IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

Not Restricted

S CI 2015 05000

SHARON KIM OOSTEMEYER — Plaintiff

v

MALCOLM POWELL & OTHERS — Defendants

JUDGE:	RIORDAN J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	25, 26 JULY 2016
DATE OF JUDGMENT:	17 AUGUST 2016
CASE MAY BE CITED AS:	OOSTEMEYER v POWELL & OTHERS
MEDIUM NEUTRAL CITATION:	[2016] VSC 491

REAL PROPERTY – Restrictive covenant – Application for modification – Covenant restricting, amongst other things, the erection of more than one dwelling on the land – Proposed development involving subdivision and construction of a second dwelling on the land – Whether precedent already set by previous developments - Whether modification will not substantially injure the persons entitled to the benefit – Application refused – Applicable legal principles – *Property Law Act 1958* (Vic), s 84(1)(c).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr W Rimmer	Aughtersons Lawyers Pty Ltd
For the Defendants	In person	In person

HIS HONOUR:

The Application

1 The plaintiff is the registered proprietor of Lot 22 on Plan of Subdivision No 26169 being the land described in Certificate of Title Volume 7974 Folio 106 situated at 3 Karrala Court, Chirnside Park ('the subject land'), which is depicted as Lot 22 on Plan 1.

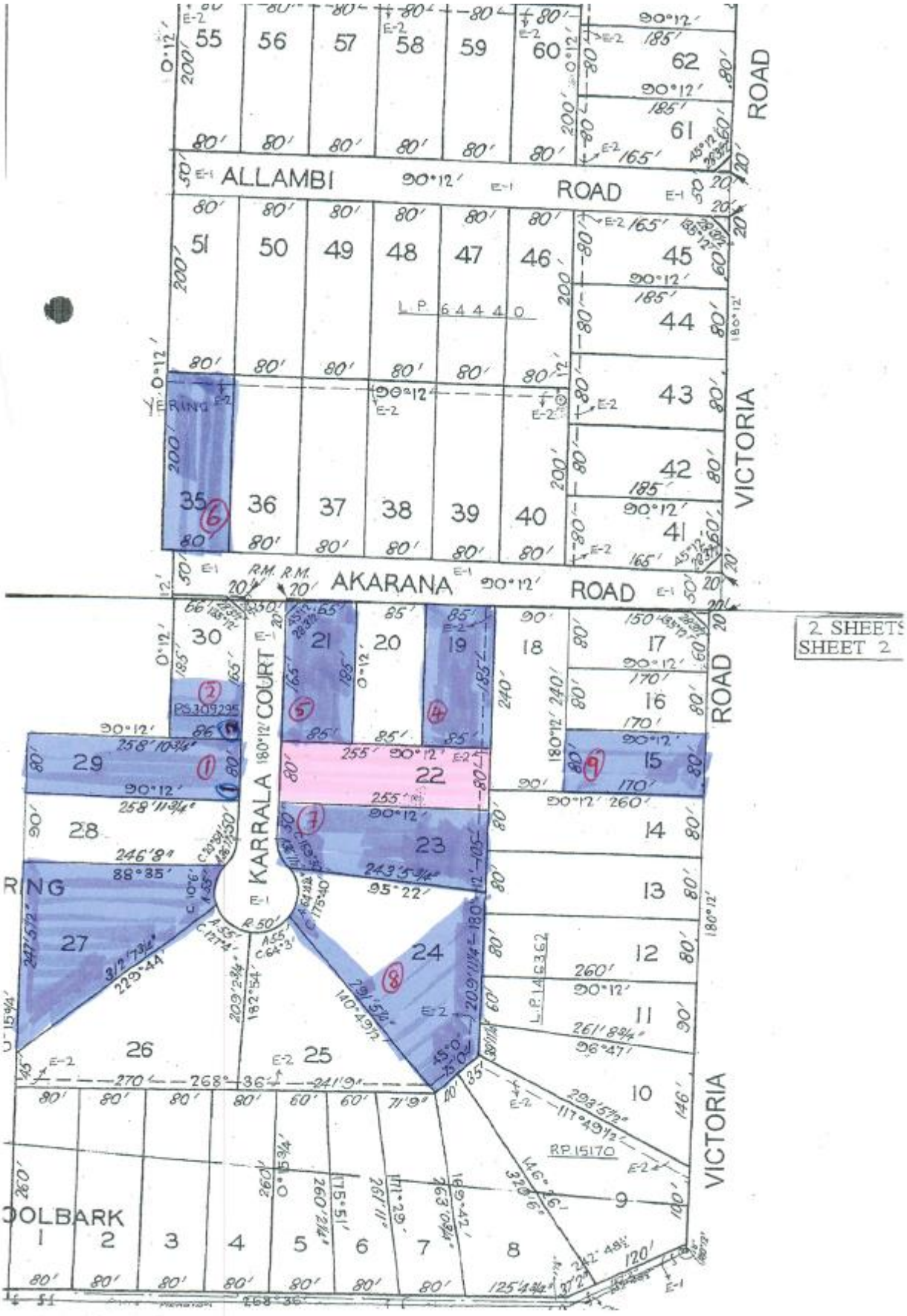
2 The subject land is affected by the following restrictive covenant ('the restrictive covenant') contained in Instrument of Transfer No 2582765 dated 30 June 1952:

> (a) No building shall be erected on the said Lot 22 other than one private dwelling house with the usual outbuildings or one church.
>
> (b) Every such building outbuilding or church shall be of brick, brick-veneer, concrete or weatherboard construction.
>
> (c) No such building outbuilding or church shall be constructed wholly or in part of second hand materials.
>
> (d) Every such dwelling house or church shall exclusive of all verandas and outbuildings be of an area of not less than 1,000 square feet.

3 By originating motion filed 23 September 2015, as amended pursuant to leave given on 26 July 2016, the plaintiff seeks an order pursuant to s 84(1)(c) of the *Property Law Act 1958* (Vic) ('the Act') that the restrictive covenant be modified by the addition of the following words:

> However, nothing in this instrument prevents the construction of a second dwelling behind the existing dwelling on Lot 22 on Plan of Subdivision No 26169 substantially in accordance with the drawings SK-1 to SK-5 (inclusive) entitled "Proposed Residence at 3A Karrala Court, Lilydale" prepared by Bums Architecture of 6/163 Commercial Road, South Yarra 3141 in May 2016, copies of which are annexed to the Order made by the Honourable Associate Justice Riordan in the Supreme Court of Victoria Proceeding No. 2015 05000, subject to any amendment required by the Responsible Authority as a condition of planning approval for that dwelling.

Plan 1


ALLAMBI ROAD
AKARANA ROAD
VICTORIA ROAD
KARRALA COURT
RING
L.P. 64440
PS.309295
L.P. 146362
RP 15170
2 SHEETS
SHEET 2

The defendants

4 Malcolm Powell, the first defendant, is the registered proprietor of 10 Karrala Court, Chirnside Park, which is Lot 29 on Plan 1.

5 Mr John Tresidder, the second defendant, is a registered proprietor of 11 Karrala Court, Chirnside Park, which is the southern portion of Lot 30 on Plan 1.

6 Peter Bromage, the third defendant, is the registered proprietor of 8 Karrala Court, Chirnside Park, which is shown as Lot 27 on Plan 1. Mr Bromage was given leave to withdraw from the proceeding by order of Ierodiaconou AsJ made on 27 April 2016.

7 Mr Geoff Stephenson, the fourth defendant, is a registered proprietor of 3 Akarana Road, Chirnside Park, which is Lot 19 on Plan 1.

8 Mr Ian Donald Hannan, the fifth defendant, is the registered proprietor of 7 Akarana Road, Chirnside Park, which is Lot 21 on Plan 1.

9 Mr Neville Skewes, the sixth defendant, is a registered proprietor of 12 Akarana Road, Chirnside Park, which is Lot 35 on Plan 1.

10 Mr Scott Bennett, the seventh defendant, is a registered proprietor of 4 Karrala Court, Chirnside Park, which is Lot 23 on Plan 1.

11 Mr Cornelius Bouma, the eighth defendant, is a registered proprietor of 13 Victoria Road, Chirnside Park, which is Lot 15 on Plan 1.

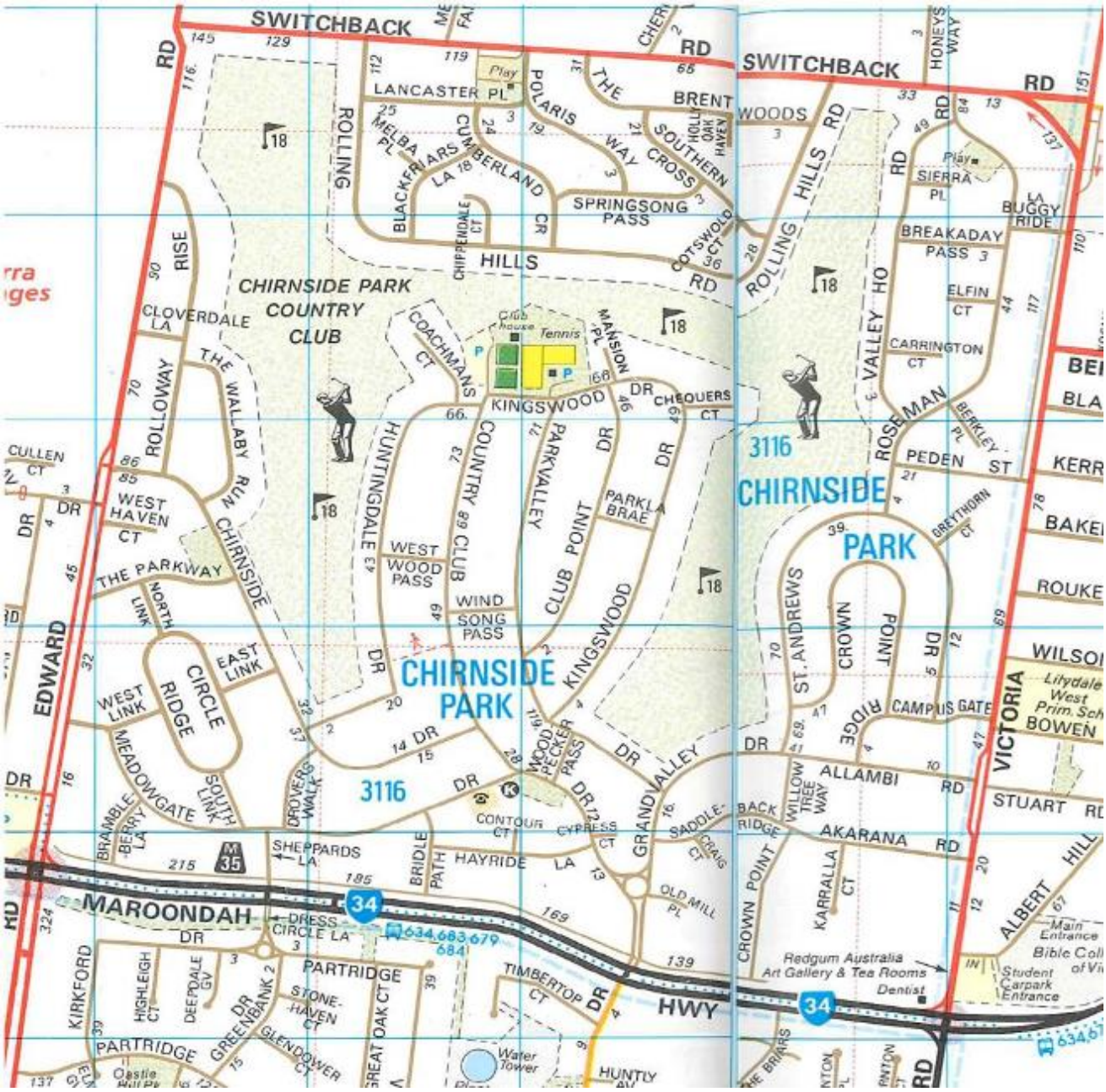
12 Mr Max Curnow, the ninth defendant, is a the registered proprietor of Lot 5A Karrala Court, Chirnside Park, which is the coloured part of Lot 24 on Plan 1.

The title

13 The subject land was originally part of a parent title (being the land described in Certificate of Title Volume 6451 Folio 077), which covered a large area of 659 acres and 38 perches, being approximately one square mile. This is the land between Switchback Road in the north, Maroondah Highway in the south, Edward Road in the west and Victoria Road in the east shown in Plan 2, which would become the

Chirnside Park Country Club and associated residential estate. The original homestead was located on the site of the current club house and tennis courts on what is now Kingswood Drive.

Plan 2



14 As was the practice of the Titles Office at the time, lots were transferred from the parent title, from time to time, and the transferred part was shown as cancelled on the parent title with a reference to the newly created certificate of title for the lot transferred out.

15 The relevant transfers from the parent title were as follows:

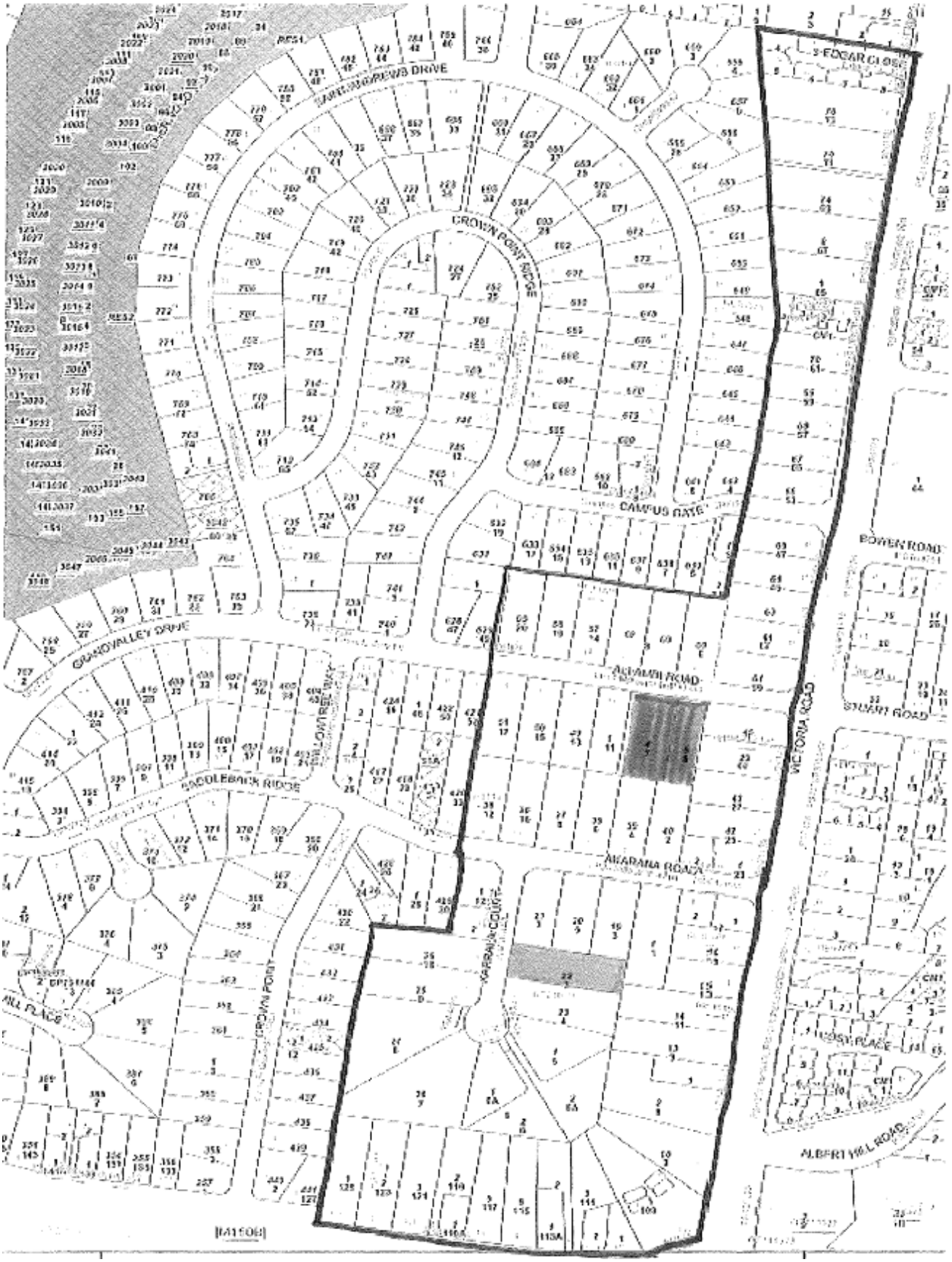
DATE	TRANSFER	VOL/FOL	LOT
10 July 1952	2582764	7974/105	46, 47
10 July 1952	2582765	7974/106	22 (the subject land)
15 August 1952	2511923	7974/107	23
5 September 1952	2516225	7974/108	21
4 December 1952	2530000	7974/109	4
4 December 1952	2530001	7974/110	1
31 March 1953	2549991	7974/111	58, 59
	R15421266	7974/112	2, 3, 5-20, 24-30, 35-45, 48-51, 55-57, 60-77
28 November 1961	B323523	8373/755	Road widening
28 November 1961	B147059	8373/758	Balance of parent title

16 The transfer of the subject land provided that the transferees covenanted with the registered proprietor of the parent title and 'its transferees the registered proprietor or proprietors for the time being of the land now remaining untransferred' in the parent title. Accordingly, the benefit of the covenant was to all transferees of future lots from the parent title, except for Lot 46 and Lot 47, which had been transferred out prior to the transfer of the subject land.

17 Mr Robert Easton is a town planning consultant and a principal of the firm of Easton Consulting, Planning, Development and Subdivision Consultants. He was the expert witness called by the plaintiff and included in his report the 'Benefit Plan' showing the lots entitled to the benefit of the restrictive covenant, which is Plan 3 below. Lot 46 and Lot 47, which do not have the benefit of the restrictive covenant, are blocked out.

18 Mr Easton's opinion was that the best definition of the neighbourhood related to the subject land was the lots within the bold delineation in Plan 3. The lots outside the bold delineation are the balance of the parent title transferred out on 28 November 1961.

Plan 3


CAMPUS GATE
ALAMBIL ROAD
ALARAMA ROAD
VICTORIA ROAD
BOWEN ROAD
STUART ROAD
ALBERT VILLE ROAD
CROWN POINT RIDGE
CROWN POINT
CROWN POINT COURT
GRANVILLE'S DRIVE
BACKLEBACK RIDGE
ST EDGAR CLOSE

Karrala Court and environs

19 Karrala Court is situated on an elevated area, which, according to the evidence of a number of the defendants, allows for 180 degree views from the houses in the Court towards Christmas Hills, Yarra Glen, Healesville, Lilydale, Warburton and Mount Dandenong. The high point is approximately at the southern end of Karrala Court from which point Lot 24 and Lot 25 in particular start to slope down to the south and south-east. The views offered by the position could have been a reason for the land in Plan 1 being subdivided before the balance of the parent title. The subject land is over 20,000 square feet (1,856 square metres) and each of the original lots in Karrala Court were of a similarly substantial size.

Aerial photograph of Karrala Court

20 Most of the houses to the north of Karrala Court, in Akarana Road and Allambi Road, are also on large blocks of approximately 16,000 square feet (1,486 square meters). These properties also have views particularly to the north as the land continues to fall away in that direction. To the west, the density of the housing

increases particularly in the new housing estate, which was formerly (as it is shown in Plan 2) the golf course.

21 To the south of Karrala Court, the Maroondah Highway is a major east-west thoroughfare in the eastern suburbs of Melbourne. To the east of Karrala Court, Victoria Road is also a substantial and busy thoroughfare.

Existing additional development

22 Despite the existence of covenants, a number of two-lot subdivisions have been developed within the locality.

23 In 1996, Lot 30 on Plan 1 was subdivided and became 11 and 12 Karrala Court. This subdivision was effected by a rectification to the title following the removal of the covenant. The documents produced from a search of the title do not disclose how the removal occurred; but the evidence of the defendants was that they received no notification of the proposal. Mr Easton gave evidence that there were the following possible methods available for the removal of the covenant:

(a) Section 60(5) of the *Planning and Environment Act 1987* (Vic) which provides as follows:

> The Responsible Authority must not grant a permit, which allows for the [removal of the covenant], unless it is satisfied:
>
> (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 grant of a 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.

(b) A planning scheme amendment under the *Planning and Environment Act 1987*.

24 Mr Easton agreed with Mr Powell's evidence that the removal of the covenant over Lot 30 was the result of a site specific planning scheme amendment approved by the

Minister. Such a planning scheme amendment, at that time, could have been made without notification to the neighbours.

25 In about 2000, the covenants affecting Lot 24, Lot 25 and Lot 7 were varied to permit the construction of an additional private dwelling on each lot. Mr Powell and Mr Bennett gave evidence that these two-lot subdivisions were the result of negotiations with the owner of the lots and the Yarra Ranges Shire Council ('the Council') in the following circumstances:

(a) The owner of these lots was Mr Tozer, who still owns and resides in Lot 26. Mr Tozer was an elderly gentleman at the time and is now about 99 years old. After he applied to the Council for a permit for the subdivision, the Council arranged negotiations with the objectors.

(b) The objectors were concerned that, because Lot 24 and Lot 25 were particularly large and could be accessed from the Maroondah Highway through Lot 7, if the proposed subdivisions were not approved, there was a prospect that the beneficiaries of Mr Tozer's estate could apply for the approval of a much higher density development.

(c) The objectors negotiated a settlement on the basis that two-lot subdivisions would be permitted with certain set-back requirements and the covenant would remain. With respect to Lot 7, Mr Powell said that they 'didn't object to that … lot [being] subdivided and two residences built on it, [because] it would preclude any access [to] lots 24 and 25 from Maroondah Highway and it would further decrease the possibility of high density development.'

(d) Lot 24 and lot 25 were originally approximately double the size of the other lots in Karrala Court (namely, 3,960 square metres and 2,955 square metres). The subdivided lots are between 1,473 square metres and 2,040 square metres in size and remain subject to a restrictive covenant prohibiting the building of more than a single dwelling on each lot.

26 On 9 February 1999, the Council granted a variation of the covenant over Lot 4, being 119 Maroondah Highway, to permit the construction of an additional private dwelling.

27 In July 2001, the Council granted a permit to allow a variation to a covenant to build a second dwelling of what is now 23 Victoria Road and 2A Akarana Road on the northwest corner of Akarana Road and Victoria Road. Mr Powell objected to the application but did not appeal to the Victorian Civil and Administrative Tribunal ('VCAT') against the Council's notice of decision.

28 In 2003, the Council refused an application pursuant to s 60(5) of the *Planning and Environment Act 1987* (Vic) for a variation to the covenant over Lot 17, being 17 Victoria Road, to allow two single storey dwellings.

29 On 24 November 2003, VCAT set aside the decision of the Council.[1] The Tribunal Member noted that Mr Powell, as the only remaining objector, had only relied upon detriment generated by traffic danger. The Tribunal Member found that 'the addition of one more single storey dwelling on the site [would] not generate any traffic hazard at all for Mr Powell'[2] and that consequently 'Mr Powell [would] be unlikely to suffer any detriment of any kind including any perceived detriment from the addition of one extra single storey dwelling on Lot 17'.[3] No reference was made to this decision establishing any precedent for future applications for modifications of covenants.

30 On 29 July 2011, VCAT rejected an appeal by Mr Powell against a decision of the Council to grant a permit allowing for the removal of the covenant over Lot 14, being 11 Victoria Road, Chirnside Park. The Tribunal noted that Mr Powell had submitted that he had a 'perception of detriment due to the desire of the local authority and State Government to steadily increase Medium Density residential development

1 *Schock v Yarra Ranges Shire Council* [2003] VCAT 1733.
2 Ibid [27].
3 Ibid [28].

throughout the inappropriate areas of the outer suburbs'.[4] With respect to this concern, the Tribunal Member said:

> Mr Powell's concerns at the authorities' promotion of medium density housing in what he refers to as inappropriate areas of the outer suburbs does not lead me to conclude from this statement that he will suffer detriment as a result of the removal of the covenant, rather from this statement I conclude Mr Powell personally does not like medium density housing.[5]

31 Further north on Victoria Road, the following relevant covenants have been removed:

(a) In 2011, the covenant over Lot 71, being 63 Victoria Road, was removed and the lot was developed with four double storey townhouses.

(b) In 2012, the covenant over Lot 72, being 65 Victoria Road, was removed following a decision of VCAT.[6]

32 Further, there have been the following developments of lots that were not subject to a covenant:

(a) In 1980, Lot 9, now being units 1–4/109 Maroondah Highway, was developed as a dental practice in a four-lot subdivision.

(b) In 2013, Lot 77, being 75 Victoria Road, was developed with eight townhouses.

The plaintiff's evidence

33 The plaintiff relied upon the evidence of Mr Robert Easton. He gave evidence with respect to the significance of covenants to planning, the beneficiaries of the covenant, the burden of the covenant, the neighbourhood of the covenant, the neighbourhood in 1952 and today (including the subsequent two-lot and other subdivisions referred to above), the potential impact of the proposed modification and concluded that the

4 *Powell v Yarra Ranges SC & Anor* [2011] VCAT 1449, [9].
5 Ibid [12].
6 *Monks v Yarra Ranges SC* [2012] VCAT 1832.

construction of a second dwelling on the subject land would not substantially injure the persons entitled to the benefit of the restriction.

34 In support of this contention, he particularly relied upon the following:

(a) The subject land was large and the proposed front lot would have an area of 905 square metres and the rear would have an area of 989 square metres. These lots were comparable to many other standard lots within the neighbourhood, which he considered to be the land in LP26169[7].

(b) The second dwelling would be accessed via the southern driveway, which already exists, and therefore there would be no change to the street frontage. Planning controls and building regulations would mean that it was no longer possible to erect two dwellings which, taken together, would be greater than the largest single dwelling that could be built on a lot. Planning controls and building regulations provide 'a greater degree of consistency between single dwellings and multi dwellings especially in regard to the street set-back, distance from boundaries, site coverage, overlooking and overshadowing'.

(c) The covenant permits a church which would have a far greater impact on surrounding properties than the construction of a second dwelling.

(d) There will be no appreciable increase in traffic movements within Karrala Court.

35 In oral evidence, Mr Easton said that the reasoning, which had led him to the conclusion that the modification or removal of the covenant would not substantially injure the persons entitled to the benefit of the restriction,[8] could generally be applied to the other (unsubdivided) properties in Karrala Court and to the residential area to the north of Karrala Court.[9] His evidence was that, if the covenant

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7 Being the lots within the bold delineation in Plan 3 above.

8 At the time Mr Easton gave evidence, the plaintiff was seeking removal of the covenant.

9 Although in some instances the position of the existing house would require demolition before a second dwelling could be constructed.

was removed for these properties, there would not be a substantial change to the amenity of the area for the following reasons:

(a) The required set-backs from the frontage for the new developments would be the same.

(b) There are mandatory requirements for landscaping.

(c) In the backyard 'instead of seeing a garage you may see a dwelling'.

The defendants' evidence

36 Mr John Tresidder of 11 Karrala Court gave evidence that he and his wife purchased their home in 2002 and the factors important to them in deciding to purchase included:

(a) a quiet court where their children could ride their bikes or collect a stray ball with safety;

(b) a quiet court with few cars coming and going and minimal traffic;

(c) an established streetscape with no prospect of subdivision for development;

(d) low density housing with spacious grounds, trees and gardens; and

(e) a pleasing, family friendly ambience.

He gave evidence of his concern that an order for removal or modification of a covenant over the subject land would be used as a precedent by other property owners and would change the character of the neighbourhood, particularly as further developments occurred. He noted that two other properties were currently for sale in Karrala Court.

37 Ms Helen Hannan of 7 Akarana Road gave evidence that her husband purchased the property in 1971 and the factors important to them in deciding to purchase included:

(a) low density living

(b) large blocks of land;

(c) space for children to play; and

(d) a quiet street with minimal traffic and noise.

She gave evidence that she was concerned that the removal or modification of the covenant would be used as a precedent by other property owners in the neighbourhood.

38 Mr Scott Bennett of 4 Karrala Court gave evidence that he and his wife had purchased their home in 1982 from his grandfather, who had purchased the property in the mid-1960s and built the house on the property in 1968. He said the attributes of the property that he valued were:

(a) its location in a quiet court;

(b) minimal traffic in the court;

(c) low density living; and

(d) views over the Yarra Valley.

He gave evidence that he was concerned that the removal or modification of the covenant would adversely impact on these features and would be used as a precedent by other property owners.

39 Mr Geoff Stephenson of 3 Akarana Road gave evidence that he bought the property with his partner in 2005 and the factors important to them in deciding to purchase included:

(a) a quiet, safe, family friendly area;

(b) low traffic and noise;

(c) private, low density living with no immediate overlooking dwellings;

(d) views extending over the Yarra Valley;

(e) large block sizes with premium value dwellings; and

(f) increased property value from having no subdivisions.

He gave evidence that he was concerned that the removal or modification of the covenant would impact on these matters and would be used as a precedent by other

property owners in the neighbourhood and would change the character of the neighbourhood.

40 Mr Malcolm Powell of 10 Karrala Court gave evidence that he bought the property in 1963 and subsequently built his house in 1975. The factors that were important to him in deciding to purchase included:

(a) a half acre lot to build on and for his future family to play on and enjoy;

(b) views over the Yarra Valley and the Christmas Hills;

(c) protection of the local environment by virtue of the large lot sizes;

(d) the protection of a restrictive covenant with no prospect of subdivision for development; and

(e) a quiet court location minimising traffic flow and ensuring safety for children.

41 Mr Powell further deposed as follows:

(a) Prior to buying the property, he carried out research regarding the area and was aware of the restrictive covenant affecting properties in Karrala Court and its immediate vicinity.

(b) The existence of the covenant prohibiting the building of more than one private dwelling house was the principal reason he purchased his property.

(c) The covenant meant that as the area developed over the years the special character and ambience of the large lots in Karrala Court and Akarana Road would be protected in perpetuity.

42 He gave evidence that he was very concerned that his quiet enjoyment of his property, the streetscape and the character and ambience of the neighbourhood, would be seriously affected by the construction of a second dwelling on the subject property because of the following:

(a) The potential for more on street parking in a narrow court that was not designed for on street parking.

(b) The increase in vehicle movements in the court.

(c) A reduction in safety for those living in the court.

He said his concerns were heightened by the fact that there were two other properties for sale in the court.

43 Mr Curnow opposed the plaintiff's application and swore an affidavit. It was explained that he was currently receiving treatment for a very serious illness and could not give evidence.

44 Mr Bouma opposed the plaintiff's application and swore an affidavit. It was explained that he is caring for his daughter and could not give attend to give evidence.

45 Mr Skewes opposed the plaintiff's application and swore an affidavit. It was explained that he was unable to attend because of other appointments.

Legal Principles

46 Section 84(1) of the Act provides:

> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially 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
>
> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or

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

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.

47 The plaintiff only relies on s 84(1)(c) and therefore has the burden of proving, as a matter of fact,[10] that the proposed discharge or modification will not substantially injure the relevant persons. This means that the plaintiff must prove the negative.[11] As the person carrying the burden, the failure by a plaintiff to establish its plans with specificity may result in the Court not being satisfied that the conditions of the section have been fulfilled.[12]

48 To determine whether persons, who are entitled to the benefit of the covenant, will not be substantially injured, the courts have established the following guiding principles:

(a) A substantial injury must be real and not a fanciful detriment.[13] The requirement that the injury must be substantial was intended 'to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds'.[14]

(b) The substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant.[15] It is not sufficient for a

10 *Vrakas v Registrar of Titles* [2008] VSC 281 [40] (Kyrou J) and the cases cited.
11 Ibid [42].
12 Ibid.
13 Ibid [36].
14 *Ridley v Taylor* (1965) 1 WLR 611, 622 (Russell LJ); referred to with approval in *Re Stani* (Unreported, Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10.
15 *Vrakas v Registrar of Titles* [2008] VSC 281 [30], [34] (Kyrou J) and the cases cited.

plaintiff to merely prove that there will be no appreciable decrease in the value of the property that has the benefit of the covenant.[16]

(c) Substantial injury may consist of the order for modification of the covenant being 'used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed [being] completely defeated'.[17] This consideration is referred to as the 'precedent value'.[18]

(d) Whether there will be substantial injury is to be assessed by comparing:

(i) the benefits initially intended to be conferred and actually conferred by the covenant; and

(ii) the benefits, if any, which would remain after the covenant has been discharged or modified.[19]

If the evidence establishes that the difference between the two will not be substantial, the plaintiff has established a case for the exercise of the court's discretion under s 84(1)(c).[20]

49 In *Prowse v Johnstone*,[21] Cavanough J considered that, in assessing the benefits actually conferred by the covenant, the Court should have regard to 'the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.'[22] His Honour was also prepared to 'assume, without deciding' that in assessing the benefits which would remain, if the covenant is removed or modified, the Court could consider the protections afforded to neighbouring properties by statutory planning provisions. In my opinion, it is relevant to consider evidence of statutory planning provisions to the extent it shows

16 *Re Parimax (SA) Pty Ltd* (1956) 56 SR (NSW) 130, 133 (Myers J).
17 *Re Stani* (Unreported, Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11.
18 *Vrakas v Registrar of Titles* [2008] VSC 281 [39] (Kyrou J) and the cases cited.
19 Ibid [35].
20 *Re Cook* [1964] VR 808, 810-811 (Gillard J); approved in *Freilich v Wharton* [2013] VSC 533 [25] (Bell J).
21 [2012] VSC 4.
22 Ibid [104].

what realistically will be the result of the removal or modification of the covenant because 'it would be artificial and wrong to pay no heed at all to the reality of the situation'.[23]

50 In considering whether the plaintiff has satisfied the Court that there will not be substantial injury:

(a) town planning principles are not to be taken into account;[24]

(b) the absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof;[25] and

(c) each case must be decided on its own facts;[26] and each covenant should be construed on its own terms and having regard to the particular context in which it was created.[27]

51 If the plaintiff satisfies the Court that there will not be a substantial injury to the relevant persons, the Court has a residual discretion to refuse the application. In the exercise of its discretion, the court may take into account town planning principles and the precedent value.[28]

Plaintiff's submissions

52 Mr Rimmer, who appeared as counsel for the plaintiff, submitted as follows:

(a) For the purposes of the comparison, in assessing the benefits actually conferred by the covenant, the Court should have regard to the realistic probability that under the covenant the plaintiff would be entitled to build 'something more than the existing dwelling' and at least an extension to the existing building.

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23 Ibid [104].
24 *Vrakas v Registrar of Titles* [2008] VSC 281 [41] (Kyrou J) and the cases cited.
25 Ibid [43].
26 Ibid [44].
27 *Prowse v Johnstone* [2012] VSC 4 [52] (Cavanough J).
28 *Vrakas v Registrar of Titles* [2008] VSC 281 [45]–[46] (Kyrou J).

(b) There was no evidence of an unacceptable increase in traffic that would result from the construction of a second dwelling on the subject land.

(c) The impact that the construction of a second dwelling on the subject land would have on the present character of Karrala Court is neither unreasonable nor substantial, given that:

(i) the present character of Karrala Court has already changed from that which originally prevailed in 1952, when the subdivision was first laid out - Lots 24, 25 and 30 have already been redeveloped to create dual occupancies;

(ii) only one additional household will be introduced into Karrala Court;

(iii) there will be no change to the street frontage and the impact of the plaintiff's proposal on adjoining land will not be substantial or unreasonable; and

(iv) Mr Easton's evidence is that traffic movements in Karrala Court have not increased to any appreciable extent by reason of the three dual occupancy developments that have already occurred which increased the number of lots which use Karrala Court for vehicle access from 10 to 13.

(d) The covenant in its unmodified form does not guarantee a house or garden of any particular size, but merely preserves the area as one of substantial homes and gardens. Each of the households that will result from the subject land, if the modification is permitted, will still occupy land sufficient for a substantial family home and garden and will be just as likely as other properties in Karrala Court to be occupied by a family intending to develop and maintain a property with a substantial home and garden.

(e) With respect to the precedent value of the modification, it was submitted as follows:

(i) There are already precedents for the plaintiff's proposed modification. The plaintiff's proposed modification will not substantially add to the weight of these precedents so as to render a future application by others within the neighbourhood more likely. In particular, in Karrala Court, there are already precedents for dual occupancies on Lots 24, 25 and 30.

(ii) The evidence of Mr Easton was that, if the modification of the covenant led to the construction of numerous other second dwellings in the area, there would be no substantial injury to the owners of the benefiting property owners because 'they would almost certainly be done with single driveways for most to get into the backyard and it would have minimal impact on the streetscape and some minor impact laterally at the backyard interface with the next door property. But to the general lay observer they wouldn't be necessarily conscious that the dual [occupancies] were there unless they looked down the driveway.'

Conclusion

53 In my opinion, the purpose of the imposition of the single dwelling covenant in this case is substantially identical to that found to be the purpose in respect of similar single dwelling covenants in previous applications under s 84(1)(c) of the Act being:

(a) to ensure for its beneficiaries a 'reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence';[29]

(b) to prevent the erection on the subject land of more than one dwelling house, and 'thereby to preserve the area in question as an area of spacious homes and gardens';[30] and

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29 *Re Stani* (Unreported, Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 8.

30 *Re Miscamble's Application* [1966] VR 596, 601 (McInerney J).

(c) 'the maintenance of reduced population numbers in the area'.[31]

54 The evidence, which was supported by my view of the site, establishes that the covenant has actually achieved these benefits. Even the second dwelling on each of Lots 24, 25 and 30 does not appear to have substantially deprived Karrala Court of its character. So much was accepted by the plaintiff, who contended that this fact supported the contention that the construction of a second dwelling on the subject land would not substantially interfere with the amenity of the area.

55 However, in my opinion, the granting of the proposed modification to the covenant on the subject land would have a very strong precedent value. Mr Easton agreed that the reasons supporting the modification or removal of the covenant to the subject land, could generally be applied to the other (unsubdivided) properties in Karrala Court and to the residential area to the north of Karrala Court. Accordingly, this is not a case such as *McLurkin v Searle*[32] in which Derham AsJ was able to conclude that the modifications would not have any significant precedent value because the relevant lot was 'physically separate from … where most of the properties having the benefit of the covenant are located'.[33]

56 I do not accept the plaintiff's submission that a proliferation of dual occupancies, following the precedent, which would be set by an order on this application, would not cause substantial injury to the owners of the benefiting properties and, in particular, the defendants.

57 In my opinion this application must fail because I am not satisfied that the proposed modification to the covenant on the subject land would not cause substantial injury to the persons entitled to the benefit of the covenant and to the defendants in particular. Although some people may prefer higher density living, it cannot be said that persons who have deliberately purchased a home in a premium low density area would not suffer a substantial injury if the effect of the Court's decision was to

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31 *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65,197 (Eames J).
32 [2015] VSC 750.
33 Ibid [94].

open the gates to dual occupancies throughout Karrala Court and the surrounding area. As was said by Young CJ, Barber and Nelson JJ in *Re Stani*:[34]

> The learned trial Judge ultimately concluded that in the instant case the modification sought did involve a real and substantial injury because the resident in the subdivision had the benefit of a restriction which assumes a limited density of population and protected them from the detrimental effect of increased density. This benefit would be eroded by the modification sought in this instance. We are disposed to agree that, if the covenant were modified as sought, this might well be used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed would be completely defeated. An examination of the subdivision shows that there are a number of allotments in respect of which an application such as this could be made, supported by the same arguments as were used to justify this application.

58 Similar sentiments were expressed by Myers J in *Re Parimax (SA) Pty Ltd*, in which his Honour said:[35]

> I consider that the benefit which a person gets from a restriction cannot necessarily be measured only by material consideration. There are many of us who derive enjoyment from our surroundings, even though they do not add anything to the value of our houses. Indeed, there are many people who object, because it would be unpleasant to them, to the alterations in their neighbourhood, even though it might actually increase the value of their properties.

59 No authority was cited in support of the proposition that a precedent that may cause the conversion of a low density area into a high density area does not cause substantial injury to the owners of benefiting properties.

60 I also reject the plaintiff's argument that the precedent has already been set by the construction of a second dwelling on Lots 24, 25 and 30 for the following reasons:

(a) The removal of the covenant over Lot 30 was in circumstances that are not entirely clear. However, it is likely it was by ministerial approval without notice to neighbouring residents. Mr Easton's evidence was that such a site specific planning amendment was rare and he doubted if the Yarra Ranges Council 'are doing them any more'.

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34 *Re Stani* (Unreported, Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10–11, approved in *Freilich v Wharton* [2013] VSC 533 [67] (Bell J).

35 [1956] SR (NSW) 130, 133.

(b) The modification of the covenants over Lot 24 and Lot 25 were effected by negotiation with the neighbours and the Council in the circumstances referred to above. In particular, Lot 24 and Lot 25 were substantially larger blocks than the subject land, the objectors perceived a risk of multi-lot development. Further, the position of Lot 24 and Lot 25 on the southern downslope meant that the construction of the second dwellings had a reduced impact on Karrala Court.

(c) The modifications to the covenants on the lots adjoining the very busy thoroughfares of the Maroondah Highway and Victoria Road raise very different considerations to the modification of a covenant in Karrala Court.

(d) None of the developments has been by order of a court pursuant to s 84(1) of the Act.

61 Given the previous relaxations of the restrictions imposed by the covenant, it might be that the covenant over the subject land 'stands as a soldier guarding the residential character'[36] of Karrala Court and its surrounding area, which is distinguished by its large blocks and low density. I consider that these previous developments demonstrate 'that any relaxation of the restriction imposed by the covenant would almost certainly lead to further applications of a similar nature, resulting in a detrimental change to the whole subdivision.'[37] As the Full Court said in *Re Stani*:

> The fact that there have already been, in breach of the covenant, the instances of similar subdivisions of allotment … in a very similar situation to that of the subject land, and the fact that the applicant relied upon the existence of these breaches to support his application point to the reality of this fear of the ultimate destruction of the original planner's design.[38]

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36 *Freilich v Wharton* [2013] VSC 533 [71] (Bell J).

37 *Re Stani* (Unreported, Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 9.

38 Ibid 9–10.

Substantial injury to immediate neighbours

62 Although it is difficult to discern the impact of a second dwelling on the subject land to the neighbours by reference to increases in vehicular traffic and parking; or changes to the visual impact from the street, I am not satisfied that there would be no substantial injury to the neighbours at Lot 19 and Lot 23.

Lot 19

63 Mr Stephenson, the co-owner of Lot 19, gave evidence of his concern about a loss of privacy and that the subject land 'sits on land higher than our property and it is likely that a second dwelling built on that land will look directly into our backyard and likely impact our views to the Dandenong[s].' He also gave evidence about the importance of the protection of the covenant in his wife's and his decision to buy the home.

64 Mr Easton responded by stating that '[t]he proposed dwelling being single storey will be located at least 6 metres from the common boundary and is considerably lower than if an alternate shed or dwelling extension were constructed.'[39]

65 In considering whether the plaintiff has established that the owners of Lot 19 will not be substantially injured (in the relevant sense), I do not lightly dismiss the concerns expressed by Mr Stephenson, particularly in an area such as this where, as the evidence establishes, the residents put a high value on privacy and low density. The backyard of the subject land is above and looks over the backyard of Lot 19. As was observed by Myers J in *Parimax (SA) Pty Ltd*:[40]

> An order modifying a restriction is a serious inroad upon the proprietary right which is vested in the person who is entitled to enforce the restriction. An order, therefore, which is opposed by the person entitled to the benefit of the restriction should not, in my view, be made, unless the applicant establishes to the reasonable satisfaction of the court that one or other of the conditions prescribed by the section is being fulfilled.[41]

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39 Supp report [26].
40 [1956] SR (NSW) 130, 133 (Myers J).
41 Ibid 131.

66 The plaintiff contends that Mr and Mrs Stephenson will suffer no relevant injury because the detriment, of which Mr Stephenson complains, would be similarly caused by the construction of an extension or a new single dwelling, which could cover up to 60% of the block. I reject this submission for the following reasons:

(a) I do not consider that the risk of such a development occurring without the removal of a covenant is realistic. There is no evidence to suggest that there is any real prospect that the owners of the subject land would demolish and reconstruct a much larger house; or they would construct an extension over an area, similar to that proposed for the second dwelling. The injury to Mr and Mrs Stephenson arises from the comparison of the near certainty of the proposed second dwelling with the remote prospect of an alternative construction, permitted under the restrictive covenant, having a similar impact.

(b) I consider it is reasonable for Mr and Mrs Stephenson to be more concerned about the construction of a house, from where persons can overlook their backyard, than the construction of a shed. As the person entitled to the benefit of the restriction, Mr Stephenson is entitled to say that he does not want a house overlooking his backyard.[42]

67 I do not consider that Mr Stephenson's concerns can be described as fanciful, insincere or lacking in bona fides. I am not satisfied that that the plaintiff has established that Mr and Mrs Stephenson, as the owners of Lot 19, will not be substantially injured (in the relevant sense) by the modification of the covenant.

Lot 23

68 The house at Lot 23 is positioned to look over the backyard of the subject land north towards the view, to which I have previously made reference. The second dwelling on the subject land has been designed in a manner which means it should not obstruct the view from Lot 23 as such. However, it would be expected that the view

42 Ibid 133.

from Lot 23, which previously looked over a backyard, would now have a dwelling in the foreground.

69 Mr Easton gave evidence that the existence of a new single storey low profile dwelling at the rear of the subject land will have no impact on these views. Further, he said that the second dwelling would have less impact than if a standard free standing garage with a pitched roof was to be constructed.

70 I consider that residents, particularly in an area such as Karrala Court (as previously described), are entitled to enjoy the benefit of a backyard adjoining another backyard rather than a dwelling. I am not satisfied that a second dwelling adjoining the Bennetts' backyard would not impact on their amenity. The increase in density must increase the likelihood of issues arising from noise and other matters when the Bennetts are enjoying their backyard.

71 The plaintiff again contends that Mr and Mrs Bennett will suffer no relevant injury because the same detriment would be caused by the construction of an extension or a new single dwelling. I reject this submission for the same reasons as those made with respect to Mr and Mrs Stephenson.

Order

72 I propose to dismiss the Originating Motion.
