RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1175/2010
PERMIT APPLICATION NO. TPA007/2010

IN THE MATTER OF Peter & Gaye Hill v Campaspe Shire Council

BEFORE Helen Gibson, Deputy President

NATURE OF CASE	Variation of restrictive covenant
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LAW – issue of interpretation or application	Consideration of who may be a party to a proceeding involving an application under clause 52.02 to remove or vary a restrictive covenant – How may other people's interests be affected who are not owners or occupiers of benefiting land?
LEGISLATION – interpretation or application of statutory provision	Consideration and application of section 60(5) *Planning and Environment Act* 1987
PLANNING SCHEME – interpretation or consideration of VPP provision	Clause 52.02 – Is there is a general discretion to refuse to grant a permit under clause 52.02, even if a consideration of section 60(5) of the Act does not mean that a permit must be refused?

SUMMARY

This proceeding is an application to review the responsible authority's decision to refuse to grant a permit under clause 52.02 of the planning scheme to vary a restrictive covenant on the grounds that the requirements in sub-paragraphs (a) and (b) of section 60(5) were not satisfied. The key issues considered in the decision are:

- Who can be parties to a proceeding to vary or remove the covenant? In particular, who may object to a permit under clause 52.02; and how may other people's interests be affected who are not owners or occupiers of benefiting land?
- Is it necessary or possible for the Tribunal to determine the validity of the covenant?
- For the purpose of considering section 60(5) of the *Planning and Environment Act* 1987, who has the benefit of the covenant in this particular case?
- Is the grant of a permit to vary the covenant precluded by the provisions of section 60(5) of the Act?

- Even if the grant of a permit is not precluded under section 60(5), does the Tribunal have a discretion to refuse to grant the permit?
- If so, what is the nature of that discretion?

With respect to the first issue relating to objections and the status of objectors as parties, there is nothing in the planning scheme that limits the right of third parties to object to a permit application to remove or vary a restrictive covenant. The scheme incorporated into the *Planning and Environment Act* 1987 and the planning scheme regarding the removal or variation of a restrictive covenant establishes three categories of potential objectors:

- Those who own land that has the benefit of the covenant;
- Occupiers of land that has the benefit of the covenant; and
- Other affected people.

It is therefore open to persons other than the owners of land benefited by the covenant to lodge objections to the permit application and to be parties to the proceeding. What weight should be placed on their grounds of objection is a different issue to whether they have a right to object and hence participate in the proceeding.

The purpose and decision guidelines of clause 52.02 require the responsible authority and the Tribunal to consider 'the interests of affected people'. The meaning of 'affected people' is considered and the nature of their interests. Most cases dealt with by the Tribunal regarding the removal or variation of covenants are decided solely on the basis of section 60(5). However, the Tribunal has a general planning discretion whether or not to grant a permit under clause 52.02 independent of the provisions of section 60(5). The need to exercise this discretion will arise if the grant of a permit is not prohibited under section 60(5).

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CATCHWORDS

Clause 52.02 Campaspe Planning Scheme – variation of restrictive covenant – operation of section 60(5) *Planning and Environment Act* 1987 – who is an affected person – who may be a party to a proceeding about the removal or variation of a restrictive covenant – nature of discretion under clause 52.02

APPLICANT	Peter & Gaye Hill
RESPONSIBLE AUTHORITY	Campaspe Shire Council
RESPONDENTS	Roslyn Neil, Mark & Mary Fenwick, Margaret Turner, Ronald & Shirley Johnson
SUBJECT LAND	286 Anstruther Street, Echuca
WHERE HELD	55 King Street, Melbourne
BEFORE	Helen Gibson, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	21 & 22 March 2011
DATE OF ORDER	19 May 2011
CITATION	Hill v Campaspe SC (includes Summary) (Red Dot) [2011] VCAT 949

ORDER

1 Pursuant to section 127 and clause 62 of schedule 1 of the *Victorian Civil & Administrative Tribunal Act* 1998, the application for review and the permit application are amended so that the variation to the restrictive covenant applied for is in the terms set out in Appendix A.

2 The decision of the responsible authority is affirmed. No permit is granted to vary the covenant in Instrument of Transfer P277592D.

Helen Gibson
Deputy President

APPEARANCES

For Peter William & Gaye Hill	Mr Andrew Walker of counsel, instructed by Vincent Ryan. He called as a witness: • Damian Iles, town planner, Hansen Partnership Pty Ltd The affidavit of Vincent Ryan dated 19 June 2009 was also accepted into evidence.
For Campaspe Shire Council	Ms Nicola Collingwood of counsel, instructed by Norton Rose; and Mr Bill Cathcart, planning and building manager, Campaspe Shire Council
For Jack Hewitt	Mr Hewitt, in person

INFORMATION

Description of Proposal	Amend covenant in Instrument of Transfer P277592D
Nature of Proceeding	Application to review refusal under section 77 of the *Planning and Environment Act* 1987.
Zone and Overlays	Part Residential 1 Zone Part Urban Floodway Zone Land Subject to Inundation Overlay
Permit Requirements	Clause 52.02 Campaspe Planning Scheme

REASONS

WHAT IS THIS PROCEEDING ABOUT?

1 Mr and Mrs Hill (the Hills) own land at 286 Anstruther Street, Echuca. This land is affected by a restrictive covenant. The covenant has two parts to it:

- Only one private dwelling may be constructed on the land. The dwelling must be constructed to a modern standard and design, with an area of not less than 130 square metres with external walls of predominantly brick, brick veneer or stone material.
- Any external outbuilding or shed shall only be constructed with materials of brick veneer, stone, colourbond or corrugated iron (in muted environmental toning) and have an area not greater than 40 square metres and a height of no greater than 3 metres.

2 The benefit of the covenant purports to be "*attached to and run at law and in equity with each and every lot on plan of subdivision No 209978Y other than the said lot hereby transferred".*

3 The Hills have applied for a planning permit to vary the covenant. The permit application did not specify the nature of the variation, but details of the variation were provided at the hearing and the application was amended accordingly. The proposed amendment is set out in Appendix A.[1]

4 This proceeding is an application to review the council's refusal to grant a permit to vary the covenant. There were two reasons for refusal as follows:

- The responsible authority is not satisfied that the proposed variation of covenant is unlikely to result in detriment, including perceived detriment, being suffered by the beneficiaries of the covenant.
- The objections lodged by owners who are beneficiaries to the covenant have not been made vexatiously nor in bad faith within the meaning of section 60(5)(b) of the *Planning and Environment Act* 1987.

5 Objections were received to the grant of the permit from a number of people. Some of these people lodged statements of grounds with the Tribunal. At a practice day hearing, Member Code considered applications by the Hills for interim orders, including orders relating to the standing of objectors and parties to this proceeding. By order dated 22 October 2010, Member Code removed North Central Catchment Management Authority and John and Laurice Murphy (the Murphys) as parties. He refused to remove Mr and Mrs Fenwick and Mrs Turner as parties to the proceeding on the grounds that the land they respectively own does not have the benefit of the restrictive covenant. He directed that any application by the Hills to

[1] I note that the plan of subdivision referred to in the proposed amendment refers to plan of subdivision No 209979K. This appears to be an error and should probably refer to plan of subdivision No 209978Y.

remove one or more of the parties must be made at the hearing. As a consequence, a substantial amount of time at the hearing before me was devoted to the Hills' application that Mark and Mary Fenwick, Margaret Turner, Roslyn Neil, and Ronald and Shirley Johnson should be removed as parties to the proceeding or alternatively that their objections should be disregarded for the purpose of assessing the application on the basis that they do not have the benefit of and the right to enforce the covenant, and that the covenant is also generally unenforceable against the Hills.

6 In the course of addressing these issues, Mr Walker, on behalf of the Hills, took me down various legal paths and referred me to many cases. I do not intend to address every single submission he made, but only those I consider relevant to the key issues.

7 In my view, having regard to the legislative framework within which this permit application must be considered, the following are the key issues that must be addressed:

- Who can be parties to a proceeding to vary or remove the covenant?
- Is it necessary or possible for the Tribunal to determine the validity of the covenant?
- For the purpose of considering section 60(5) of the *Planning and Environment Act* 1987, who has the benefit of the covenant in this particular case?
- Is the grant of a permit to vary the covenant precluded by the provisions of section 60(5) of the Act?
- Even if the grant of a permit is not precluded under section 60(5), does the Tribunal have a discretion to refuse to grant the permit?
- If so, what is the nature of that discretion?

8 Before considering each of these issues, it is appropriate to outline the statutory framework that applies in this proceeding; to describe the physical context of the land and the background to the covenant; and to identify previous proceedings, which the Hills have initiated in respect of the covenant.

STATUTORY FRAMEWORK

9 Section 6A of the *Planning and Environment Act* 1987 provides that a planning scheme may require a permit to be obtained before a person proceeds to create, remove or vary an easement or restriction under section 23 of the *Subdivision Act* 1988. Restriction has the same meaning as in the *Subdivision Act*, which provides that:

> ***restriction*** means a restrictive covenant or a restriction which can be registered, or recorded in the Register under the *Transfer of Land Act* 1958.

10 Clause 52.02 of the Campaspe Planning Scheme provides that a permit is required before a person proceeds under section 23 of the *Subdivision Act* 1988 to create, vary or remove an easement or restriction. The purpose of clause 52.02 is stated as follows:

> **Purpose**
>
> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

11 The following decision guidelines apply to any application for a permit under clause 52.02:

> **Decision guidelines**
>
> Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

12 In addition to the general notice provisions set out in section 52(1)(a) and 52(1)(d) of the *Planning and Environment Act* 1987, notice must be given to the owners and occupiers of land benefited by a registered restrictive covenant, if the application is to remove or vary the covenant[2], and by a sign on the site and notice in a locally circulating newspaper, if the permit is to vary or remove a registered restrictive covenant or to authorise anything that would result in a breach of the covenant.[3]

13 Sections 60(2) and 60(5) of the Act apply to the consideration of any permit application to remove or vary a restrictive covenant made under clause 52.02 of the planning scheme. If a covenant was created on or after 25 June 1991, section 60(2) applies. If the covenant was created before this date, section 60(5) applies. The covenant on the subject land was created on 5 June 1989, hence section 60(5) applies.

14 Section 60(5) provides as follows:

> 60(5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—
>
> (a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and
>
> (b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

[2] Section 52(1)(cb) *Planning and Environment Act* 1987
[3] Section 52(1AA) *Planning and Environment Act* 1987

THE LAND AND ITS CONTEXT

The subject land

15 The subject land is Lot 2 on plan of subdivision PS 329232U. It is a large lot of 5775m^2, which has a frontage to Anstruther Street and whose western boundary borders the Campaspe River. The subject land was part of a two lot plan of subdivision created in 1998. Lot 1 on this plan of subdivision (PS 329232U), has an area of 969m^2 and a frontage to Lord Court. There is a single dwelling on Lot 1 constructed prior to the subdivision. On Lot 2 there is a large shed with an area of 57m^2 and a height of 3.5 metres. The shed on Lot 2 breaches the covenant because it exceeds the size and height of outbuildings specified in the covenant.

16 The two lots in plan of subdivision PS329232U originally comprised Lot 1 on plan of subdivision LP209978Y. This was a 16 lot subdivision created in 1988 (the original subdivision). When the lots in this subdivision were sold, each transfer[4] contained a restrictive covenant in similar terms to that affecting the subject land, namely only one private dwelling may be constructed on each lot and any outbuilding or shed must meet certain requirements. The benefiting properties specified in each covenant are each of the other lots in plan of subdivision LP209978Y.

17 Although Lot 1 on the original subdivision (plan of subdivision LP209978Y) now comprises the two lots on plan of subdivision PS329232U, the restrictive covenant still applies to the whole of the land. As the land as a whole has already been developed with a dwelling in accordance with the terms of the covenant, the subject land (Lot 2 PS 329232U) cannot be developed for another dwelling without breaching the covenant.

Lord Court

18 A plan of the land in the original subdivision, plan of subdivision LP209978Y, is included in Appendix B. There were 16 original lots each having a frontage to Lord Court. Three of the lots on the west side of Lord Court were much larger than the other lots. Lots 1, 6 and 7 each include large areas of flood prone land lying between the rear of the lots fronting Lord Court and the Campaspe River. Each of these lots includes a frontage to Lord Court and an area akin to the other smaller lots fronting Lord Court.

19 Through subsequent subdivision, some of the boundaries of the original lots have been changed, including Lot 1, which has been subdivided into two lots – the subject land and no. 1 Lord Court now owned by Mr and Mrs Murphy.

[4] With the exception of Lots 3 and 4

20 Dwellings have been constructed on each of the lots fronting Lord Court. There are no dwellings on the flood prone area of land between the dwellings and the river. The dwellings are all set back between 80 – 100 metres from the riverbank. A native landscape of river red gums and other tall eucalypts is evident along the river corridor. They provide a backdrop to development fronting Lord Court and a contrast to the more exotic planting, including palm trees and lower scale vegetation, that frames Lord Court.[5]

Background to original subdivision

21 A permit[6] for plan of subdivision LP209978Y was issued on 28 July 1986. It contained the following condition:

> 7. The land being lots 1 – 16 of the proposed subdivision shall be filled to a level not less than the level of the 1% flood contour. These lots shall be graded so that all overland stormwater drainage can be collected by the applicant's proposed drainage scheme for section 17, Parish of Echuca North. Evidence satisfactory to the responsible authority that the land has been filled and does drain as described shall be supplied to the responsible authority before the subdivision is sealed. The first seven meters fronting Anstruther Street are exempted from this clause.

22 The council produced plans of the drainage and fill that was undertaken pursuant to condition 7. These plans and the existing condition of the subdivision show that the lots abutting Lord Court were all filled and levelled with a slight slope towards Lord Court and with the toe of the bank located within the large portions of lots 1, 6 and 7 behind the lots fronting Lord Court.

23 The Rural Water Commission of Victoria, which was a referral authority, provided the following comments with respect to the permit application for the original subdivision:

> The Commission notes that the proposed subdivision is liable to flooding from the Campaspe River and within the flood fringe zone with the exception of Lots 1, 6 & 7 parts of which extend into the floodway zone, as shown on the attached plan.
>
> The Commission, whilst raising no objection to the proposal, considers that the following conditions should be applied:-
>
> 1. The plan of subdivision is suitably endorsed "All of the land is liable to inundation by flooding". (Note:-1% flood level is 95.4m AHD and floor levels of buildings will need to be built at least 300mm above the 1% level).

[5] Evidence of Damian Iles, town planner
[6] Planning permit No 865 issued under City of Echuca Planning Scheme

2. No development should take place within the floodway zone and any fencing within this zone should be of a rural nature (i.e. post & wire).

24 The original plan of subdivision when registered included the notation that "*all of the land is liable to inundation by flooding"*.

Planning controls

25 The filling of the land fronting Lord Court to raise it above the 1% flood contour is evident from the zones and overlays, which affect the subdivision. The land in the riparian corridor, which includes approximately 70 – 75% of the subject land, is included in an Urban Floodway Zone. In the Urban Floodway Zone, dwelling is a prohibited use.

26 The remainder of the subject land, including all the filled land fronting Lord Court, is included in a Residential 1 Zone. A Land Subject to Inundation Overlay applies in a long strip to the sloping section of the fill at the rear of the lots fronting Lord Court.

27 Approximately 25 – 30% of the subject land is included in the Residential 1 Zone with a Land Subject to Inundation Overlay affecting it. There is therefore virtually no part of the subject land that is not either included in an Urban Floodway Zone or in a Land Subject to Inundation Overlay.

28 Under the Residential 1 Zone, a permit for the use or development of a single dwelling subject land is not required. Normally, a permit would be required to construct a dwelling in a Land Subject to Inundation Overlay, but in the schedule to this overlay under the Campaspe Planning Scheme a permit is not required to construct or carry out:

- a new dwelling within Residential 1 Zone (R1Z) of Echuca where the floor level is at least 300 millimetres above the designated 100-year ARI flood level as shown on the Rural Water Commission Plan No. 135897, or a higher level set by the responsible authority;

29 Therefore, if the restrictive covenant affecting the subject land is varied to allow a single dwelling to be constructed on the subject land and the dwelling complies with this provision in the schedule, no permit is required. This means that there is no way in which the concerns of the North Central Catchment Management Authority[7] can be addressed. These concerns relate to the depth of flooding along the access route to the dwelling and ensuring that if filling of the land is proposed, a balance of cut and fill must be achieved which does not raise flood levels or obstruct flood flow.

30 The North Central CMA purported to object to the permit application to vary the restrictive covenant as a referral authority pursuant to section 56 of the *Planning and Environment Act* 1987 on grounds relating to flood hazard

[7] These concerns are set out in a letter to council from the CMA dated 1 March 2010

and obstruction to flood flows. However, the CMA is not a referral authority in respect of permit applications under clause 52.02. At the practice day hearing on 1 October 2010, this was acknowledged and the CMA advised the Tribunal that it wished to remove its objection to the removal [sic] of the restrictive covenant. It stated that:

> North Central CMA confirms that whilst it has concerns regarding the construction of a dwelling in the proposed location from a floodplain management perspective it is not a party to the proceedings relating to the removal of the restrictive covenant.

31 Whilst I do not necessarily endorse the proposition that the North Central CMA has no right to be a party to this proceeding for reasons that I will address later, I accept that it is now no longer a party to this proceeding.

Nature of variation to covenant

32 The Hills seek to vary the covenant by allowing construction of a dwelling in accordance with specifically identified plans. The plans referred to in the proposed variation show the elevations and floor plan of a large single storey weatherboard house, but include no details about the height of the proposed dwelling.

33 The North Central CMA has advised that flood levels for the 1% AEP probability (100 year ARI) have been declared for this area under the *Water Act* 1989. The declared 1% flood level for the subject land is 95.45 metres AHD.

34 According to the CMA and based on survey levels of the subject land provided by the Hills, it appears that the whole of the subject land is lower than the declared 1% flood level and would be subject to inundation in the event of a 100 year ARI flood. This means that in order to avoid the need for a permit under the schedule to the Land Subject to Inundation Overlay, the floor level of any dwelling would need to be raised to at least 300mm above 95.45 metres AHD, ie to 95.75 metres AHD. Based on the survey provided by the Hills, the floor level would need to be elevated by approximately 1 metre above the higher portion of the subject land available for development in the Residential 1 Zone. The elevation above natural ground level would be higher as the land slopes down towards the river.

HILLS' ACQUISITION OF LAND

35 Lot 1 on the original subdivision (the parent lot) had an area of 3.382 hectares. It was transferred on 5 June 1989 from Property and Investments (Vic) Pty Ltd (the original subdivider and vendor) to William John Love and Lynne Jean Love (the Loves). The transfer included the covenant, which was then registered on the title as the covenant in Instrument P27752D (the covenant).

36 The Loves subdivided the parent lot into two lots in August 1998.[8] The permit for this two lot subdivision[9] contained the following condition:

> [7] **Department of Natural Resources and Environment**
>
> a) Provided the owner of the property achieves the removal of the restricting covenant, the following must be complied with:
>
> b) The retaining wall and fill should slope back to natural levels with a suggested slope of 1 in 8 to minimise the risk of erosion in future.
>
> As the retaining wall will be subjected to high velocity flooding during major flood events, its design and construction should be supervised by an experienced and qualified structural engineer.
>
> c) No part of the structure should encroach into the floodway area.

37 The permit also contained the following note:

> This permit is granted for the subdivision of the subject land only and shall not be taken as any indication or agreement on the part of the responsible authority, either express or implied, that a second dwelling may be erected on the subject land or that any dwelling may be erected on proposed Lot 2.

38 The Loves sold Lot 1, which already contained a dwelling, to the Murphys. The Hills purchased the subject land, Lot 2, from the Loves pursuant to a contract of sale dated 9 April 2002. The contract of sale contained a section 32 certificate, which included information about the covenant.

39 Evidence given by Mr Hill clearly indicates that he was aware of the covenant before entering the contract of sale.

40 Prior to the contract being entered, there was correspondence from the Hills' solicitor to the council querying the council's advice that the covenant applied to the whole of the parent lot and permitted only one dwelling on the whole of this land. This letter was dated 8 January 2002 and refers to the need to resolve this matter urgently as "*our client has been advised by the Vendors that should he not sign an unconditional Contract by 5pm today that his ability to purchase the property on the terms currently negotiated will be at an end"*. Mr Hill says that acting on his solicitor's advice that the restriction would not stop him from building a single dwelling on the land, he proceeded to enter the contract. In fact, the contract of sale was not dated until 9 April 2002, some three months later than this correspondence.

[8] Plan of subdivision PS329232U
[9] Permit No 82-96-262 issued on 27 May 1997

PREVIOUS PROCEEDINGS

41 The Hills have been applicants in a number of previous proceedings before the Tribunal concerning the covenant.

42 *Hill v Campaspe SC*[10] involved an earlier permit application in 2002 to remove or vary the covenant as it applies to the subject land. Deputy President Horsfall rejected the application for review and affirmed the council's decision not to vary or remove the covenant. He made a number of findings that I will refer to later. In particular, he found that no permit should be granted because neither of the tests in sub-sections 60(5)(a) or (b) were satisfied.

43 The council urged me to place great weight on the findings of Deputy President Horsfall whereas the Hills submitted that this was a fresh application, which was not identical to the first application and that I should consider it afresh on its own merits.

44 There was a declaration proceeding under section 149A of the *Planning and Environment Act* 1987 in 2004 about whether section 47(2) of the Act applied to a permit application to remove the covenant.[11] There were further declaration proceedings in 2006, which were respectively struck out and dismissed.[12] There was a declaration proceeding in 2005, ostensibly as to the meaning of the covenant, but held not to be so by Justice Morris.[13] In fact, the declaration sought related to the enforceability of the covenant in terms of who was a beneficiary, but Justice Morris found that the Tribunal was not the appropriate venue for the making of such applications and that the appropriate venue for these matters was the Supreme Court of Victoria.

45 There were other proceedings involving a fence in October 2007[14] and works involving fill on the subject land in November 2007.[15] A further application for declaration regarding certain works on the subject land was dismissed as being misconceived and premature in February 2009.[16]

46 I was told that the Hills have applied to the Supreme Court under section 84 of the *Property Law Act* 1958 to remove the covenant, but that at present the proceeding "was going nowhere". Whether or not the Supreme Court proceeding goes ahead will depend on the outcome of this proceeding.

[10] [2002] VCAT 1541; application P1021/2002
[11] *Hill v Campaspe SC* [2004] VCAT 1399
[12] *Hill v Campaspe SC* [2006] VCAT 2525
[13] *Hill v Campaspe SC* [2005] VCAT 1382
[14] *Hill v Campaspe SC* [2007] VCAT 1999
[15] *Hill v Campaspe SC* [2007] VCAT 2265
[16] *Hill v Campaspe SC* [2009] VCAT 286

WHO CAN BE PARTIES TO A PROCEEDING TO VARY OR REMOVE A RESTRICTION?

Who may object to a permit under clause 52.02?

47 The Hills say that in order to contest this proceeding to vary the covenant, the objectors must establish that they have the right to enforce the covenant. This proposition has led them to submit that the objectors should be removed as parties to the application or, alternatively, that their objections should be disregarded.

48 I disagree with the proposition that only objectors who have a right to enforce a covenant (as submitted by the Hills) or who are owners of land benefited by the covenant (see section 60(5)) can be parties to a proceeding to review a permit application to vary or remove a restriction under clause 52.02 for the following reasons.

49 There is nothing in the planning scheme that limits the right of third parties to object to such a permit application.

50 Section 52(4) of the Act provides that a planning scheme may exempt any class or classes of applications from all or any of the notice requirements of subsection (1) except paragraphs (ca) and (cb). These paragraphs relate to any permit application that would result in a breach of a covenant or any application to remove or vary the covenant.

51 Theoretically, there is nothing in the Act that would preclude a planning scheme from exempting third party notice and review rights from anyone who did not fall within the categories of persons referred to in sub-sections (ca) and (cb) of section 52(1) or to the categories of persons referred to in sections 60(2) and 60(5) – the owners of any land benefited by the restriction – if it had been intended that persons outside these categories should have no rights to object to the grant of a permit under clause 52.02 or to be parties in a proceeding concerning such a permit.

52 In the absence of any such provision, there is therefore no limitation on third party rights of notice and review in respect of applications under clause 52.02. Consequently, there is no reason why persons who do not have the benefit of a covenant may not object to its removal or variation. How much weight should be given to their objections is a different issue to whether or not they are entitled to object.

53 Section 57(1) of the Act provides that any person who may be affected by the grant of the permit may object to the grant of a permit. Section 57(1A) provides that:

> 57(1A) If the permit would allow the removal or variation of a registered restrictive covenant or if anything authorised by the permit would result in a breach of a registered restrictive covenant, an owner or occupier of any land

benefited by the covenant is deemed to be a person affected by the grant of the permit.

[Emphasis added]

54 Section 57(1A) places owners or occupiers of land benefited by a covenant in a special category; it does not rule out other persons who may be affected by the grant of a permit to vary or remove the covenant from having a right to object.[17] It also includes occupiers of land in addition to owners of land, whereas section 60(5) refers only to owners of land benefited by the restriction. The reference to occupiers as well as owners reflects the notice provisions of sub-sections (ca) and (cb) of section 52(1), which also refer to owners and occupiers. I consider that this provision therefore indicates, that people other than an owner of land benefited by a covenant may be affected by the grant of a permit to remove or vary the covenant and may have a right to object.

55 This conclusion is strengthened by reference to the notice provision in section 52(1AA). Having required notice to be given directly to owners and occupiers of land benefited by a registered restrictive covenant,[18] this section also requires notice to be given by way of a sign on the site and in a newspaper. There would be no point in requiring this additional notice if the only people who could object were owners or occupiers of benefiting land to whom notice must be given directly. Section 52(1AA) must therefore be interpreted as implying that other persons may also be affected by the grant of such a permit and that the purpose of this notice provision is to bring a permit application to the potential attention of such affected people.

56 In my view, the scheme incorporated into the *Planning and Environment Act* 1987 and the planning scheme regarding the removal or variation of a restrictive covenant establishes three categories of potential objectors:

- Those who own land that has the benefit of the covenant;
- Occupiers of land that has the benefit of the covenant; and
- Other affected people.

57 The objections of people within the first category, ie owners of land benefited by the covenant, will carry great weight because of the provisions of section 60(5). Indeed, under sub-paragraph (b) any objection by such a person, providing their objection is not vexatious and is made in good faith, will be sufficient to impose a legal barrier that prevents the grant of a permit.

[17] The Tribunal in *Arifoglou v Stonnington CC* [2003] VCAT 1461 acknowledged that objectors who were not the owners of land benefited by the covenant had standing, but did not consider the matters they raised to have any significant relevance to the narrow compass of the Tribunal's inquiries in respect of the restrictive covenant.

[18] Section 52(1)(ca) and (cb) *Planning and Environment Act* 1987

58 Thus, it can be seen how important the objections from owners of any land benefited by the covenant will be, and why the Hills would wish to limit this category of people.

59 Even if no objections are received from the owners of land benefited by the covenant, their interests must still be considered within the terms of section 60(5)(a). The consideration under sub-paragraph (a) is not confined objections. Any detriment of any kind in relation to any land with the benefit of the covenant must be considered, whether the owners of such land have objected or not.[19]

60 However, as I have said, there is nothing within the planning scheme or the Act that limits the right of any other person who may be affected by the grant of a permit under clause 52.02 to object to the grant of a permit. The decision guidelines in clause 52.02 provide that before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people. Section 57(1A) of the Act provides that an owner or occupier of any land benefited by the covenant is deemed to be a person affected by the grant of the permit. Clearly, they may object to a permit under clause 52.02 and their interests must be considered under the decision guidelines, but equally other people may be affected and their interests should also be considered.

How may other people's interests be affected who are not owners or occupiers of benefiting land?

61 A proposal to remove or vary a restrictive covenant will clearly affect the property law rights of the owners of land with the benefit of the covenant. However, the provisions of the *Planning and Environment Act* 1987 and the planning scheme have blurred the distinction between property law rights and what I will refer to as 'planning interests'. I do not consider that the scheme for removing or varying a covenant under the legislation is limited to a consideration only of the effect on property law rights. If that was intended, the consideration of issues could have been limited to a consideration of issues arising only under section 60(5) (or section 60(2)). But that is not the scheme established under the Act and the planning scheme.

62 Under the Act, we have the owners of land benefiting, and mentioned in section 60(2) and (5); but we also have the occupiers of benefiting land, see section 57(1A), and others by virtue of section 52(1AA) and clause 52.02.

63 In my view, the scheme established by the legislation provides that there are two matters to be considered in relation to a restrictive covenant case. Firstly, there is a question of whether the requirements of clause 60(5)[20] are

[19] *Kastoras v Manningham CC* [2009] VCAT 2370 at [36]; *Slaveski v Darebin CC* [2006] VCAT 593 at [30]

[20] Or section 60(2) in a case to which it applies

satisfied. Second, where the proposal is not barred by section 60(5), a question arises under clause 52.02 as to whether, as a matter of discretion and on the basis of the planning merits in relation to clause 52.02, a permit should be granted.

64 The first of these matters under section 60(5) is not a matter of discretion. Sub-section (5), (and for that matter section 60(2)) impose legal barriers that prevent any decision being made to grant a permit for the removal or modification of a restrictive covenant. The responsible authority and the Tribunal are called upon to determine if the requirements imposed by the sub-section are met. On the basis of the findings, the proposal is either barred or not barred. There is no discretion. It is a legal barrier.

65 It is a high barrier that prevents a large proportion of proposals. Discretion and planning merits do not enter in relation to section 60(5). They arise though, if section 60(5) does not bar the proposal, under clause 52.02. The purposes of that clause and its decision guidelines refer to "affected" people.

66 The existence of a restrictive covenant will often be instrumental in establishing the character and amenity of a particular area. The owners and occupiers of land within the area will enjoy the benefit of that amenity even though they may not enjoy the benefit of the covenant as a property law right.

67 I consider that people can be affected by the removal or modification of a covenant, even though they may not be the owner or occupier of land with the benefit. For example, the owner of a lot of over 500m^2 in a Residential 1 Zone can, in the absence of other controls, construct a large dominating and overbearing double storey dwelling that overlooks and overshadows a neighbour. Victorian planning law does not control that. If there was a single storey covenant, and that covenant was to be removed, that would enable a severe detrimental effect on that neighbouring property to result, whether or not the neighbouring property had the benefit of the covenant.

68 I consider the Murphys would be affected in this type of way by the proposed variation to the covenant. The Murphys own no. 1 Lord Court, which is Lot 1 of the two lot subdivision of the parent title. This land does not have the benefit of the covenant. However, if the covenant is varied, as applied for by the Hills, the Murphys will have a large and very tall house constructed right on their boundary, which will dramatically alter their amenity and outlook. As I have outlined previously, no permit would be required for the dwelling referred to in the proposed variation to the covenant, therefore there would be no opportunity for the Murphys to object to the construction of this dwelling. The proposed variation of the covenant would operate as a de facto authorisation for the construction of the particular dwelling described.

69 In my view, the existence of the covenant has contributed to the amenity that the Murphy land enjoys, even though it does not have the legal benefit of the covenant. Equally, there are other properties within Lord Court, which do not have the benefit of the covenant[21] but which nevertheless enjoy the amenity that has resulted from the existence of the covenant.

70 The consequence of varying the covenant will be to affect a property law right. In itself, the variation is not a use or development of land. However, I consider it would be interpreting the purpose and decision guidelines of clause 52.02 too narrowly to confine "the interests of affected people" to a consideration only of property law rights and to exclude any consideration of planning interests. Rather, I consider that the interests of affected people encompass the effects or consequences that will flow from the removal or variation of a covenant. What they may be will depend on the facts and circumstances of each case. They will be affected by nature of the covenant in question, the type of variation proposed and the planning framework that will govern the consequences of any removal or variation.

71 In the present case, I find that a consequence of the proposed variation of the covenant is that it is highly likely a large house set high above natural ground level will be constructed in close proximity to the western boundaries of the properties at nos. 1, 2 and 4 Lord Court without the need for a planning permit when previously there could be no such dwelling constructed. The variation of the covenant would remove the only legal constraint upon this occurring so that the variation would have the effect of allowing the lawful construction of the proposed building.

72 In this way I consider that in addition to detriment being suffered by benefiting owners under section 60(5)(a), other non benefiting owners may be affected in a planning sense by the variation of the covenant. I will consider this issue in further detail later. At this point, however, it is sufficient to find that other people's interests may be affected by the removal or variation of a covenant apart from the owners of land benefited by the covenant, and that these interests are not confined to the property law right of enforcing the covenant.

73 On this basis, I find that it was open to persons other than the owners of land benefited by the covenant to lodge objections to the permit application. This includes the Murphys and other people that the Hills have applied to have removed as parties to the proceeding.

Should the objectors be removed as parties?

74 I do not consider that there is any basis to remove these people as parties. People who have objected to the grant of a permit and lodged a statement of grounds within time with the Tribunal are entitled to be parties to this

[21] Assuming there is no building scheme

proceeding whether they are owners of land benefited by the covenant or not.

75 Unfortunately, at the practice day hearing in October 2010, Member Code removed the Murphys as parties. Whilst this order was made by consent, it appears that Mr Murphy continued to disagree with the basis for the order. The basis of the order was that as the Murphy land does not have the benefit of the restrictive covenant, in an application to remove or vary a restrictive covenant there is no legal basis for an owner of land that does not benefit from a covenant to participate in a proceeding.

76 The application by the Hills at the practice day hearing to remove the Murphys as parties to the proceeding was based on comments by Deputy President Byard in *Kastoras v Manningham CC*[22] where he said:

> [7] It is really only the owners of land with the benefit of the covenant that are relevant for present purposes. The disadvantage of giving notice to others, such as the owners of land that does not have the benefit of the covenant, is that those people receive notice as if they were relevant potential objectors able to object to the permit application. This sometimes, and unfortunately, means that people then seek to participate in the proceeding, and to appear at the hearing, when in fact they are not relevant and have no legal basis for participating. That has happened in the present case.

77 I disagree with this statement in *Kastoras* that the owners of land that do not have the benefit of the covenant have no legal basis for participating in a proceeding to review a decision to remove or vary a covenant. No reasons were given by Deputy President Byard for this conclusion. It is not evident whether he had turned his mind to the matters I have addressed, which have led me to the conclusion that such people do have a legal basis to participate in the proceeding. As I have indicated, what weight should be placed on their grounds of objection is a different issue to whether they have a right to object and hence participate in the proceeding.

78 I therefore consider that the Murphys consented to withdraw from the proceeding on an unsound basis. In the circumstances, I consider that the interests of natural justice and the provisions of section 98(1) of the *Victorian Civil & Administrative Tribunal Act* 1998 entitle me to consider the Murphys' statement of grounds even though they are no longer parties to the proceeding.

79 It follows from what I have said on this issue that I am not prepared to remove any of the other objectors, whether they are pre-covenant property owners or not, as parties to this proceeding and to disregard their objections. I will consider the objections of benefiting owners, as I am required to do under the provisions of section 60(5) of the Act, and those of

[22] [2009] VCAT 2370

other objectors on their merits and in accordance with the provisions of clause 52.02 the planning scheme.

VALIDITY OF THE COVENANT

80 One of the key issues, which I have identified, is whether it is necessary or possible for the Tribunal to determine the validity of the covenant.

81 The Hills submit that:

- The objectors do not have the benefit of and the right to enforce the covenant, and the covenant is also generally unenforceable against the Hills.
- As a result, the objectors should be removed as parties to the Covenant Amendment Application, or, alternatively, their objections disregarded.
- In the alternative, there is no building scheme in force. As a result, those landowners whose land was transferred out of the parent title before the covenant was created (the pre-covenant property owners) do not have the benefit of the covenant.
- As a result, those objectors who are pre-covenant property owners should be removed as parties to the covenant amendment application and their objections not taken into account.

82 For the purpose of this proceeding, I do not need to determine the validity of the covenant in terms of who may enforce it, if at all, against the Hills. There is no specific power under the *Planning and Environment Act* 1987 giving the Tribunal power to make declarations about the enforceability of a covenant. The Supreme Court has this power under section 84(2) of the *Property Law Act* 1958. The Supreme Court is therefore the proper forum for seeking declarations about whether land is affected by the covenant and the true construction of the covenant and whether the same is enforceable and if so by whom.[23] The Tribunal's power to make a declaration under section 124 of the *Victorian Civil & Administrative Tribunal Act* 1998 is not a separate proceeding in itself; rather, it may only be used in the context of an existing proceeding. Similarly, the Tribunal only has power to make findings or rulings on questions of law that arise within the context of the proceeding before it. Thus, whilst hypothetically it may be possible that a particular proceeding might require such a declaration to be made under section 124 *Victorian Civil & Administrative Tribunal Act* 1998, that is not the case here.

83 In the present case, the proceeding before me is an application to review the refusal by the council to grant a permit to vary a restriction. It is not an application to enforce the restriction. Enforcement of a covenant is not a

[23] This point was made by Deputy President Horsfall in *Hill v Campaspe SC* [2002] VCAT 1541 and Justice Morris in *Hill v Campaspe SC* [2005] VCAT 1382

matter for the Tribunal. Enforcement is by applying to the Supreme Court for an injunction.

84 A restriction is a restrictive covenant registered or recorded in the Register under the *Transfer of Land Act* 1958.[24] The restrictive covenant in question is registered on the title to the subject land. The matters that must be considered in exercising the Tribunal's discretion under clause 52.02 of the planning scheme are set out in the planning scheme and section 60(5) of the *Planning and Environment Act* 1987.

85 In order to properly apply the provisions of section 60(5), I need to make a finding about what land is benefited by the restriction (covenant). That is a relatively straightforward matter, which I shall address shortly. However, determining what land is benefited by the restriction is a different issue to determining whether the covenant can be enforced against the Hills. Therefore, to the extent that I was invited to make rulings on issues going beyond a straightforward finding about what land is benefited by the restriction, I consider this to be unnecessary.

86 I was referred to the case of *Arifoglou v Stonnington CC*[25], but I do not find the case particularly helpful. It does not change my view that it is unnecessary to consider who may enforce the covenant.

87 In *Hill v Campaspe SC*[26], Deputy President Horsfall said:

> [14] The Tribunal does not have jurisdiction to determine the question of the validity of the covenant. It can consider only its interpretation on the questions of what land has the benefit of the covenant and whether the grant of a permit would result in a breach of the covenant and related matters. The issues Mr Hill raises can only be dealt with in proceedings before the Supreme Court or some other appropriate jurisdiction.

88 I consider that *Arifoglou* is at odds with this decision. It is a confusing decision, which appears to be based on the proposition that if the restrictive covenant was not enforceable, the Tribunal did not have the jurisdiction to determine an application to remove the covenant under section 60(5). In *Arifoglou*, the applicant submitted that the covenant was unenforceable because it did not benefit any land. The Tribunal ultimately determined that there was no land identified as benefiting from the restriction and no scheme of development was established (ie building scheme). It appears that the basis of the Tribunal's decision was that, therefore, there was no basis for considering the factors in section 60(5), although this was not explicitly stated in so many words. I consider that *Arifoglou* is a case that turns on its own facts. I do not consider it detracts from the broad general principle stated by Deputy President Horsfall quoted above.

[24] Section 6A(1) *Planning and Environment Act* 1987; section 3(1) *Subdivision Act* 1988
[25] [2003] VCAT 1461
[26] [2002] VCAT 1541

89 I therefore find it is not relevant for the purpose of this proceeding to determine if there is a valid covenant. It is sufficient that there is a registered restrictive covenant. The responsible authority (and on appeal, this Tribunal) has power to grant a permit for its removal or variation. It is not necessary to determine the validity of the covenant for this purpose. Validity may become an issue if someone seeks to enforce the covenant. That is then an issue for the Courts to decide.[27] It is necessary for the Tribunal to make a finding as to who benefits for the purpose of applying section 60(5). However, this is different to deciding if the covenant itself is valid. It is enough for the purpose of deciding a permit application under clause 52.02 that there is a registered restrictive covenant.

90 For these reasons, I find that it is not necessary to make rulings on the various submissions that were put to me by the Hills, and countered by the council, about whether the restrictive covenant is enforceable.

91 My task, for the purposes of considering section 60(5) of the Act, is to determine what land is benefited by the restriction.

WHAT LAND HAS THE BENEFIT OF THE COVENANT?

Determining the pre-covenant property owners

92 In determining whether land has the benefit of the covenant, it is common ground that only land that was in the parent title at the time the covenant is created will have the benefit of the covenant unless there was a building scheme. Therefore, in determining what land has the benefit of the covenant it is important to determine the pre-covenant property owners.

93 The original subdivision (LP209978Y) contained 16 lots. Lot 3 was not encumbered by a covenant. The covenant applying to Lot 4 was different to those applying to other lots in terms that it did not restrict construction to a single dwelling, but simply requires construction of particular materials and of a particular area. With these exceptions, each of the other 14 of the original lots contained a covenant in similar terms to that which encumbers the subject land. There are some minor variations within the wording, which is relied upon in the Hills' submissions about the validity of the covenant and whether they are bound by it. However, as I have concluded that I do not need to address this issue of validity, it is not necessary to identify or dwell on these differences.

94 Some of the original lots have been resubdivided. Evidence was given[28] about when each lot was transferred out of the parent title of the original subdivision and whether this was before or after the covenant affecting the subject land was created. No issue was taken with this evidence and a summary is included in Appendix C.

[27] *Fitt & Anor v Luxury Developments Pty Ltd* 2000 VSC 258 at [310] – [320]:
[28] Affidavit of Vincent Ryan dated 19 June 2009

95 The following table, which is based on the information in Appendix C, sets out who are owners of land benefited by the covenant, who objected to the grant of a permit and who lodged a statement of grounds with the Tribunal.

TABLE

NAME	ADDRESS	BENEFITING LAND	OBJECTION	STATEMENT OF GROUNDS
John & Laurice Murphy	1 Lord Court	No	Yes	Yes
Mark & Mary Fenwck	2 Lord Court	No	Yes	Yes
Catherine Halliday	4 Lord Court	Yes	No	No
John Hewitt & Jan Shepherd	5 Lord Court	Yes	No	No
James Kirkland & Heather Kirkland	6 Lord Court	No	No	No
Margaret Turner	7 Lord Court	No	Yes	Yes
Roslyn Neil	8 Lord Court	Yes	Yes	Yes
Ronald & Shirley Johnson	9 Lord Court	Yes	Yes	Yes
Marilyn Mitchell (Winterton)	10 Lord Court	No	Yes	No
Kerry Anne Williams	11 Lord Court	No	No	No
Sandra Ann Escott	12 Lord Court	Yes	No	No
Robert John Taylor and Frances Faye Taylor	13 Lord Court	Yes	No	No
Kristine May Briggs	14 Lord Court	Yes	No	No
Jennifer Jane Hann	15 Lord Court	No	No	No
Geoffrey Kenneth Spencer, Carita Tuula Spencer and Sandy Scott Spencer	16 Lord Court	No	No	No

96 It can therefore be seen that seven properties have the benefit of the covenant based on when the land was transferred out of the parent title for the original subdivision. They are nos. 4, 5, 8, 9, 12, 13 and 14 Lord Court.

Building scheme

97 The council submits that the covenants, which apply to all but two of the lots in the original 16 lot plan of subdivision, constitute a building scheme. The Hills reject this contention. Much time was devoted at the hearing to the issue of whether there was a building scheme. For the reasons that I will come to, it is not strictly necessary to address the issue of whether there is a building scheme because the permit is precluded in any event under section

60(5). However, in deference to the attention devoted to this issue at the hearing, I make the following observations.

98 Justice Gillard described a building scheme in *Fitt & Anor v Luxury Developments Pty Ltd*[29] in the following terms:

> [138] This is a separate and distinct method to establish the right to the benefit of a covenant.
>
> [139] Where land has been subdivided into lots which are sold to purchasers for residential development, restrictions are often imposed on the purchasers of each lot for the benefit of the total subdivision, for example, a covenant prohibiting the erection of more than one house or an inferior quality building.
>
> [140] If a building scheme exists then the covenant given on the sale of each lot is enforceable by the owner for the time being of that lot against another lot owner.
>
> [141] The covenants which are entered into as all part of a scheme in effect form a law for the particular subdivision. See Reid v Bickerstaff [(1909 2 Ch 305 at 319].
>
> [142] Whether or not a building scheme exists is a question of fact.
>
> [143] What has to be established was discussed and stated by Parker J in Elliston v Reacher [(1908) 2 Ch 374 at 384-85]– affirmed by the Court of Appeal at [(1908) 2 Ch 665].
>
> [144] The plaintiff must prove -
>
> (a) the plaintiff and defendant have derived title from a common vendor;
>
> (b) prior to the sale, that is, the original sale, the vendor must have laid out the estate in lots subject to restrictions which were intended to be imposed on all of them and were consistent only with some general scheme of development;
>
> (c) the common vendor must have intended the restrictions to be for the benefit of all lots sold;
>
> (d) the plaintiffs' and defendants' lots must both have been bought from the common vendor on the footing that the restrictions were for the benefit of the other lots; and
>
> (e) the area to which the scheme extends must be defined.
>
> [145] If a building scheme existed and is proven the plaintiff does not have to establish that the covenant was annexed to particular land.

99 Further, Gillard J says:

> [249] It is well established that a restrictive covenant is enforceable by and against persons other than the original covenanting parties

[29] [2000] VSC 258

when the lands were held by respective owners under a building scheme.

[250] The object in requiring agreement to a restrictive covenant in a building scheme is that an estate is being developed in accordance with a plan and that it is vital if the value of each of the lots is to be maintained, that a purchaser should be restrained from dealing with the land in a way which would affect the value of the other lots or depreciate the value and amenities of the area.

[251] Once it is established that there is a scheme, the principle is that each purchaser can sue or be sued by every other purchaser for breach of the restrictive covenant.

…

[253] It is also well established that in an action to restrain a breach, it is immaterial whether the defendant acquired the title before or after the date on which the plaintiff purchased his lot.

100 Having regard to the elements of a building scheme that must be established, I make the following findings about each of these criteria:

a *the plaintiff and defendant have derived title from a common vendor*:

The parties agreed that this criterion was satisfied – the common vendor being Property and Investment (Vic) Pty Ltd.

b *prior to the sale, that is, the original sale, the vendor must have laid out the estate in lots subject to restrictions which were intended to be imposed on all of them and were consistent only with some general scheme of development*

With the exception of Lots 3 and 4, each of the lots were subject to the same restrictions relating to a single dwelling, the size and materials of the dwelling and the size and materials of any outbuilding. These restrictions were consistent with a general scheme of development. I do not consider that the exclusion of two out of 16 lots from the covenant negates the concept of a general scheme of development.

Although a 16 lot subdivision may not be large by comparison to the scale of some of the subdivisions, which have been considered in the authorities,[30] Echuca is a modest country town and I consider a residential subdivision of 16 lots to be of a reasonable scale in this context. The lots were sold over a period of approximately 16 months from September 1988 to January 1990, which I consider to be a reasonably short period of time. This is further evidence of a general scheme of development.

c *the common vendor must have intended the restrictions to be for the benefit of all lots sold*

[30] For example, in *Fitt* the subdivision was of 202 lots

This is evident by the specific terms of the covenant. It states that the intent is that "*the benefit of this covenant shall be attached to and run at law in equity with each and every lot on plan of subdivision No 209978Y, other than the said Lot hereby transferred."*

d *the plaintiffs' and defendants' lots must both have been bought from the common vendor on the footing that the restrictions were for the benefit of the other lots*

Again, I consider this is evident from the intent expressed in the wording of the covenant.

e *the area to which the scheme extends must be defined*

The area to which the scheme extends is the area comprised in plan of subdivision LP209978Y.

101 According to these criteria, I consider that there is a building scheme. However, the Hills submitted there was a further requirement that needs to be established before there could be said to be a building scheme. This requirement was established in *Re Dennerstein*[31], which was followed in *Vrakas v Mills*[32], namely that in order to bind a transferee of land registered under the *Transfer of Land Act* with a restrictive covenant arising under a building scheme or scheme of development, it is necessary for the notification in the Register to give notice of:

- The existence of the scheme;
- The nature of the restrictive covenant; and
- The identity of the lands affected by the scheme, both as to the benefit and the burden of the restriction.

Further, it is said to be necessary that this notice is given in the Certificate of Title, either directly or by reference to some instrument or other document to which a person searching the Register has access.

102 In *Fitt*, Gillard J raised doubts as to whether *Dennerstein* was correct insofar as it imposed a requirement that the documents placed on the Register must set out that the restrictions arise under a building scheme. In turn, Hargreave J in *Vrakos* cast doubt on the doubts about *Dennerstein* cast by Gillard J in *Fitt*.

103 In practical terms, it would seem that a strict application of the requirement in *Dennerstein* about notice on the face of the Register of a building scheme would eliminate many apparent schemes from contention. Whilst the practice might once have been to note upon a title or plan of subdivision that all lots in the plan of subdivision are affected by a building scheme (as was the case in *Fitt*), I am not sure that with modern conveyancing practice

[31] [1963] VR 688 at 696-697
[32] 2006 VSC 463 at [45] – [46]

and forms, and an electronic Register how often such a notation would now be made. In *Fitt*, Gillard J essentially says[33] that the present practice of the Titles Office (now Land Victoria) is that the Registrar does not record whether a restrictive covenant is part of a building scheme. Even if it did, that would not establish that there is a valid building scheme. Whether there is a building scheme is a question of fact to be determined on the facts and circumstances of each particular case. He also makes the point that questions concerning the basis upon which a restrictive covenant is said to be valid and enforceable are matters for the court and are not required to be part of the information in the Register.[34]

104 As I have said, a great deal of time was devoted at the hearing to a consideration of whether or not there was a building scheme and whether *Dennerstein* remains good law.

105 I do not consider that I need to make a determination on the issue of whether *Dennerstein* establishes an additional criterion. Whatever was said in *Vrakos* does not alter the important point made in *Fitt* that a finding about whether there is a building scheme is essentially a question of fact.

106 I am satisfied that when the Hills bought the subject land they had notice of the restrictive covenant and that, from the terms of the covenant, it was evidently intended that the benefit would apply to all the land in the subdivision other than the subject land; in other words, that there was a building scheme on foot. Based on the criteria established in *Elliston v Reacher* and endorsed in *Fitt,* I consider there is a building scheme.

107 However, having regard to the nature of this proceeding and the fact that I am not being called upon to enforce the covenant, which is what the courts were doing in *Dennerstein*, *Fitt* and *Vrakos*, I do not consider it is necessary to attempt to reconcile the conflicting views that were expressed in *Fitt* and *Vrakos* about the status of the decision in *Dennerstein*.

Conclusion about land benefited by the covenant

108 If I am correct in my finding that there is a building scheme applying to the whole of the original subdivision, then I must consider detriment under section 60(5)(a) in respect of all of the land in the subdivision other than the original lot 1, (ie the subject land and the Murphys' land). I must consider all of the objections made by land owners in the subdivision under the provisions of section 60(5)(b).

109 If I am not correct and there is no building scheme, then under section 60(5)(a), I must consider detriment in respect of the land in lots 4, 5, 8, 9, 12, 13 and 14. Under section 60(5)(b) I must consider the objections of Rosyln Neal (lot 8) and Ronald and Shirley Johnson (lot 9) being the

[33] 2000 VSC 258 at [305– 331]
[34] 2000 VSC 258 at [330]

owners of land benefited by the covenant who objected to the grant of the permit.

IS THE PERMIT PRECLUDED UNDER SECTION 60(5)?

The purpose of the covenant

110 There are two requirements under section 60(5) that must be satisfied. They are cumulative and they set a high hurdle that a permit applicant must overcome. It is not sufficient to overcome only one of the hurdles; both sub-paragraphs (a) and (b) must be satisfied if the grant of a permit is not to be prohibited under section 60(5).[35]

111 Before considering the requirements of section 60(5), I need to identify what the purposes of the covenant are. This is relevant because under section 60(5)(a), I must consider what detriment may be suffered *"as a consequence"* of the variation to the covenant. As Deputy President Byard said in *Castles v Bayside CC* [36]:

> [40] Paragraph (a) requires satisfaction that the owner of land benefited by the covenant will be unlikely to suffer any detriment of any kind as a consequence of the variation of the restriction.
>
> [41] This is a severe test in that any detriment, even a minor one more than counter-balance by positive considerations, will be sufficient to bar the granting of a permit. However, the test is not whether it is possible for detriment to be suffered. It is sufficient for the Tribunal to be satisfied that the owner of the land benefiting is "unlikely" to suffer any detriment. Furthermore, it has to be a detriment consequent on the variation of the covenant. There may be all sorts of detriments related to a possible development, but if they are unrelated to the covenant, then they are not relevant from the point of view of s.60(5)(a). For example, a covenant providing that there shall be no front fence and that letterboxes shall be painted green modified to allow front fences to a height of half a metre and allowing letterboxes to be red or green is not relevant to whether a particular proposal will increase traffic and overlook or overshadow adjoining properties. …

112 The purpose of the covenant is equally relevant in considering section 60(5)(b). It provides that the Tribunal cannot grant a permit to vary the covenant unless it is satisfied, if the owner of land benefiting has objected to a grant of a permit, that the objection is vexatious or not made in good faith. There are at least two objections that fall within section 60(5)(b). Unless they can be shown to be vexatious or not to have been made in good

[35] See *Carson Simpson Pty Ltd v Maroondah CC* (1998) 1 VPR 132, [1998] VCAT 645; *Hill v Campaspe SC* [2002] VCAT 1541; *Castles v Bayside CC* [2004] VCAT 864 at [42]
[36] [2004] VCAT 864

faith, they will bar the grant of a permit. In commenting on this provision, Deputy President Byard said in *Castles*:

> [53] So far as s.60(5)(b) is concerned, I am satisfied that the objections are vexatious. I do not mean that they are not made in good faith in the sense of being dishonest. I do not mean that they are vexatious in the sense of being raised to annoy or embarrass the applicant, or anyone else. They may amount to a very weak case against the proposal, but I do not need to decide whether they are vexatious in the sense of being so unarguable as to be utterly hopeless. I am satisfied that they are vexatious in the sense that they are designed to achieve an ulterior purpose. The objections by the owners with benefit are designed not to uphold the covenant and its purposes in terms of urban design, but to seek to achieve the defeat of the development proposal for reasons under-related [sic] to the covenant and because the Objectors do not like the proposal for such other reasons. I have found that these other reasons are unsustainable in terms of planning merits of the proposed development. I also find that they are not relevant to the covenant properly interpreted, or the purposes behind it. I therefore find, in the rather unusual circumstances of this particular case, and this particular covenant, that the objections are vexatious. I think the proposed modification to allow the development is appropriate and should be granted.

113 In summary therefore, it is relevant to identify the purpose of the covenant so as to consider what detriment may potentially be suffered consequent on the variation of the covenant and whether any objections by benefiting owners are relevant to the covenant or the purposes behind it in the context of determining if they are vexatious or not made in good faith.

114 The covenant places the following restrictions on the land:

- One private dwelling house constructed to a modern standard and design, with an area of not less than 130 square metres with external walls of predominantly brick, brick veneer or stone material; and
- Any external outbuildings must be constructed of brick, brick veneer, stone, colourbond or corrugated iron in muted environmental toning with an area no greater than 40 square metres and a height of no greater than 3 metres.

115 Mr Isles gave evidence for the Hills that Lord Court is an example of relatively recent subdivision that has created opportunity for infill development close to the Echuca town centre. It follows a curvilinear alignment that is in contrast to older, nearby settlement. Lord Court maintains the prevailing pattern of single dwelling development. These dwellings are setback between 80-100 metres from the river bank. This creates a natural setting that reinforces the river corridor and its landscape character.

116 All existing dwellings front Lord Court. By contrast, the subject land has direct access from Anstruther Street. It has no physical relationship to Lord Court and the land is entirely within the Campaspe River flood plain. Anstruther Street crosses the Campaspe River in the form of a pedestrian bridge. There is a cycling and pedestrian trail that runs along the west bank, opposite the subdivision.

117 Mr Isles goes on to comment that leaving aside the Murphy land, which does not enjoy the benefit of the covenant, the orientation of existing dwellings on other land, which do have the benefit of a covenant, and existing outbuildings on that land will mean that views of any dwelling constructed on the subject land will be restricted.

118 The Hills submitted that the purpose of the covenant is limited to:

- Maintaining a low intensity development pattern, with one dwelling per lot, to the extent that this can be achieved given Lots 3 and 4 could potentially be developed for more than one dwelling.
- Ensure houses are of a certain standard or size.
- Restrict the size of any sheds constructed.

119 The Hills further submit that the covenant does not:

- Set out any building envelopes, or specify that any dwellings must front Lord Court.
- Limit building heights or building footprints (save to ensure buildings exceed a certain size), so as to minimise the impact of any dwellings on adjacent lots.
- Specify that dwellings on Lots 1, 6 and 7 must not be located in the western portion of the relevant lot, so as to preserve views of the Campaspe River.
- Limit the number of sheds that can be placed on the lots.
- Specify that any sheds must not be located in the western portion of the relevant lot, so as to preserve views of the Campaspe River.
- Specify that no works or structures of any kind (such as tennis courts or fences) must not be located in the western portion of the relevant lot, so as to preserve views of the Campaspe River.[37]

120 I do not agree with what the Hills say regarding the purpose of the covenant. To my mind, they have confused purpose with the means of achieving purpose. Maintaining a low intensity development pattern, ensuring houses are of a certain standard and size, and restricting the size of sheds are a means of creating and protecting what I would call the amenity of the area. The amenity of the area will in turn, have an effect on value.

[37] For example, Mr Hewitt has constructed a tennis court on Lot 6.

121 Equally, I reject what the Hills say is not the purpose of the covenant because the measures they are talking about cannot be characterised, in themselves, as purposes.

122 In determining what the purpose of the covenant may be, I consider that the covenant cannot be divorced from the setting, context and nature of the original subdivision. The subdivision was of land that was subject to flooding. An area for development was created by filling the land abutting Lord Court to create 16 low density residential lots above the flood level. The remainder of the land below flood level was incorporated into three of the lots (lots 1, 6 and 7). Each of these lots had a frontage to Lord Court and a filled area of commensurate size and dimensions to the other lots fronting Lord Court. Each of the three lots have been developed with dwellings on the filled area, as have the other lots fronting Lord Court.

123 In my view, if there had been an intention to allow the large, flood prone portions of lots 1, 6 and 7 to be further developed, they would not have had single dwelling covenants imposed on them. Instead, they were subject to the same covenant as the other lots. To my mind, this evinces an intention that the rear portion of these lots would be retained as part of the river corridor. This river corridor contributes significantly to the amenity of the dwellings in Lord Court and forms an integral element of the character of the area, as well a fulfilling a valuable role in providing storage capacity within the flood plain for flood waters.

124 It is true that the covenant did not specify that any dwellings must front Lord Court, but in my view it did not need to do so. When constructed, the subdivision created suitable lots for building above the flood level. A covenant specified that only one dwelling could be constructed on each lot. Thus, there was no practical need when the covenant was created to make any specific provision to prevent dwellings from being constructed on the non-filled area of land below the flood level.

125 I therefore consider that in addition to establishing a low density residential environment of single dwellings as a means of creating and protecting a particular amenity, the purpose of the covenant was also to protect the amenity and neighbourhood character of the area by protecting the river corridor and keeping it free of dwellings.

126 In *Fitt*, Gillard J notes that an object in requiring a covenant in a building scheme can be to maintain the value of the lots created and the amenity of the area.[38] Several of the objectors refer to the fact that they paid a premium for their land with the knowledge of the restrictive covenant and that keeping the river corridor free of dwellings is part of the amenity of the area.

127 In my view, the purpose of the covenant can be characterised as:

[38] [2000] VSC 258 at [250]

- creating and protecting the amenity of the area by establishing a low density residential environment of single dwellings;
- protecting the amenity of the area by retaining the river corridor in a semi-natural state free of dwellings;
- reflecting the flood prone nature of the river corridor, which makes it unsuitable for dwellings.
- adding value to the land in the subdivision;

Will there be any detriment to benefiting land by removing the covenant?

128 The provisions of section 60(5)(a) require the Tribunal to be satisfied that the owner of any land benefiting by the covenant would be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the variation of the covenant.

129 The Tribunal has emphasised in various cases that this does not necessitate a finding that detriment would occur as a probability; rather it is sufficient that there be a possibility, which is neither fanciful or remote, that a detriment may occur.[39] The concept of "any detriment" in the context of section 60(5)(a) is a very wide one. It is not a matter of there being some minor detriments outweighed by countervailing benefits, whether to the benefiting owner or to the community in general. If there is any detriment, whether or not outweighed by other considerations, then a permit can only be granted if such detriment is thought to be "unlikely".[40]

130 What will be the consequence of varying the covenant in the manner sought by the Hills?

131 I have already found that varying the covenant will allow a dwelling as specified in the covenant to be constructed on the subject land. If this occurs, which is highly likely because there is no need for any permit, a large house set high above natural ground level will be constructed in close proximity to the boundaries of the properties at nos. 1, 2 and 4 Lord Court.[41] It will necessitate the removal of some existing trees. It will constitute a visual intrusion into the semi-natural river corridor.

Will this be a detriment to benefiting land?

132 I consider there will be a detriment to no. 4 Lord Court, which is benefiting land, by the close proximity of the dwelling to its boundary. This will

[39] See *Ingberg v Bayside CC* [2000] VCAT 2407
[40] *Slaveski v Darebin CC* (2006) VC AT 593 at [30]
[41] The council has cast doubt on the accuracy of the dimensions shown in the plans referred to in the proposed variation to the covenant. It queries their accuracy and whether the plans accurately reflect the boundary between the Residential 1 Zone and the Urban Floodway Zone. I consider the grounds for the council's concern about the accuracy of the plans to be well-founded, but I do not need to resolve them in the context of this proceeding. It is sufficient to conclude that it likely the proposed dwelling will be located closer to the rear boundaries of nos. 1, 2 and 4 Lord Court than the plans indicate.

detract from the low density nature of the area. I consider that the amenity of the river corridor will be detrimentally affected by the intrusion of this substantial building and this will be a detriment that all the owners of land benefited by the covenant will suffer, not just those in the immediate vicinity. I consider that the contribution which the river corridor without dwellings contributes to all the properties in Lord Court, in particular those on the western side of the street that look out across the river, is integral to the amenity of the area comprised in the subdivision. Amenity may be an intangible benefit, but it is nevertheless a benefit that is well recognised within the planning lexicon. It is not necessary that the proposed dwelling be visible from each of the lots benefited by the covenant to constitute a detriment to amenity.

133 It is in the context of assessing detriment to intangible concepts, such as amenity and character, that the notion of perceived detriment becomes highly relevant.

134 Like Deputy President Horsfall in 2002, I find that the owners of land benefited by the covenant, in particular nos. 4 and 5 Lord Court and to a lesser, but by no means less real, extent the owners of the other land benefited at nos. 8, 9, 12, 13 and 14 Lord Court, may suffer from perceived detriment as a result of the variation of the covenant and consequential construction of a dwelling on the subject land.

135 If I am correct in my finding that there is a building scheme affecting the original subdivision, then the owners of no. 2 Lord Court will be a benefiting owner as well. The detriment that they will suffer will be considerable in terms of impact on their views and amenity. They will have a large house built close to their boundaries, which will impede their sense of seclusion and the outlook across the river corridor. In reaching this conclusion, I disregard the evidence of Mr Isles that due to the design of the house on no. 2 Lord Court, any new dwelling on the subject land will not be readily seen. I consider it would be wrong to confine my assessment to the impact of the variation on existing built form within the subdivision. The present house at no. 2 Lord Court may be altered or added to in the future, or indeed replaced. The fact is that a new dwelling on the subject land will sever the connection between this property and the river, which will represent a significant detriment to its amenity.

136 Finally, I do not accept the argument that because certain owners of land benefited by the covenant have not objected, this is an argument to say that the absence of such objections makes it unlikely that such owners would suffer detriment.[42] Section 60(5) requires the responsible authority (or the Tribunal on review) to be independently satisfied about the likelihood of detriment. It is not a matter that is dependent on whether or not objections have been made.

[42] See *Kastoras v Manningham CC* [2009] VCAT 2370 at [37]

137 Construction of a dwelling, which is located close to the river and which lies between the dwellings built on the rim of the flood plain and the river, represents a marked departure from the prevailing subdivision pattern. This pattern places allotments and dwellings at a similar distance from the river thereby preserving their views and amenity. The variation will disrupt the shared amenity context and will be a discordant feature in a subdivision that is otherwise consistent in terms of layout. I find that this will also constitute a detriment to benefiting land.

138 Having regard to the requirements of section 60(5)(a), and irrespective of whether there is a building scheme, I cannot conclude that the owners of land benefited by the covenant will be unlikely to suffer any detriment (including perceived detriment) as a consequence of the variation of the covenant. As a result, the first limb of section 60(5) in sub-paragraph (a) is not satisfied.

Objections by owners of benefiting land

139 There are two owners of benefiting land who made objections – the owners of no. 8 Lord Court, Roslyn Neal, and no. 9 Lord Court, Ronald and Shirley Johnson. Unless I find that their objections are vexatious or not made in good faith, their objections will be sufficient to require me to refuse to grant a permit pursuant to section 60(5)(b).

140 If I am correct and there is a building scheme in place, then the objections of Mark and Mary Fenwick at no. 2 Lord Court, Margaret Turner at no. 7 Lord Court and Marilyn Mitchell at no. 10 Lord Court also fall into this category.

141 The objection of Mr and Mrs Johnson states that:

> When we purchased our property there was a restrictive covenant on the land between our home and Campaspe River which made our property much sought after and therefore more costly. We do not wish to have this restrictive covenant removed or altered in any way.

142 The objection by Ms Neal says:

> I wish to lodge an objection to the application of Peter Hills request for building permit …
>
> I paid a large amount of money for my land and dwelling at 8 Lord Court and certainly don't want houses behind me.

143 Each of these objections opposes a dwelling because of the effect they perceive it may have on the value of their land. Although loss of value is not normally regarded as a planning consideration when considering objections to the grant of a permit, I consider that such an objection cannot be disregarded in the context of an application to remove or vary a restriction in the context of considering section 60(5).

144 Firstly, section 60(2), which applies to the removal or variation of restrictions made after 25 June 1991, specifically refers to financial loss. Secondly, section 5 of the *Victorian Civil and Administrative Tribunal Act* 1998, which deals with when a person's interests are affected by a decision, refers to *"interests of any kind and is not limited to proprietory, economic or financial interests*". Such interests may be directly or indirectly affected by the decision. Having regard to the protection afforded to perceived detriment under section 60(5)(a) and the fact that the purpose of a covenant may be to protect the value of land[43], I consider that an objection to the grant of a permit for the removal or variation of a restriction, which is based on the perceived effect that the removal or variation may have on the value of the land benefited by the restriction, is not an objection that could be automatically dismissed as being vexatious or not made in good faith.

145 In the present case, I do not consider that these two objections fall within the category of vexatious objections discussed in *Castles*. They do not seek to achieve the defeat of the dwelling proposal for reasons unrelated to the purpose of the covenant. The objections are directly related to the covenant, namely the prospect of enabling more than a single dwelling to be constructed on the land. In addition to the financial consideration, Ms Neal has said she does not want houses "behind me". This objection goes to the relationship of the properties in Lord Court with the river corridor and the value to the general amenity of these properties that retaining the river corridor in a semi natural state will have.

146 I do not find that either of the objections from Ms Neal or the Johnsons can be said to be vexatious or not made in good faith. I find they relate to the purpose of the covenant and the direct consequence of its variation.

147 The provisions of section 60(5), in particular sub-paragraph (b), give great weight to the views of owners of land benefited by covenant when there is a proposal to remove or vary it. In the present case, the objections of Ms Neil and the Johnsons are sufficient to require me to refuse to grant the permit. For similar reasons, Deputy President Horsfall found in 2002 that he too was required to refuse the application on grounds that the test in subsection 60(5)(b) was not satisfied.

148 If a building scheme applies to the land, then the objections of the owners of land at no. 2 Lord Court (the Fenwicks), no. 7 Lord Court (Ms Turner) and no. 10 Lord Court (Ms Mitchell) will also become relevant under section 60(5)(b). I do not consider that their objections can be characterised as being vexatious or not made in good faith either.

[43] See *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258 at [250]

Conclusion under section 60(5) of the PEA

149 I am not satisfied that this permit application meets the requirements of either sub-paragraphs (a) or (b) of section 60(5) of the Act. Accordingly, I am required by the provisions of section 60(5) to refuse to grant the permit.

IS THERE A GENERAL DISCRETION TO REFUSE TO GRANT THE PERMIT?

150 Having regard to my findings, it is not strictly necessary for me to address the issue of whether there is a general discretion to refuse to grant a permit under clause 52.02, even if a consideration of section 60(5) of the Act does not mean that a permit must be refused. Nevertheless, because of the uncertainty that appears to surround this issue[44] and because the Hills have been so persistent in their attempts to get rid of or get around the provisions of this covenant, I consider it is appropriate to address the issue.

151 Most cases dealt with by the Tribunal regarding the removal or variation of covenants are decided solely on the basis of section 60(5). However, in my view, the Tribunal has a general planning discretion whether or not to grant a permit under clause 52.02 independent of the provisions of section 60(5). The need to exercise this discretion will arise if the grant of a permit is not prohibited under section 60(5).

152 Clause 52.02 contains decision guidelines that refer to the decision guidelines in clause 65 in addition to the interests of affected people. The interests of affected people can be the interests of the owner(s) of land benefited by the covenant, which are reflected by section 60(5) of the Act, the occupiers of benefited land (under section 57(1A)), and any other persons who may be affected by the removal or variation of the covenant. As discussed earlier, it is not just benefiting owners who may be affected by the removal or variation of a covenant or who have the right to lodge an objection or be parties to a proceeding concerning an application under clause 52.02.

153 Clause 65 commences with the words:

> Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.

[44] See, for example, *Jaborca Pty Ltd v Hobsons Bay CC* [2011] VCAT 114, where Member Cook says:

> [9] … I construe the "interests of affected people" in an application such as this as a reference to beneficiaries of the covenant. The reason I adopt this view is that, fundamentally, clause 52.02 regulates the removal of a restriction created in property law and that legal framework affords benefit to only identified beneficiaries. In the absence of any broader and explicit rights being granted to non-beneficiaries via the planning system (in particular, the *Planning and Environment Act* 1987) I do not consider it justified to extend consideration of detriment to non-beneficiaries by the removal of the covenant where there is no concurrent use/development application.

154 Of course, the normal rules governing the exercise of a planning discretion will apply equally to permits under clause 52.02 as to other permits. Thus, the discretion of the decision maker must be exercised in accordance with the purpose for which the discretion is conferred.[45]

155 The purpose of the control in clause 52.02 is:

> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

156 As I have indicated, the present planning controls over the subject land would enable a dwelling to be constructed without a permit if the covenant was varied as proposed. However, that does not necessarily mean that the construction of such a dwelling will not affect the interests of people having regard to the matters set out in clause 65.

157 I have already examined the effect on the amenity of the area in terms of benefiting owners of land in Lord Court. I also find that there will be a significant effect on the amenity of the Murphy's land, which is not benefited land. As previously discussed, I consider that the Murphys are affected people.

158 The development will result in the destruction of native vegetation, which will impact on the semi-natural state of the river corridor. This will adversely affect the amenity of affected people.

159 The development will be located on flood prone land. The degree of flood hazard associated with the location of the land is a relevant matter to consider under clause 65. Any development in the flood plain of the Campaspe River has the potential to cause detriment not only to future occupants of the proposed dwelling, but to other properties as well that may be affected by a loss of flood plain capacity to store floodwaters.

160 As previously discussed, I consider that one of the purposes of the covenant was to reflect the flood prone nature of the river corridor, which makes it unsuitable for dwellings. The general unsuitability of using the flood prone area of the land in the original subdivision for dwellings is reflected in:

- The conditions of the permit for the subdivision requiring the land to be filled to a level not less than the level of the 1% flood contour;
- The response by the referral authority, Rural Water Commission of Victoria, to the permit application;
- The note attaching to the subsequent permit for the two lot subdivision;
- The opposition of the North Central CMA to the proposed development and any variation of the covenant which would allow it;

[45] *National Trust of Australia (Vic) v Australian Temperance and General Mutual Life Assurance Society Ltd* [1976] VR 592

- A consideration of the general objectives and strategies set out in the SPPF and LPPF about flood plain management.[46]

161 In hindsight, the decision by the council in 1998 to grant a permit for the two lot subdivision of Lot 1, which created the subject land as a separate lot, was a poor planning decision. It has generated a long series of proceedings before the Tribunal as the Hills have sought to defeat the covenant and the restrictions it places on the use of their land.

162 Nevertheless, the Hills were aware of the covenant when they bought the land and were aware that the council regarded the covenant as applying to the whole of the parent title and permitting only one dwelling on the whole of the land comprised in the original lot 1.[47] The Hills took the risk when they purchased the land that they may not be able to build on the land. This in itself is not a reason to remove or vary the covenant.

163 Just because the particular provisions of the schedule to the Land Subject to Inundation Overlay applying to the land would enable construction of a dwelling without a permit does not mean that the outcome necessarily represents an acceptable outcome in terms of the decision guidelines in clause 65.01 when considered in the context of an application under clause 52.02. More particularly, I find the construction of a dwelling will be detrimental to the interests of affected people who lodged objections to the application. In my view, granting a permit to vary the covenant to enable a dwelling to be constructed on the subject land would only compound the poor planning decision that allowed the subdivision in the first place. It would not produce an acceptable outcome in terms of the detrimental effect on the amenity of the area; the flood hazard associated with the land; and the destruction of native vegetation.

164 Having regard to the decision guidelines in clause 52.02 and clause 65, I do not consider I should exercise my discretion to grant the planning permit were it necessary to do this. The covenant should not be varied to enable a dwelling of the type contemplated in the plans specified in the amendment to be built.

CONCLUSION

165 On two separate grounds, I conclude that a permit should not be granted to vary the covenant:

- The grant of a permit is precluded under section 60(5) *Planning and Environment Act* 1987 because I am not satisfied about either of the

[46] Clause 13.02 and 21.04 Campaspe Planning Scheme.

[47] I do not place any weight on the suggestion that the Hills were pressured into buying the land without adequate time to ascertain the effect of the covenant. The letter from their solicitors making this assertion was dated 8 January 2002 whereas the date of the contract of sale was 19 April 2002. The Hills became registered proprietors of the land on 10 May 2002. On the face of these dates, the Hills had plenty of time to clarify the situation. If they were given wrong advice, that is not a reason for varying the covenant.

matters set out in sub-paragraphs (a) or (b). I must be satisfied about both matters if a permit is not to be prohibited under section 60(5).

- Even if the grant of a permit was not barred by section 60(5) and I was required to exercise my discretion under clause 52.02, I find the proposal will not produce an acceptable outcome in terms of the decision guidelines set out in clause 65, which include the decision guidelines in clause 52.02.

Helen Gibson
Deputy President

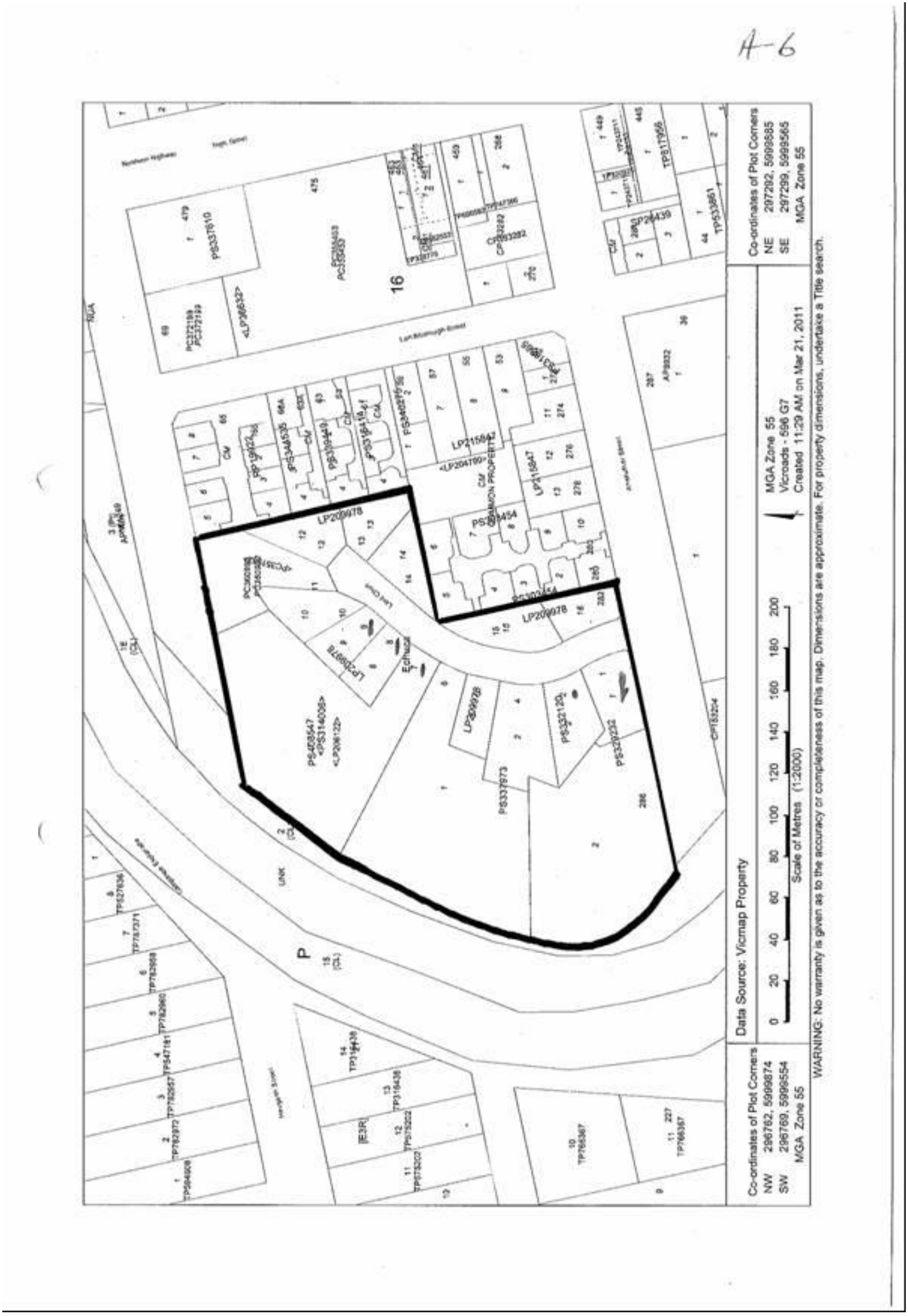
APPENDIX A

AMENDMENT SOUGHT TO THE COVENANT

[Words underlined are words added to the existing covenant]

"And we the said purchasers with the intent that the benefit of this covenant shall be attached to and run at law and in equity with each and every Lot on Plan of Subdivision No.209979K other than the said Lot hereby transferred DO HEREBY for ourselves our heirs, executors and administrators transferees with the Transferors [sic] and other [sic] the registered proprietor or proprietors for the time being of the land comprised in the said Plan of Subdivision other than the lot hereby transferred that the said Transferees will not at any time hereafter build, construct or erect or cause to be built constructed or erected on the said Lot hereby transferred ANY BUILDING other than one private dwelling house on Lot 1 of Plan of Subdivision PS 329232U and one private dwelling house on Lot 2 of Plan of Subdivision PS 329232U (provided that the dwelling house on Lot 2 of Plan of Subdivision PS 329232U shall be constructed generally in accordance the plans prepared by Denham Design dated June 2006 Drawing Numbers Dd806-02 and the Site Plan prepared by Plan Right Licensed Surveyors dated January 2010 drawing number S5230) and such dwelling house shall be of a modern standard and design and shall be of an area not less than one hundred and thirty square metres and shall not have external walls of material other than material which is predominantly brick, brick veneer or stone or in the case of the dwelling on Lot 2 of Plan of Subdivision PS 3292320 weatherboard AND FURTHER that they will not at any time hereafter build, construct or erect or cause to be built constructed or erected on the said Lot hereby transferred any external outbuilding or shedding except with materials of brick brick veneer stone colour bond or corrugated iron (in muted environmental toning) and of an area not greater than fifty - seven square metres and of a height no greater than three and a half metres AND IT IS INTENDED that the above covenants shall appear on the Certificate of Title to issue for the said land hereby transferred and run with the said land."

APPENDIX B


A-6
Co-ordinates of Plot Corners
NE 297292, 5999885
SE 297299, 5999565
MGA Zone 55
MGA Zone 55
Vicroads - 596 G7
Created 11:29 AM on Mar 21, 2011
Data Source: Vicmap Property
0 20 40 60 80 100 120 140 160 180 200
Scale of Metres (1:2000)
Co-ordinates of Plot Corners
NW 296762, 5999874
SW 296769, 5999554
MGA Zone 55
WARNING: No warranty is given as to the accuracy or completeness of this map. Dimensions are approximate. For property dimensions, undertake a Title search.

APPENDIX C

ANNEXURE – OUTLINE OF OBJECTORS' PROPERTIES AND OTHER PROPERTIES IN LORD COURT

Name of Party	Relevant Land	Title Particulars	Was the land transferred out of the Parent Title before the Covenant was created?
Objectors Properties			
John and Laurice Murphy	1 Lord Court	Part Lot 1 LP 209978Y, now Lot 1 PS 329232U, Certificate of Title Volume 09800 Folio 422	Not relevant, as not a beneficiary of the Covenant.
Mark and Mary Fenwick	2 Lord Court	Lot 2 LP 209978Y + part lot 3 LP 209978Y, now Certificate of Title Volume 10197 folio 903	Yes.
Margaret Turner	7 Lord Court	Part Lot 7 LP 209978Y, now Lot 1 of PS 408547D	Yes.
Roslyn Neil	8 Lord Court	Lot 8 of LP 209978Y, certificate of title volume 9800 folio 429	No.
Ronald and Shirley Johnson.	9 Lord Court	Lot 9 of LP 209978Y, Certificate of Title Volume 9800 Folio 430.	No.
Marilyn Mitchell (Winterton)	10 Lord Court[38]	Lot 10 on LP 209978Y, Certificate of Title volume 9800 folio 431.	Yes

[38] Ms Mitchell lodged an objection, but did not lodge a Statement of Grounds.

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Other Properties			
Catherine Halliday	4 Lord Court[39]	Part Lot 3 LP 209978Y + Lot 4 LP 209978Y + part lot 6 LP 209978Y, now Certificate of Title Volume 10235 folio 758.	As to Lot 3 of LP 209978 – Yes. As to Lot 4 of LP 209978 – No. As to Lot 6 of LP 209978 – Yes.
John Hewitt and Jan Shepherd.	5 Lord Court[40]	Lot 5 on LP 209978Y, Certificate of Title volume 9800 folio 426.	No.
James Kirkland and Heather Kirkland.	6 Lord Court[41]	Part of lot 6 on LP 209978Y, being Lot 1 on PS 337973D.	Yes
Kerry Anne Williams	11 Lord Court	Lot 11 on LP 209978Y + part Lot 7 on LP 209978Y, being the land described in Certificate of Title volume 10343 folio 963.	As to Lot 7 and 11 of LP 209978Y - Yes
Sandra Ann Escott	12 Lord Court	Lot 12 on LP 209978Y, being the land described in Certificate of Title volume 9800 folio 433.	No.
Robert John Taylor and	13 Lord	Lot 13 on LP 209978Y being the land described	No.

[39] Note – the Covenant placed on that property differs in that it does contain a "single dwelling" covenant.

[40] Ms Shepherd wrote to the Council advising that she did not object to the variation of the Covenant as the dwelling would not be visible from her home, and also requesting that the Hills continue to provide access to the rear of her property via the Hill Land.

[41] Mrs Heather James supports the variation of the Covenant provided she can continue to have access to the rear of her property via the Hill Land.

Frances Faye Taylor	Court	in Certificate of Title volume 9800 folio 434.	
Kristine May Briggs	14 Lord Court	Lot 14 on LP 209978Y, being the land described in Certificate of Title volume 9800 folio 435.	No.
Jennifer Jane Hann	15 Lord Court	Lot 15 on LP 209978Y, being the land described in Certificate of Title volume 9800 folio 436.	Yes.
Geoffrey Kenneth Spencer, Carita Tuula Spencer and Sandy Scott Spencer	16 Lord Court	Lot 16 on LP 209978Y, being the land described in Certificate of Title volume 9800 folio 437.	Yes.

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