

NAVIGATING COVENANT MODIFICATIONS; LEGAL GUIDELINES & NEIGHBOUR RELATIONS

THE NEW LANDSCAPE
FOR REAL ESTATE DEVELOPMENTS

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OUR FOCUS

This presentation focuses on recent decisions of the Jamaican Courts regarding real estate developments, relating to modification and discharge of restrictive covenants and the application of development orders.

OVERVIEW

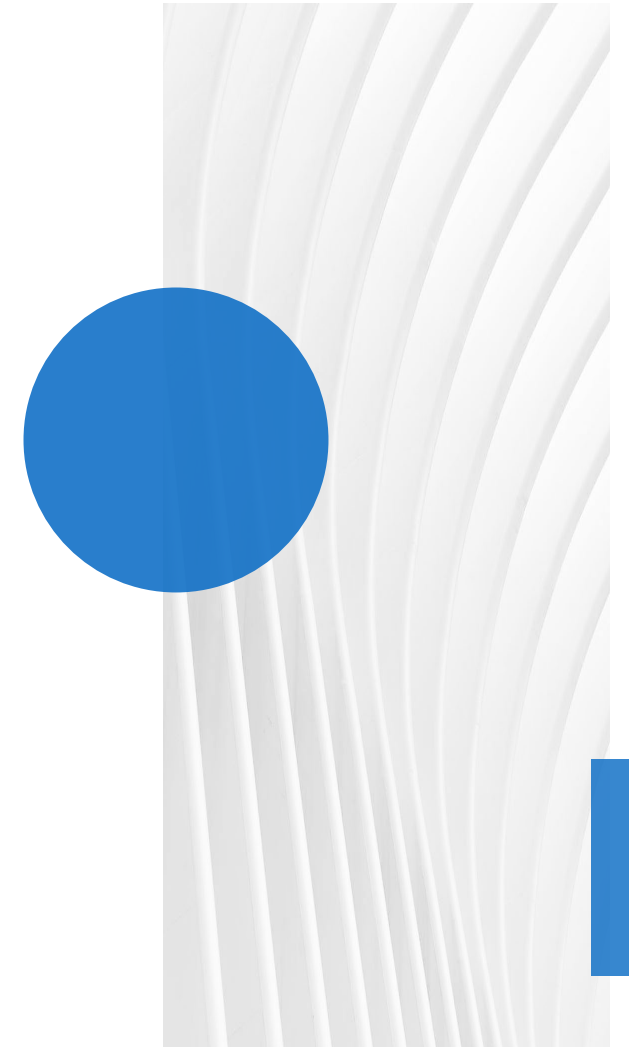


- 1** ● Introduction
- 2** ● Development Orders Explained
- 3** ● Decisions of the Court and the Effect
- 4** ● Enhanced Due Diligence
- 5** ● Looking Ahead

INTRODUCTION

Important legislation to be considered in relation to Real Estate Developments:

- 1. The Town and Country Planning Act*
- 2. The Restrictive Covenants (Discharge & Modifications) Act*
- 3. Registration of Titles Act*





RESTRICTIVE COVENANTS ORDERS EXPLAINED

WHAT IS A RESTRICTIVE COVENANT?

DEVELOPMENT ORDERS DEFINED

- Initially, they are contractual terms which restrict the use of land.
- Usually comes about when a person(s) buys a subdivision of a larger lot. Restrictive covenants imposed to control use of the neighboring subdivided lots.
- The law allows for be benefit and burden of the covenants to run with the land, therefore binding successive owners of the respective properties.
- Usually endorsed on the Certificate of Title.

WHAT IS A RESTRICTIVE COVENANT?

NATURE OF RESTRICTIONS

- Restrictions commonly pertain to use of the land, for example:
 - Prohibiting multi-family development
 - Preventing commercial use.
 - Number of buildings that can be built on lots.
 - Distance of buildings from neighboring lots.
 - Distance of buildings from the roadway.

WHAT IS A RESTRICTIVE COVENANT?

ENFORCEMENT OF RESTRICTIVE COVENANTS

- Where your use, or intended use, of land violates a restrictive covenant, that covenant may be enforced by a party that has the benefit of the covenant.
- Interim or permanent injunctions (to stop development work), mandatory injunction (to compel changes to the property to bring it in conformity with the covenants), and damages are available remedies where covenants are breached.
- Enforcement is avoided by successfully applying to have the offended covenant discharged or modified.

WHAT IS A RESTRICTIVE COVENANT?

DISCHARGE & MODIFICATION

- Discharge: to remove or delete.
- Modification: to edit to make compatible with intended works.
- Four (4) statutory grounds:
 - Consent
 - Obsolescence, due to change in character of neighborhood.
 - Impeding reasonable use of land.
 - No injury to persons entitled to benefit.



DEVELOPMENT ORDERS EXPLAINED

WHAT IS A DEVELOPMENT ORDER?

DEVELOPMENT ORDERS DEFINED

- Under section 5 of the *Town and Country Planning Act (the “TCPAct”)*, the **Town and Country Planning Authority** after consultation with the relevant local [planning] authority (“LPA”), e.g., Kingston and St. Andrew Municipal Corporation, may prepare and issue Provisional Development Orders with the general objectives being to:
 - **control the development of land in the particular area to which the order applies;**
 - **secure proper sanitary conditions and convenience and co-ordination of roads and public services;**
 - **protect and extend the amenities; and**
 - **conserve and develop resources in the area.**
- The orders are “Provisional” in the first instance and are subject to confirmation.

WHAT IS A DEVELOPMENT ORDER?

CONFIRMING A PROVISIONAL DEVELOPMENT ORDER

- An *interested person* may object to the provisional development order within a specified time upon the ground *that the order is for any reason impractical or unnecessary or that it goes against the interest of the economic welfare of the local area.*
- If there are no objections within a time specified under the **TCPAct** and the Provisional Order is deemed by the relevant Minister *as likely to be in the public's interest*, he may issue a **confirmation** for the order.

WHAT IS A DEVELOPMENT ORDER?

APPLICATION OF PROVISIONAL DEVELOPMENT ORDERS BY LPA

- According to section 11 of the *TCPAct*, the local planning authority may grant permission unconditionally or subject to conditions they think fit or refuse permission.
- When the LPA is considering whether to grant the planning permission, they **must** give regard to the provisions of the development order so far as it is material and **any other material consideration**.
- Judicial decisions have given certain interpretations to these provisions.



DECISIONS OF THE COURT AND THE EFFECT

- **SUMMARY OF CASES**

- Birdsucker Drive
- Upper Montrose Road
- 10 Roseberry Drive
- Upper Montrose Road Appeal

- **CONSIDERING DEVELOPMENT ORDERS FOR APPLICATIONS TO MODIFY RESTRICTIVE COVENANTS**

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case

- Owners and occupiers of properties neighboring a multi family development on Birdsucker Drive commenced proceedings challenging building and environmental approvals granted by the KSAMC and NRCA.
- Previous registered proprietors (not the developers) obtained environmental approvals.
- The developers obtain environmental approvals in their names after work had already commenced.
- Building approvals obtained before environmental approvals were obtained.

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case (cont'd)

What was decided?

- ✓ The building permit was unlawful, since it was issued prior to the application for, and grant of, environmental permit by the NRCA.
 - Section 11(1A) of the TCPA – where the provisions of section 9 of the NRCAA applies, planning permission shall not be granted unless an application is made to the Authority and the Authority has granted approval or signified in writing its intention to grant a permit.
 - Section 9 of the NRCAA applies to areas, categories of enterprise, construction or development as prescribed by order of the Minister published in the gazett.
 - Criminal offence to build without a permit (section 9(7) of the NRCAA).

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case (cont'd)

What was decided?

- ✓ The KSAMC was required to take into account the minimum standards established under the 2017 Provisional Development Order as this is a material consideration. No evidence that its provisions were contemplated, even in light of significant breaches. Therefore, the grant of permission was unreasonable, in the *Wednesbury* sense.
 - Section 11(1) of the TCPAA empowers the local authority to grant planning approvals, with or without condition, or refuse to grant approvals. In the exercise of this discretion, the local authority **shall** have regard to provisions of the development order (reference to a confirmed 1966 Development Order) and to any other **material consideration**.
 - KSAMC argued that the 2017 PDO were mere guidelines and not binding. Despite this, it relied on affidavit evidence which spoke to its consideration of the provisions of the 2017 PDO in deciding to grant the approval. On that basis, the Court concluded that the 2017 PDO is a material consideration.

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case (cont'd)

What was decided?

- ✓ The development breached the 2017 PDO as follows:
 - The development land is 0.38 acres, 2017 PDO require 0.5 acre for multi-family developments.
 - 50 habitable rooms per acre were permitted, however 68 habitable rooms were built on a lot that is 0.38 acres.
 - Rooms which were described as 1 bedroom units were actual counted as 3 bed room units.
 - Where the area of a studio is exceeded (i.e., 400 square feet), the number of habitable rooms will be assessed as a one, two, or three bedroom apartment, with the number of rooms increase with every 100 additional square feet (Policy SP H30 of the 2017 PDO) .
 - In Birdsucker, the development was 1,200 square feet, therefore, for density purposes, the apartment is assessed as a three bedroom and not one bedroom apartment.

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case (cont'd)

What was decided?

- ✓ The KSAMC, as local authority, does not have the power to vary the minimum standards guaranteed in the PDO. This power is reserved to the Town and Country Planning Authority. No evidence that the application was referred to the TCPA for its consideration of a variation. Approvals were, therefore, ultra vires the TCPAA.
 - Section 12(1A) TCPAA requires the local authority (KSAMC) to refer applications which are not in conformity with the development order to be referred to the Authority (Town & Country Planning Authority) for its consideration of variations to be made to the development order.
- ✓ NRCA did not have the power to grant an environmental approval after construction began and permits that were granted to previous owners were personal to the owner.
 - Natural Resources Conservation (Permits and Licenses) Regulations (1996), Regulation 7 – permits are not transferable. General condition 2 of the permit prohibited assignment. The Developer, therefore, could not rely on the permit obtained by its predecessor in title.
 - Section 9(3) of the NRCAA makes obtainment of the environmental permit a condition precedent to commencement of development under pain of criminal sanction.

DECISIONS OF THE COURT AND THE EFFECT

Birdsucker Drive Case (cont'd)

- Court exercised its discretion to quash the permits, though it would have significant financial impact on the developer.
- It was determined that it was fair to do so since:
 - ✓ The Claimant acted promptly in communicating their objections.
 - ✓ The Developer had failed to apply for its own environmental permit.
 - ✓ The Developer proceeded to build, despite being aware of Court action against the development.
 - ✓ The Developers intentionally misrepresented the number of habitable rooms and built more than the number approved.

DECISIONS OF THE COURT AND THE EFFECT

Upper Montrose Road and 10 Roseberry Drive Cases

- Each concern the refusal of an application for modification and/or discharge of restrictive covenants which prohibit multifamily developments.
- Court considered factors apart from the four primary grounds for modification and discharge in determining that it would not be just and equitable to grant the orders sought.
- Common Threads:
 - ✓ The developers began construction before obtaining orders to modify the covenant. Construction in breach of the covenants rendered the building permits “null and void”
 - ✓ The construction exceeded the density requirements approved under the 2017 PDO.
 - ✓ Construction proceeded despite the developers having full knowledge of the objections and despite the court proceedings. Deemed to have assumed the risk of defeat.

DECISIONS OF THE COURT AND THE EFFECT

Upper Montrose Road and 10 Roseberry Drive Cases

Unique Features:

➤ Upper Montrose

- ✓ Court had issued an interim injunction restraining further work on the property and prohibiting the developer from permitting the premises to be occupied.
- ✓ Despite this, the developer completed the premises and let it to tenants.

➤ 10 Roseberry

- ✓ Deliberate attempts to conceal the extent to which the 2017 PDO and KSAMC permits were breached by cementing off doorways and putting up blockades to prevent full access to the premises by the Court on its visit to the construction site.
- ✓ First known application of PDOs in Restrictive Covenant cases.
- ✓ Applied in a private law case, not judicial review.

DECISIONS OF THE COURT AND THE EFFECT

The Upper Montrose Road Appeal

- The appeal concerned the standing of the objectors to enforce the covenants endorsed on the development land (the objector's claim).
- The developers did not pursue their challenge to the first instance Court's finding that the covenants were breached and that the grounds for modification have not been met (the developer's claim).
- The objectors asserted standing on the basis of the existence of a scheme of development.
- UKPC decision in ***Jamaica Mutual Life v Hillsborough***:
 - Identification of a defined area of land to which the scheme relates.
 - Evidence that purchasers from a common vendor purchased with the knowledge of the reciprocity of obligations under the covenants.

DECISIONS OF THE COURT AND THE EFFECT

Upper Mont Rose Road Appeal

What was decided?

- ✓ The objectors did not have a common vendor with the developers.
 - Property registered to Charles Costa and John Cargill upon subdivision (November 1927). Costa died in 1940 and Hurbert Dunn became the registered joint tenant with Cargill. Change of ownership of the lands in the subdivision after 1940.
 - Developer's original predecessor in title purchased in 1942 (from Dunn and Cargill). Three of the Five claimant's obtained title through original transferees who purchased prior to 1940 (from Costa and Cargill), hence no common vendor with the developers. For the remaining two, there was insufficient evidence connecting the title of the objectors to the original subdivision.
- ✓ If there was a common vendor, no evidence that that vendor had an intention to establish a scheme.
 - No direct evidence of intention of any vendor (no Agreements for Sale adduced in evidence). No basis to infer this intention from surrounding circumstances. The fact that there are lands derived from the same subdivision with similar covenants is not a sufficient basis to infer an intention to create reciprocal obligations among transferees. The covenants could have been imposed for the benefit of the original owners of parent property to be enforceable by them for the protection of lands retained by them (lands were retained by them as late as 1950s).
- ✓ No evidence of knowledge and intention of purchasers.
 - If there was a finding of a common vendor who had an intention to create a reciprocal obligation, once the original vendors had notice of this at the time of purchase, one may infer an intention on the part of the purchasers to take the land on this same premise. This not being the case, there was no basis to infer that the purchasers had an intention to assume an obligation to anyone but their vendor.



ENHANCED DUE DILIGENCE

- **THE FUNDAMENTALS**
 - Analysing your title
 - Root of Title research
- **DETERMINING WHO CAN OBJECT TO AN APPLICATION TO MODIFY RESTRICTIVE COVENANTS**

CONDUCTING DUE DILIGENCE

ANALYSE YOUR TITLE

Analyse the Duplicate Certificate of Title for the property you plan to acquire.

Conduct research on the root of title.

RESTRICTIVE COVENANTS

Determine which restrictive covenants may affect your ability to develop the land.

Assess whether they can be modified.

OBJECTORS

Determine who the potential objectors are to your development.

NEPA's DAC

Check NEPA's Development Assistance Centre for advice on the potential pre-application requirements.

DEVELOPEMENT ORDER

Check the Development Order for the parish you plan to commence your development.

It raises important issues for you to consider

RESTRICTIVE COVENANTS & OBJECTORS

The process of assessing the restrictive covenants requires you to:

- Determine which restrictive covenants would affect your ability to develop.
- Determine the likelihood of success in making an application to modify the restrictive covenants.

RESTRICTIVE COVENANTS & OBJECTORS

- Proceed with the modification process before breaking ground or purchasing (as the case may be).
- An application to modify requires serving a Notice of the application on potential objectors
- Registrar of Titles can place a caveat on the splinter titles requiring that you modify a restrictive covenant

RESTRICTIVE COVENANTS AND OBJECTORS

When preparing your development plans, you should ensure you consider:

- The right to privacy
- Access to light
- Density

These are two of the common grounds a potential objector might use to stop your development especially for high rise buildings

THE DEVELOPMENT ORDER: RECOMENDATIONS

The main Takeaway: It is very possible that you can receive a ‘vulnerable planning permission’, and if you construct based on this you have opened yourself up to significant financial and legal risk.

You should therefore:

- Ensure that special consent is granted by the appropriate planning authority for varying the requirements for setback, density, building height, as the case may be etc.
- Obtain an opinion on the reliability of your planning permission from an experienced attorney as well as other independent professionals.
- Financial institutions may also be concerned about the reliability of approvals obtained.



AFTER YOU BREAK GROUND

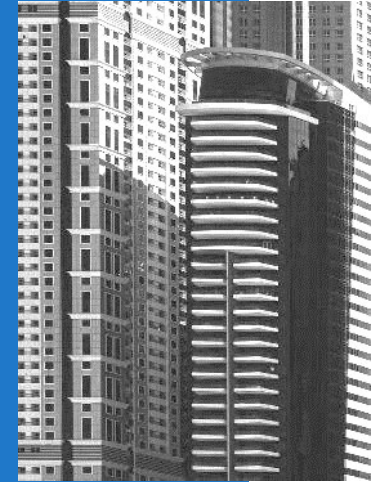
- **CONSTRUCT WHAT YOU ARE PERMITTED TO
BUILD**

CONSTRUCT WHAT YOU ARE PERMITTED TO BUILD

- Assuming your planning permission is properly granted, it is important that you construct in accordance with the conditions of the permit.
- The planning authorities can revoke permits for non-compliance and although many developers have not been affected by this, we may see in the future more of these revocations as the planning authorities come under pressure.
- Tightening the reigns on developers ought not be viewed negatively, so long as the reigns reasonable need to be pulled in.

RECAP

- ❖ **Conduct extensive Due diligence first**
- ❖ **Assess restrictive covenants and modify the ones which affect your plans before purchasing or breaking ground.**
- ❖ **Make sure your permit is good before breaking ground**
- ❖ **Assess Legal & Financial Exposure based on all your circumstances**



An aerial photograph of a parking lot with white diagonal stripes on a dark asphalt surface. A large, semi-transparent blue circle is overlaid on the left side of the image. Inside the blue circle, the text "THANK YOU" is written in large, white, bold, sans-serif capital letters. Below it, "Any questions?" is written in a smaller, white, sans-serif font. A small silhouette of a person is visible at the bottom of the blue circle. On the right side of the image, there are two vertical blue bars of different lengths.

THANK YOU
Any questions?