REMOVING OR MODIFYING A RESTRICTIVE COVENANT IN VICTORIA

This article briefly describes a number of ways to modify or remove a restrictive covenant in Victoria, namely:

- by planning permit pursuant to clause 52.02 of a planning scheme--mostly useful for a deadwood or non-contentious covenant;[1]
- the making of orders pursuant to s84 of the *Property Law Act* 1958 (***PLA***)--the most common route for potentially contentious applications;
- by amending the relevant planning scheme--useful where there is considerable support for the proposed change at the municipal or state level;
- by consent--useful where there is a small number of beneficiaries and/or good relations amongst beneficiaries; and
- at the direction of the Registrar of Titles--useful where the covenant might be said to be personal or where the benefit of the covenant fails to pass.

The planning permit process

For what might be described as "deadwood" covenants, an application may be made for a planning permit to remove or modify a covenant pursuant to clause 52.02 of the relevant planning scheme.

However, the operation of s60(5) of the *Planning and Environment Act* 1987 (***PEA***) means that where there is a real prospect of genuine opposition, this avenue is to be avoided. Section 60(5) provides:

> *The responsible authority must not grant a permit which allows the removal or variation of a restriction … unless it is satisfied that—*
>
> *(a) the owner of any land benefited by the restriction … 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;*

As described by DP Gibson of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Hill v Campaspe SC [2011] VCAT 949* this is "a high barrier that prevents a large proportion of proposals." For covenants created on or after 25 June 1991, a less restrictive test applies.[3] *Hill v Campaspe* was recently applied in *Dacre v Yarra Ranges SC* [2015] VCAT 1453.

A further disincentive to rely on this provision is the need to notify all, rather than the closest beneficiaries of the application.[4]

Interestingly, however, there is a little-known provision that allows the circumvention of the onerous advertising provisions in the PEA where the breach has been in existence for two years or more. Section 47(2) of the PEA provides:

> *(2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the Subdivision Act 1988) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.*

Section 52 of the Act deals with advertising of applications for permits to potentially affected third parties and section 55 deals with referral to bodies such as DELWP, Telstra, VicRoads and so on.

In *Hill v Campaspe SC* [2004] VCAT 1399, the Tribunal explained:

> *26 My conclusion is that if part of a covenant is breached, and the breach continues for 2 years without any action on the part of those having the benefit of the covenant, it is reasonable that no notice should be given of an application to vary by removal part of the covenant of which there is a breach. But this exemption from notice pursuant to section 47(2) of the Act should not extend to the removal of any aspect of a covenant of which there is no breach.*

Although the proper interpretation of this provision is not free from doubt, this decision suggests that if a use or development has been in breach of a covenant for more than two years, a permit can be granted to remove or modify the covenant to regularise the use or development. If you rely on this provision, the relevant responsible authority under the Act should issue the permit to remove or amend the covenant without notifying other beneficiaries. However, as DP Gibson cautions, the power is limited, so any application should be judiciously drafted.

Section 84 of the *Property Law Act* 1958

Where some degree of opposition is expected from one or more beneficiaries, an application may be made to remove or modify the covenant pursuant to s84(1) of the *PLA*.

S84(1) is currently structured as a series of threshold tests to be satisfied before the court's discretion to exercise the power is enlivened. The two most commonly relied upon are ss84(1)(a) and (c):

> *(1) The Court shall have power … to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied:*
>
> *(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued*

existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or …

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction…

An application under s84(1) usually involves the filing of an Originating Motion and Summons for Relief with the Supreme Court. This application should be accompanied by planning or other evidence in support of the application for modification or removal.

This is returnable before an Associate Judge who may inquire as to the nature and location of beneficiaries before determining the extent of advertising—often a combination of letters to the closest beneficiaries and the posting of a sign on the land.

Orders may then be made for the return of the summons at a future directions hearing at which objectors may attend.[5]

A surprising number of applications attract no objections. Upon being satisfied that this is the case, the Court may grant the application.

Alternatively, objections may be received and/or objectors may attend court on the return.

If a mutually acceptable agreement on the application cannot be reached with the objectors, orders may be made for the exchange of further evidence before the matter is listed for mediation and/or final hearing.

Historically, the courts have taken a conservative approach to applications for the removal or modification of restrictive covenants. In the often cited words of Farwell J in *Re Henderson's Conveyance*:

*… I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes.**[6]***

However, in recent times, the Court has been more prepared to agree to modification applications based on s84(1)(c) of the *Property Law Act* 1958. See *Wong v McConville & Ors* and *Maclurkin v Searle.*

The practical challenge is to reassure the court about the likely impacts of the proposed development scheme, while allowing sufficient flexibility in the subsequent town planning permit application process.

As Morris J explained in *Stanhill*:

> *... the lack of specific plans makes it more difficult for the plaintiff to discharge the onus of showing that a modification of a restriction will not substantially injure persons entitled to the benefit of the restriction.**[16]***

In view of this judicial need for certainty, or at least reassurance based on the ability to consider the detail of a development proposal, it would be sensible to allow the grant of a planning permit conditional upon the subsequent removal or variation of the subject covenant, but this possibility was ruled out by VCAT in *Design 2u v Glen Eira CC*[17]. In that case, DP Gibson held:

> 5 *... I find that unless there is a prior or simultaneous grant of a permit or decision to grant a permit to allow the removal of variation of the covenant, a permit cannot be granted by either the responsible authority or the Tribunal if the grant of a permit would authorise anything which would result in a breach of the covenant. I find that as the grant of a permit in this particular case would result in a breach of the covenant affecting the subject land, the application for review must fail and should therefore be dismissed.*

Regrettably, the Victorian Government elected to not remove this obstruction in its *Response To The Key Findings Of The Initial Report of the Victorian Planning System Ministerial Advisory Committee.*[18]

Applicants now need to substantially reduce the scope of development schemes in anticipation of a worst-case assessment by VCAT or simply articulate building envelopes into which future applications for planning permission may subsequently be contained.

Alternatively, for modest variations to covenants there is some scope to rely on the planning system as a means of ensuring that substantial injury would not result from the variation. This recently occurred in *Hermez v Karahan* [2012] VSC 443 when Associate Justice Daly held:

> 4 *... in respect of the relevance of town planning principles in determining whether an applicant has established a ground for removal or modification of a restrictive covenant, Cavanough J agreed with the general principle laid down by the authorities that the desirability or otherwise of a proposed development, taking into account such considerations was not part of the Court's function. However, his Honour was prepared to assume, without finally deciding the matter, that the existence of statutory planning provisions aimed at protecting the*

> *amenity of neighbours might be relevant for assessing substantial injury. For the purposes of this application, I am also prepared to assume that planning and building regulations governing building size and height, set backs, and allowable overshadowing and overlooking are relevant to assessing whether modifying the covenant would cause substantial injury.*

Significantly, the court in *Hermez* allowed a variation of the covenant to replace the reference to "one dwelling" with "two dwellings" and didn't confine the applicant to building two dwellings generally in accordance with a given set of plans.

Notwithstanding these matters, it would be a mistake to frame an application under s84(1)(c) solely on town planning concepts of amenity. For instance, in *Fraser v Di Paolo**[19]*** Coghlan J reviewed a number of authorities before observing: "These decisions were made more than 30 years ago but they do give an insight into the importance of the rights which go with a covenant beyond town planning rights." In other words, substantial injury may occur merely through the diminution of proprietary rights, particularly if the decision may set a precedent.

The importance of costs in s84 applications

Potential applicants should be familiar with the cost implications of *Re: Withers**[20]*** that:

> *... unless the objections taken are frivolous, an objector in a proper case should not have to bear the bitter burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his.*

Re Withers was applied by Justice Morris in *Stanhill v Jackon**[21]*** who noted:

The principle set out in *Re Withers* is consistent with other decisions of the Court, such as that by Gillard J in *Re Markin*[22], Lush J in *Re Shelford Church of England Girls' Grammar School*[23] and McGarvie J in *Re Ulman*.[24] In my opinion, it is a sound principle.

When acting for objectors, this rule may be of corresponding significance.

The combined permit/amendment process

Interestingly, the least-used means of removing or amending a covenant is also that arguably capable of delivering the most ambitious proposals, namely amending the planning scheme to remove or amend a covenant.[25]

In this process, the assessment is made according to ordinary planning principles:[26]

In the Mornington Peninsula C46 Panel Report, Member Ball explained:

> *First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. ...*

> *Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.*
>
> *Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.*
>
> *Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.**[27]***

Here an applicant runs an entirely different risk, for while the planning system might eschew Farwell J's disdain for profitable property ventures, to succeed, an application will need the support of the local council and the relevant Minister at the time the amendment is both prepared and adopted. In the worst case, the period between these two events may be many months and punctuated by Council elections thus adding a political wildcard into an already unpredictable process.

An example of this process being successfully employed was the recent approval of a Place of Assembly (museum) at 217 And 219 Cotham Road, Kew as part of Amendment C143 to the Boroondara Planning Scheme. The proposal involved the conversion of two dwellings into a contemporary museum with liquor licence and few on-site parking spaces, contrary to a restrictive covenant that prevented the use of the land for anything other than dwellings. Arguably, there would have been no prospect that such an ambitious project would have been approved under s84 of the *Property Law Act* 1958, but the project received Council backing at both ends of the process and a highly favourable planning panel report.[28]

Removing or modifying a covenant by consent

A restrictive covenant can be removed or modified by consent. Section 88(1AC) of the *Transfer of Land Act* 1958 provides:

> *A recording on a folio of a restrictive covenant that was created or authorised in any way other than by—*
>
> > *(a) a plan of subdivision or consolidation; or*
> > *(b) a planning scheme or permit under the Planning and Environment Act 1987—*
> > *may be deleted or amended by the Registrar if the restrictive covenant is released or varied by—*
> > *...*
> > *(d) the agreement of all of the registered proprietors of all land affected by the covenant; ...*

If the proposed modification or removal is not controversial and/or the number of beneficiaries is not large, this may be the most efficient means of proceeding.

Removing a covenant at the direction of the Registrar of Titles

Finally, a covenant may be removed at the direction of the Registrar of Titles pursuant to s106(1)(c) of the *Transfer of Land Act* 1958. This provides:

> *(1) The Registrar—*
>
> *(c) if it is proved to his satisfaction that any encumbrance recorded in the Register has been fully satisfied extinguished or otherwise determined and no longer affects the land, may make a recording to that effect in the Register;*

This provision can be used for covenants that do not define the land to which the benefit is affixed or where the benefit of the covenant might be said to have not passed to subsequent successors or transferees. Covenants of this nature were discussed in *Prowse v Johnstone* [No. 2] [2015] VSC 621 at [62].

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[1] "A permit is required before a person proceeds: - Under s23 of the *Subdivision Act* 1988 to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant."

[2] [2011] VCAT 949 at [65]

[3] *PEA* s60(2): … must not grant a permit which allows the removal or variation of a restriction unless … the owner of any land benefited by the restriction … will be unlikely to suffer "a) financial loss; or b) loss of amenity; or c) loss arising from change to the character of the neighbourhood; or d) any other material detriment—as a consequence of the removal or variation of the restriction."

[4] *PEA* s52(1)(cb).

[5] See R52.09 of the *Supreme Court (General Civil Procedure) Rules* 2005.

[6] [1940] Ch 835 at 846

[7] [2005] VSC 169; (2005) 12 VR 224, 231

[8] [2005] VSC 169; (2005) 12 VR 224, 231 [13], 239 [41]-[42]

[9] Per Daly AJ in *Grant v Preece* [2012] VSC 55 at [55]

[10] [2006] VSC 298

[11] [2007] VSC 426

[12] [2011] VSC 346

[13] [2008] VSC 281 at [48]

[14] (2007) 81 ALJ 68 at 71

[15] [2012] VSC 4

[16] [69]

[17] [2010] VCAT 1865

[18] Response to Committee Finding 26

[19] [2008] VSC 117 at [42]

[20] [1970] VR 319-320 at 320

[21] [2005] VSC 355

[22] [1966] VR 494.

[23] Unreported, 6 June 1967.

[24] (1985) VConVR 54-178.

[25] See Division 5 of the *PEA* "Combined permit and amendment process" or the use of site specific controls pursuant to clause 52.03 as occurred in Amendment C143 to the Boroondara Planning Scheme.

[26] *M.A. Zeltoff Pty Ltd v Stonnington City Council* [1999] VSC 270

[27] Amendment C46 to the Mornington Peninsula Planning Scheme at 25. Applied by the panels considering amendments C23 to the Stonnington Planning Scheme; C72 to the Manningham Planning Scheme; and C137 to the Mornington Peninsula Planning Scheme.

[28] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/PPV/2012/5.html?stem=0&synonyms=0&query=Amendment%20C143%20to%20the%20Boroondara%20Planning%20Scheme

[29] *Easements and Covenants*, Final Report #22; Recommendation 43.