

# Legal Alert

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## Law Reform - Rights Affecting Property - Easements and Covenants

### The importance of easements and covenants to commercial property

Easements and covenants are of practical importance to a large number of landowners and developers. Rights of way or covenants restricting the development of land will have inevitable consequences for the viability of any proposed development. Recent cases dealing with rights of light have illustrated how important the proper consideration and interpretation of these rights can be to the success of commercial developments. It is common for property transactions to involve the consideration of easements and covenants; recent Land Registry figures suggest that at least 65% of freehold titles are subject to one or more easements and 79% are subject to one or more restrictive covenants.

A restrictive covenant was at the centre of the recent case of *Alisha House, Re v [2008]*. The land in question was subject to a restrictive covenant which prevented residential development. The benefit of this covenant lay with the council. However, the council subsequently gave planning permission for residential development of a parcel of land which included the burdened land. Negotiations for the inclusion of the council's land in the development broke down and the developer applied to the Lands Tribunal for the discharge of the restrictive covenant, which would allow him to develop his land in isolation. The Tribunal held that the roles of the council as planning authority and as landowner were sufficiently coincidental, and that by granting planning permission the council had demonstrated that the practical benefits secured by the covenant were not of substantial advantage to them. The covenant was therefore discharged.

The law relating to both easements and covenants has been the subject of much criticism in the past, and as a result of this the Law Society has published a consultation paper containing provisional proposals for wide-ranging changes to be made to the law in these areas and their application in relation to the private ownership and use of land. Hopefully these proposed changes will make it easier for developers to assess the viability of their proposals.

### Law Commission consultation paper

The stated aim of the project is to modernise and simplify the law, removing anomalies, inconsistencies and unnecessary complications where they exist.

The main proposals of the Law Commission include:

- the abolition of the existing multiple methods of the acquisition of easements by long use by a landowner (known as "prescription") and the creation of a single new method of prescriptive acquisition;
- the rationalisation of the current law of extinguishment of easements, giving the Lands Tribunal the same power to modify or extinguish an easement as they currently possess in relation to covenants, and the modernisation of the statutory means of modifying and discharging restrictive covenants; and
- the creation of a new interest in land - the Land Obligation - to take the place of positive and restrictive covenants. Both the benefit and the burden of Land Obligations are to be registered against the titles of the appropriate properties, which will address the current problem of identifying the parties with the benefit of a covenant.

Should these changes be implemented they will have a significant effect on the methods by which landowners can control the use of and exercise rights over neighbouring land. The full paper can be found at <http://www.lawcom.gov.uk/docs/cp186.pdf>. The consultation period closes on 30 June 2008.

**For further information please contact our property litigation partner, David Stevens, on 020 7421 6453**

