APPLICATIONS IN THE SUPREME COURT TO DISCHARGE OR MODIFY A RESTRICTIVE COVENANT

INFORMATION FOR OBJECTORS

This basic information is given by the Court to help you understand the significance of a notice you may have received from lawyers acting for a landowner in your neighbourhood telling you about an application to discharge or modify a restrictive covenant. You might also see a notice of the application posted on the land.

An application to the Supreme Court for the discharge or modification of a restrictive covenant is determined under the *Property Law Act* 1958 whereas an application for planning permission is determined under the *Planning and Environment Act* 1987. These Acts are quite different both in purpose and process. An application to modify or discharge a restrictive covenant is often made so as to enable a planning application to be made later.

A restrictive covenant is like a promise made by a landowner not to use land in a certain way. Once made, the promise continues to bind those who buy the land later. A common example is a promise not to build more than one house on the land.

The promise is usually not made to everyone in the neighbourhood but is only for the benefit of certain land, or 'Lots' in a subdivision. If you receive a notice it is usually because the Court has already determined you have the benefit of the covenant and might be affected by the application. You are known as a beneficiary. Only a beneficiary can object to the application.

The owner making the application will have already prepared and filed documents in the Court making a case for discharging or modifying the covenant. A beneficiary considering whether to object can first obtain the documentation about the application from the lawyer acting for the applicant and then decide what to do.

The process after notification starts with a hearing at which the Court sees if there are any objectors. If a beneficiary wishes to object, written notice must be given to the plaintiff's solicitors in accordance with the Notice. The objector must then come to Court or be legally represented in Court on the date stated in the Notice. On that day you can explain to the Court the basis of your objection without becoming a party in the case, that is a defendant. However, objections may not be considered by the Court unless you attend in person or have someone represent you. You do not have to engage a lawyer to represent you at the first hearing, but applications of this nature involve a degree of technicality and you may benefit from being represented or obtaining legal advice beforehand.

If you wish to place evidence before the Court you will need to be made a party in the case – that is become a defendant. Time is then given to prepare documents to oppose the application. This is best done with the assistance of a lawyer, and may be done together with other objectors.

When the documentation is done, the next step is for the Court to conduct a hearing to decide the case. Only objectors who have been joined as parties can be involved in that hearing, although of course other interested neighbours can attend and listen in open Court. The hearing will involve testing the facts and opinions in the documentation and hearing argument on the merits of the application. It usually takes one or two days. The Judge may visit the neighbourhood to get a better idea of the character of the area.

There is natural concern by prospective objectors about the legal costs of Court proceedings. Normally, the costs of the application are paid for by the applicant even if the application is granted over the objection. But it may be different if a beneficiary objects without having any genuine or arguable grounds. That is why it is best to get legal advice first. If you wish to represent yourself, assistance is available from the Court's Self-Represented Litigant Co-ordinator. More information about that service is available on the Supreme Court's website.