



## Broomhaugh & Riding Parish Council Covenants Policy 2009

### **Historical Context**

Broomhaugh and Riding Parish Council is the successor covenantee of covenants affecting many properties in Riding Mill, as a result of a conveyance in 1973 whereby the original covenantee, Riding Mill Estates Company, conveyed the benefit of those covenants to the Parish Council.

Attempts have been made over the years to clarify the Council's position in relation to consenting to development or releasing these covenants, as it has been claimed that there may have been inconsistency in the Council's actions, resulting in uncertainty for those whose properties are subject to the covenants.

In 2005 a letter setting out the Council's policy was sent to those whose properties the Council thought might be subject to covenants, but the way in which the Council has implemented that policy has been challenged by members of the Parish involving a referral to the Audit Commission. The District Auditor who handled the matter stated that the Council had not done anything illegal in its actions in requiring payment for release of covenants. However he recommended that the Council take legal advice on various points he raised, and this the Council has now done.

### **The Council's Legal Advice**

The letter of advice to the Council is available on the Council's website and copies are available from the Parish Clerk (at a nominal cost to cover copying). The salient points are (briefly):

- 1 The benefit of the covenants is an interest in land, and the Council by statute may not without Secretary of State's consent dispose of any interest in land for less than the best consideration reasonably obtainable.
- 2 In any event, the Council has a fiduciary legal duty to the Parish, as a result of which it should, in any disposal of its assets or equivalent transaction, seek to realise the full value of those assets for the benefit of the Parish, unless other

material considerations, which have been properly weighed in the balance with the Council's fiduciary duty, indicate otherwise.

- 3 Such "other material considerations" may emerge from consideration of the circumstances of an individual case, but as a matter of general policy there appears to be nothing to indicate that the Council should do otherwise than seek to charge full value for a release, in circumstances where the covenant has more than a merely nominal value.
- 4 Where the Council would demonstrably have little or no hope of success in any action to enforce a covenant, it should probably not seek to charge for a release.
- 5 In all other cases the Council should generally seek to realise the benefit of releasing a covenant, unless other material considerations connected with an individual case indicate otherwise.
- 6 Any moneys received by the Council for the release of a covenant are not earmarked for any particular purpose and are available for any lawful purpose of the Council.

### **Comment**

It appears to be generally accepted that there are at least two building schemes involved in the original development affected. As a result, the restrictive covenants may be enforced not only by the Council as covenantee but also between the owners of the properties subject to the covenants.

Because the Council does not have copies of all the conveyances to the various residents, and as it appears that the wording of some of the covenants varies from property to property it is not possible for the Council to give a definite ruling on its attitude to future release of covenants. In any case the Council must make a decision on the merits of each application whether to release the relevant covenant, or consent to development pursuant to it, or decline to do so. Subject to that, the Council wishes to give residents guidance about its likely response to such applications to enable them to make plans.

The Council considers that the original purpose of the covenants, in so far as that purpose can be assumed to be known and is still relevant, was to protect the

covenantee's property in the relevant building scheme and also to enable neighbours (fellow covenantors) to prevent plot splitting, new build and extensions any of which they considered would impact adversely upon their own property.

## **The Council's Policy**

### **1 EXTENSIONS**

In the case of normal extensions for the houseowner's own use, the Council will not generally withhold its consent to development but will require a copy of the plans to be lodged with the Council. (The purpose of this is (a) to enable the Council to be satisfied that the extension proposed is a normal one and not a substantial one equivalent to a partial new build and (b) as a correct record of the extension). The Council will need to know the exact terms of the covenant applicable to that property. The Council will provide a letter of consent to the particular development provided that:

- (i) any necessary planning approval has been obtained and
- (ii) no neighbour has sought to enforce the covenant

If a letter from the Council is sought before a planning application is made, in order to give the property owner the necessary assurance to make a planning application, then upon receipt of the plans and the Council being satisfied as to the nature of the extension as outlined above, the Council will be prepared to confirm in writing its willingness to give a letter of consent once conditions (i) and (ii) above are met.

A deed of release of covenant in respect of a specified normal extension will, where requested, usually be given provided any legal fees are paid by the houseowner and again provided no neighbour has sought to enforce the covenant.

A small fee to cover administrative costs may be charged by the Council in either case.

### **2 PROPERTY SPLITS AND OTHER DEVELOPMENTS**

The Council in accordance with the letter of legal advice received will, in the case of property splits, give precedence to its fiduciary duty to the Parish and will not grant a release or consent other than for value.

In the balance to be held between realising the value of the benefit of the covenant and respecting the rights of the neighbours, the Council will generally give preference to the neighbours' rights – i.e. if any neighbour chooses to enforce the restrictive covenant, the Council will not assist the covenantor by releasing the covenant, waiving it or in any way consenting to the development, even though the Council would thereby forego an opportunity to make a charge for such release.

If a neighbour, having objected to the planning application, notifies the Council in writing of intention to seek to enforce a covenant should planning permission be granted and acts on that notification within a month of the grant, the Council will not release the covenant.

The Council will not release a covenant prior to the grant of the relevant planning permission.

### 3 BUSINESS RUN FROM HOME

In the case of a covenant restricting trade, business, manufacture or calling of any description on the premises, the Council is not inclined to enforce this covenant in respect to activities which do not cause disturbance to neighbours. This does not obviate the need for a property owner to obtain any planning approvals or other permissions that may be required in appropriate cases. Nor is it intended to affect the rights of neighbours to enforce the covenant under any building scheme.

### 4 CHANGE OF USE

Where a house owner wishes to change the permitted use of a property in breach of covenant the Council may release the covenant in respect of that change and may make a charge for doing so. If the amount of such charge as ascertained by valuation is negligible the council may if requested by the covenantor enter into a formal deed of release at the expense of the covenantor (but no other charge will be made.). The Council reserves its right to make a substantial charge if the covenantor does not apply for such release at the time of change.

The Council will give preference to neighbours' rights and the provisions of 2 above will apply to applications for change of use

## 5 VALUATION

Where the Council has been asked (under 2 above) to release a covenant to enable a house owner to proceed with a sale or development of his property or part of his property, the amount charged by the Council for such release will be based on the figure assessed by the Valuation Office Agency as appropriate. The Council may modify this figure in negotiation with the house owner to reflect individual circumstances. The amount charged will be based on a percentage of the valuation of the land without the restriction of the covenant less the value of the land with the restriction. This valuation will in effect reflect the value to the covenantor of the Council's release of the covenant without the expense and uncertainty of outcome of recourse to the Lands Tribunal. Among other factors which the Council will take into account in such negotiations will be the need for consistency in the amounts charged by the Council for the release of covenants on other properties in the village.

## 6 INDIVIDUAL CIRCUMSTANCES

The above is intended as a statement of general policy. Whilst as noted above the policy is intended to give homeowners guidance about the Council's likely response to applications under the covenants, the Council will consider each application on its merits, having regard to the general policy and other material considerations. In any individual case where the Council appears to the applicant to depart from its general policy, the Council will notify the applicant in writing of the reasons for such apparent departure.

## SUMMARY

There are no fundamental changes from the policy established in 2005 which was sent to covenant holders (also after legal advice was taken).

This time the policy is put into the public domain, following the legal advice of August 2009 as recommended in the District Auditor's report, for all parishioners to see. The Council is also putting the letter of legal advice into the public domain. Any individual application for covenant release will continue to be considered by the Council in confidence as far as possible, but each applicant will be able to check that the outcome of his or her application is consistent with the published policy and legal advice.

Any income or expenditure related to covenants will be reported at the same time as the annual audit, whilst preserving as far as possible the financial privacy of the individual.

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