional Development Order (referred to as "Order Area"). Policy SP H30 suggests that the standard one-bedroom unit is deemed to be 100 square feet. It states:

> *"Where the standard area of a studio is exceeded, the planning application will be assessed as a one (1), two (2), or three (3) bedroom unit, (as the case may be)* ***for each additional 100 square feet*** *(9.29m2), with the application of the relevant statutory requirement". (My emphasis)*

[102] However, in this case, KSAMC seems to have not observed that the layout of the rooms and bathrooms (as indicated in the approved plan) suggested that the space in each unit could accommodate two (2) bedrooms rather than one (1) bedroom.

[103] In this case, the objector did not apply for the building to be demolished or for an injunction, and without an application, I can make no such order. However, KSAMC might wish to issue an enforcement notice in respect of the breaches. The KSAMC's powers include ordering the demolition of the building pursuant to section 45 of the 2018 **Building Act**.

ORDERS

[104] In all the circumstances the following orders are made:

1. The application for modification of restrictive covenants numbers 1, 2, 3, 5 and 7 endorsed on Certificate of Title registered at Volume 1202 Folio 746 of the Register Book of Titles is refused.
2. Costs to the objector to be agreed or taxed.
3. Attorneys-at-Law for the objectors are to prepare, file and serve this order.
4. The parties are to return to Court on January 12, 2022 at 9:30 am to make submissions on consequential orders.