

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

Not Restricted

S ECI 2018 01168

IN THE MATTER of an application under section 84 of the *Property Law Act 1958* (Vic)

- and -

IN THE MATTER of an application for the discharge or modification of a restriction arising under a covenant in a transfer of land registered no. 1853030 affecting the land at 1017 High Street, Reservoir, Victoria, being the land in Certificate of Title Volume 06543 Folio 557 by:

XIAOLONG ZHANG

Plaintiff

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JUDGE: Derham AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 15 November 2018  
DATE OF JUDGMENT: 22 November 2018  
CASE MAY BE CITED AS: Re Zhang  
MEDIUM NEUTRAL CITATION: [2018] VSC 721

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PROPERTY - Restrictive covenant - Application to modify restrictions in covenant pursuant to the *Property Law Act 1958* (Vic), s 84 - Modification of covenant to remove restriction on 'hoarding for advertisement purposes', to allow for excavation works to be carried out 'for the provision of driveways, garden beds and the like', and to allow not more than four dwelling houses - Whether discharge or modification will not substantially injure the persons entitled to the benefit - Application granted - Applicable legal principles - *Property Law Act 1958*, s 84(1)(c).

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Townsend	MPW Lawyers

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HIS HONOUR:

### Introduction

- 1 The plaintiff is the registered proprietor of the land at 1017 High Street, Reservoir, Victoria (**Land**).<sup>1</sup> The Land is burdened with a restrictive covenant that, amongst other restrictions, prevents the erection of more than one dwelling on the Land. The plaintiff has applied to the Court pursuant to s 84(1)(c) of the *Property Law Act 1958* (Vic) (**PLA**) to modify the Covenant affecting the Land to the allow the erection of four dwellings on the Land.

### The covenant

- 2 The Land is lot 26 on Plan of Subdivision 8486 (**Plan of Subdivision**). The covenant was created when Thomas Michael Burke transferred the Land out of the parent title (Volume 4984 Folio 717) by instrument of transfer 1853030 on 20 February 1942. The parent title was a part of a larger subdivision commenced in 1925. The Land is proximate to, and in the same subdivision as, the land the subject of the decision in *Stanhill Pty Ltd v Jackson*,<sup>2</sup> in which a substantially similar restriction was modified to allow the erection of not more than two dwelling houses. In his judgment in that decision Morris J observed:<sup>3</sup>

It would appear that in about 1919 two entrepreneurs, Thomas Michael Burke and Patrick Deane, purchased 1,119 acres of land at Reservoir and gradually commenced the process of subdividing the land into more than 3,000 lots. Initially the residential lots were transferred directly out of the original title. Later larger lots were transferred out of the original title, then these larger lots were further subdivided into residential lots. One of these larger lots, Volume 4984 Folio 717, was transferred from the original parcel on 10 February 1925. Subsequently this lot was divided into 145 residential lots, including the subject land.

- 3 The essential terms of the covenant, annotated to show the modifications sought by the plaintiff, are as follows:

... and the said William Joseph Burke DOTH HEREBY for himself his heirs executors administrators and transferees COVENANT WITH THE SAID

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<sup>1</sup> The land more specifically described in Certificate of Title Volume 6543 Folio 557.

<sup>2</sup> [2005] VSC 169 (Morris J) (*Stanhill*).

<sup>3</sup> Ibid [4].

Thomas Michael Burke his heirs executors administrators and transferees the registered proprietor or proprietors for the time being of the land remaining untransferred in the said Certificate of Title

- (a) ~~No hoarding for advertisement purposes shall be erected on the said lot hereby transferred.~~
- (b) No quarrying operations shall at any time hereafter be carried on in or upon the said lot hereby transferred and no stone earth clay gravel or sand shall at any time hereafter be carried away or removed from the said lot hereby transferred except for the purpose of excavating for the foundations of any building to be erected thereon **or for the provision of driveways, garden beds and the like.**
- (c) No shops laundries factories or works shall be erected on the said lot hereby transferred and not more than ~~one~~ **four** dwelling houses shall be erected on the said lot hereby transferred ~~and the cost of constructing such house shall not be less than four hundred pounds (inclusive of all architects fees and the cost of erecting any outbuildings and fences)....~~

### The plaintiff's evidence

4 The plaintiff primarily relies on a report of Robert Walter Easton (**the Easton Report**).<sup>4</sup> Mr Easton's evidence is referred to below in the background facts and in my consideration of the evidence and submissions. In addition;

- (a) the plaintiff has sworn an affidavit confirming his intention to construct four dwellings on the Land in accordance with a proposed plan referred to in the Easton Report;<sup>5</sup>
- (b) the plaintiff's solicitor has sworn an affidavit as to service of the notices of the application on beneficiaries of the covenant, the posting notices of the application on the Land, as required by orders of the Court made on 20 September 2018, and the responses by beneficiaries (and non-beneficiaries) of the covenant objecting to the modifications sought.

### The beneficiaries

5 Notice was given to selected beneficiaries of the covenant (landowners and mortgagees of the properties having the benefit of the covenants) in the usual way.

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<sup>4</sup> The Easton Report is Exhibit RWE-1 to the affidavit of Robert Walter Easton made 24 August 2018.

<sup>5</sup> Affidavit of Xiaolong Zhang made 31 August 2018.

The properties having the benefit of the covenant were identified in the Easton Report. As is usual in Mr Easton's reports, he prepares a plan that identifies the benefitted properties, as follows:



Figure 7: Benefit Plan showing parent title outlined in bold. Areas not in title are marked N. Subject land coloured pink. All lots, reserves and sections of laneway coloured yellow, have the benefit of the covenant.

- 6 The owners of 17 properties gave notice of objection to the modifications sought (many do not having the benefit of the covenant). There were six owners with the benefit of the covenant who gave notice of objection. Only one owner, Mario Gambaro of 1045 High Street, Reservoir, appeared before the Court, as required by the orders of the Court, to maintain his objection. This was hardly surprising as it emerged that Mr Gambaro's daughter had 'letterboxed' other property owners in the neighbourhood with a proposed letter of objection for them to sign and send to the plaintiff's solicitors. Many did so, but did not appear.
- 7 It also emerged in the course of the hearing that Mr Gambaro's ability to speak English was limited and his ability to read and write English was nearly non-existent. His daughter, Maria Lucia Gambaro, had prepared the written letter of objection after

discussing the matter with her father. She assisted her father to present his objection to the Court without he being added as a defendant. Mr Gambaro gave evidence in support of his objections, with the assistance of his daughter.

### **Location of the Land**

- 8 The Land is a rectangular shaped lot on the corner of High Street and Gellibrand Crescent, Reservoir.<sup>6</sup> It has an area of 10,290 square feet (955 square metres). It is developed with a single story brick veneer dwelling with a tiled roof. It is oriented to High Street but has two driveways, one at the corner accessing High Street and one at the rear accessing Gellibrand Crescent. There is a large outbuilding in the back yard oriented to Gellibrand Crescent.
- 9 High Street, Reservoir, on which the Land fronts, is a very busy road with a relatively low level of residential amenity at its frontage. On the other side of High Street there is the railway. The property immediately to the north of the Land (1019 High Street) has the benefit of the covenant. Its owner has not objected to the plaintiff's application. That may be because the evidence is that the owner has applied for a planning permit to build six two storey townhouses on that land.<sup>7</sup> The properties to the immediate west of the Land do not have the benefit of the covenant. Mr Gambaro's property is about 300 metres north of the Land and fronts High Street.
- 10 The following aerial photograph shows the Land, part of High Street (to the right running about vertically) and Gellibrand Crescent (running about horizontally) and part of a five dwelling development on the opposite corner of Gellibrand Crescent and High Street, being 1015 High Street.<sup>8</sup>

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<sup>6</sup> Rectangular except for a splayed corner.

<sup>7</sup> Easton Report [7.4].

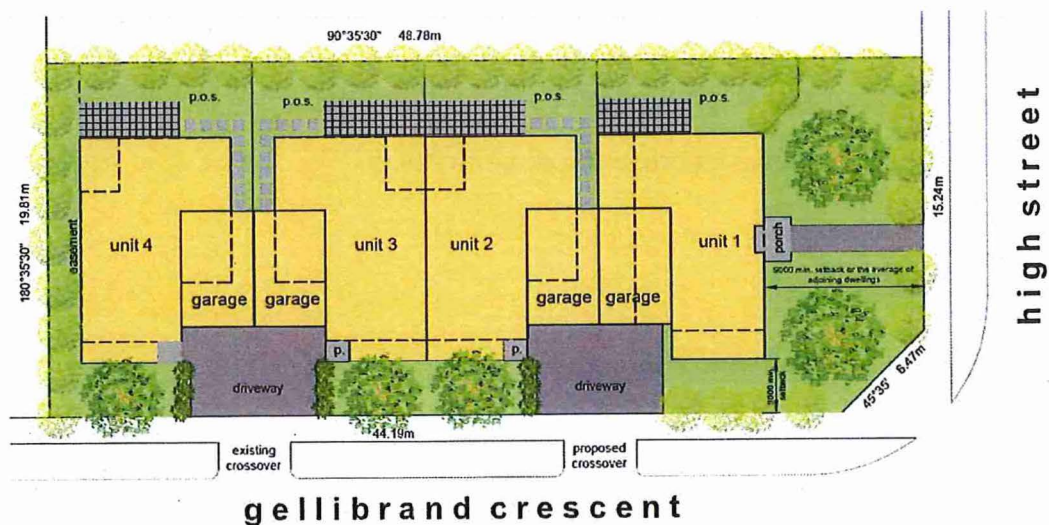
<sup>8</sup> Easton Report, Figure 5.





### The proposed development

- 11 The plaintiff proposes to demolish the house and other improvements presently on the Land and construct four dwellings. All four dwellings will be accessed via Gellibrand Crescent rather than High Street (save for pedestrian access), as the following plan depicts:<sup>9</sup>



<sup>9</sup> Easton Report, Figure 8.

### **Planning and building controls**

- 12 Town planning controls and considerations are not directly relevant to the application for the discharge or modification of a restrictive covenant. They do, however, provide a backdrop and establish a framework to assess how the subject land may be developed subject to or in the absence of the restrictions in the covenants. The Eastern Report notes that the Land is in a General Residential 2 Zone. There is a mandatory requirement for a minimum garden area of 35% for lots over 650 square metres and a mandatory height limit of 11 metres, but no limit on the number of dwellings. A planning permit will be required to subdivide the Land as proposed.
- 13 Specific standards apply to one or more dwellings on a lot. The detailed standards set out in 'Rescode' apply.<sup>10</sup> The Rescode standards apply to such things as overlooking, overshadowing, length of walls on boundary and neighbourhood character. Schedule 2 of the General Residential Zone requirements applies only to lots facing High Street. The lots in the hinterland west of High Street are in the Schedule 1 area and they are subject to more stringent controls than are applicable along High Street, where the Land is situated. This recognises that the character of the neighbourhood along High Street is different from that to the west. The Darebin Council have introduced a Development Contributions Plan Overlay for lots facing High Street. This requires any additional dwellings to make a financial contribution to other services in the area and reduces the financial impact of development on beneficiaries of the covenant. In the event that the construction cost of the proposed four dwellings exceeds \$1 million the owner is required to pay a Metropolitan Planning Levy to the State Government to cover necessary infrastructure improvements.<sup>11</sup>

### **Applicable law**

#### **Construction of restrictive covenants**

- 14 In *Clare v Bedelis*<sup>12</sup> I set out the relevant principles of interpretation applicable to restrictive covenants. In summary, subject to certain qualifications, it is necessary to

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<sup>10</sup> Set out in cls 54 and 55 of the Darebin Planning Scheme.

<sup>11</sup> Easton Report [8].

<sup>12</sup> [2016] VSC 381, [31].



discover the parties' intention revealed by the language of the relevant document, giving words their ordinary meaning and construing them in their context, with regard to the purpose or object of the restriction from the eyes of a reasonable reader. If the meaning of the covenant is ambiguous, then it ought be interpreted against the covenantor.

### **Discharge or modification**

- 15 The plaintiff relies on s 84(1)(c) of the *PLA*, and therefore has the burden of proving as a matter of fact that the proposed discharge or modification will not substantially injure those with the benefit of the covenant.<sup>13</sup> The plaintiff must prove the negative<sup>14</sup> and the failure by the plaintiff to establish its plans with specificity may result in the Court not being satisfied that the conditions of the section have been fulfilled.<sup>15</sup>
- 16 The following guiding principles apply to determine whether those entitled to the benefit of the covenant will not be substantially injured:
- (a) a substantial injury must be a detriment to the benefitted land that is real and not fanciful.<sup>16</sup> The requirement that the injury must be substantial is intended 'to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds'.<sup>17</sup> That does not mean, however, that s 84(1)(c) of the *PLA* is restricted to dealing with vexatious or frivolous objections. Although the restriction of s 84(1)(c) of the *PLA* to 'substantial' injury would enable the weeding out of vexatious objections to the modification or removal of a covenant, the dichotomy in the section is not between vexatious and non-vexatious claims but is between cases involving some genuinely felt but insubstantial injury, on the one hand, and cases where

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<sup>13</sup> *Vrakas v Registrar of Titles* [2008] VSC 281, [40] (Kyrou J) and the cases cited (*Vrakas*).

<sup>14</sup> *Ibid* [42].

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* [36].

<sup>17</sup> *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.

the injury may truly be described as substantial, on the other.<sup>18</sup>

- (b) the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant.<sup>19</sup> It is not sufficient for a plaintiff to merely prove that there will be no appreciable decrease in the value of the property that has the benefit of the covenant;<sup>20</sup>
- (c) substantial injury may arise from 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'.<sup>21</sup> This consideration is referred to as the 'precedent value';<sup>22</sup> and
- (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.<sup>23</sup>
- (e) 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) of the *PLA*.<sup>24</sup>
- (f) it is relevant to consider evidence of statutory planning provisions to the extent they show what realistically will be the result of the removal or modification of

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<sup>18</sup> *Greenwood v Burrows* (1992) V ConvR 54-444, 65, 199 (Eames J) (*Greenwood*); *MacLurkin v Searle* [2015] VSC 750, [54]-[56] (*MacLurkin*); *Jiang v Monaygon Pty Ltd* [2017] VSC 591, [37].

<sup>19</sup> *Vrakas* [2008] VSC 281, [30], [34] and the cases cited.

<sup>20</sup> *Re Parimax (SA) Pty Ltd* (1956) 56 SR (NSW) 130, 133 (Myers J).

<sup>21</sup> *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11.

<sup>22</sup> *Vrakas* [2008] VSC 281, [39] and the cases cited.

<sup>23</sup> *Prowse v Johnstone* [2012] VSC 4, [104] (*Prowse*).

<sup>24</sup> *Re Cook* [1964] VR 808, 810-11 (Gillard J) (*Cook*); approved in *Freilich v Wharton* [2013] VSC 533, [25] (Bell J).

the covenant because 'it would be artificial and wrong to pay no heed at all to the reality of the situation'.<sup>25</sup>

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

(i) town planning principles and considerations are not relevant;<sup>26</sup>

(ii) the absence of objectors to the discharge or modification of a covenant will not necessarily satisfy the onus of proof;<sup>27</sup> and

(iii) each case must be decided on its own facts,<sup>28</sup> and each covenant should be construed on its own terms and having regard to the particular context in which it was created.<sup>29</sup>

(h) If the plaintiff satisfies the Court that there will be no substantial injury to the relevant persons, the Court has a residual discretion to refuse the application.<sup>30</sup> The Court in exercising its discretion, may consider town planning principles and the precedent value.<sup>31</sup>

17 The common single dwelling covenant is imposed for the purpose of ensuring one residence only can be erected on the subject land, so that there would be a reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence.<sup>32</sup> The general suggestion is that this living environment would be reduced by higher density housing, leading to a reduction of open space, a greater congestion of people and traffic and an increased

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<sup>25</sup> *Prowse* [2012] VSC 4, [104].

<sup>26</sup> *Vrakas* [2008] VSC 281, [41] and the cases cited.

<sup>27</sup> *Ibid* [43].

<sup>28</sup> *Ibid* [44].

<sup>29</sup> *Prowse* [2012] VSC 4, [52].

<sup>30</sup> *Cook* [1964] VR 808, 810; *Re Robinson* [1972] VR 278, 285-6; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR 54-444, 65, 192, 65, 200; *Stanhill* (2005) 12 VR 224, 239.

<sup>31</sup> *Vrakas* [2008] VSC 281 [45]-[46].

<sup>32</sup> *Re Stani* (Unreported, Full Court of Supreme Court of Victoria, 7 December 1976) 8; See also *Re Miscamble's Application* [1966] VR 596, 601 (*Miscamble*); *MacLurkin* [2015] VSC 750, [59]; *Re Morihovitis* [2016] VSC 684, [38] (*Morihovitis*).

demand on municipal amenities. The judgment to be made about 'substantial injury' turns on the nature and degree of the injury to those benefits.<sup>33</sup>

### **Submissions and consideration**

#### **No hoarding for advertisement purposes**

- 18 This part of the covenant is a basic form of advertising control. In the Easton Report, the opinion is given that it is now obsolete as large commercial advertising hoardings are no longer able to be placed in residential areas. Small residential signs, real estate signs and signs relating to a lawful use on the land are the only signs generally allowed under present day planning controls.<sup>34</sup> Mr Gambaro suggested that the restriction was intended to prevent 'suburban neighbourhood homes for families' being turned into business premises.<sup>35</sup> There was no opposition by any person to the discharge of this part of the covenant. It is in my view obsolete as a form of planning control. Indeed, Mr Gambaro had, at the time of my view, affixed to the fence of his property an array of boards advertising a candidate for election to, I think, the local Council.
- 19 In light of the uncontested evidence given by Mr Easton that this restriction is obsolete, and the lack of opposition to its discharge, it is strictly unnecessary to say much about its meaning or reach. But in deference to the views of Mr Gambaro, and in light of comments I made at the hearing about the scope of the restriction, it is appropriate I say a little about its meaning.
- 20 The construction Mr Gambaro places on the restriction is, in my opinion, broadly correct. The Macquarie Dictionary defines:<sup>36</sup>
- (a) 'hoarding', relevantly, as 'a large board on which advertisements or notices are displayed; a billboard';
  - (b) 'advertisement' as any device or public announcement, as a printed notice in

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<sup>33</sup> *Morihovitis* [2016] VSC 684, [38].

<sup>34</sup> Easton Report [5.2].

<sup>35</sup> Exhibit MPW-4 to the affidavit of Myles Patrick Watson made 13 November 2018, Mr Gambaro's letter of objection dated 11 October 2018.

<sup>36</sup> Susan Butler (ed), *The Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 6<sup>th</sup> ed, 2013).

a newspaper, commercial film on television, a neon sign, etc., designed to attract public attention, bring in custom, etc.

- 21 Construed literally, this restriction would prevent the erection on the land of a real estate 'for sale' or 'for lease' sign, for example, or a board supporting a candidate for election. But when construed in the context of a residential property in a residential neighbourhood, it seems to me that the purpose of the restriction is not to prevent reasonable advertising of properties for sale or for lease, or supporting a candidate for election. Its purpose is to prevent the erection on the Land of a board on which are displayed advertisements, particularly business advertisements, of a kind unconnected with the residential character of the land. Thus, advertising a business or advertisements for the sale of goods or land (other than the land in question) are covered by this restriction. In my opinion, the reasonable reader knows that in the Melbourne metropolitan area, 'for sale' signs on properties using a large board, sometimes with pictures of the dwelling, and details of its features is so common (and permitted by the planning laws) that to construe this restriction in accordance with its literal meaning would be to misread its purpose.

#### **Quarrying restriction.**

- 22 The second part of the covenant is an early form of planning control designed to prevent the establishment of quarries and sandpits on the outskirts of Melbourne. These uses are now strictly controlled by both planning controls and specific legislation relating to extractive industries. It is no longer likely that these uses will be established in any residential area.<sup>37</sup> This particular part of the covenant provides an exemption for building foundations, but does not provide any exemption in respect of driveways and landscaping. There is no opposition to the modification sought.
- 23 The purpose of the covenant initially was to preserve the amenity of the benefitted lots as a residential neighbourhood and that this purpose is not substantially affected by extending the scope of permitted excavation works to include works in connection

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<sup>37</sup> Easton Report [5.3].

with any residential use. The plaintiff's proposal is to preserve the covenant against commercial quarrying, but to broaden the exception to allow for some residential works. It may be that it was not the intention or purpose of this covenant to prevent establishing driveways, garden beds and the like. To that extent the modification sought may be unnecessary.

- 24 If the covenant is not modified, however, the plaintiff's proposal may be thwarted by a strict reading and application of the covenant, notwithstanding the fact that the covenant was not intended to apply to non-commercial construction.<sup>38</sup> It is therefore, in the interests of avoiding disputes, desirable to provide the modification as sought. It will cause no substantial injury to any of the benefitted properties,

### **Single dwelling restriction**

- 25 A single dwelling covenant is directed to limiting the density of population with a view to enabling a reasonably quiet residential atmosphere with a more attractive, tranquil and quiet existence.<sup>39</sup> The general suggestion is that this living environment would be reduced by higher density housing, leading to a reduction of open space, a greater congestion of people and traffic and an increased demand on municipal amenities. The judgment to be made about 'substantial injury' turns on the nature and degree of the injury to those benefits.<sup>40</sup>

- 26 With the agreement of the plaintiff and Mr Gambaro, I undertook an unaccompanied view of the Land and its surrounds. That view has confirmed to me the evidence given by Mr Easton in his Report that:

- (a) the area in which the Land is located, on a busy main road, does not bear any direct relationship to the areas to the west and remote from High Street;
- (b) several other properties fronting High Street have been developed with multi-

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<sup>38</sup> See *Freedom90 Pty Ltd v Bass Coast SC* [2010] VCAT 1034.

<sup>39</sup> *Re Stani* (Unreported, Full Court of Supreme Court of Victoria, 7 December 1976) 8; see also *Miscamble* [1966] VR 596, 601; *MacLurkin* [2015] VSC 750, [59]; *Morihovitis* [2016] VSC 684, [38]; *Oostemeyer v Powell* [2016] VSC 491, [53].

<sup>40</sup> *Morihovitis* [2016] VSC 684, [38].



unit dwellings;

- (c) the impact of erecting four dwellings on the Land would not be greater than one larger dwelling, a community building or a medical centre (which could otherwise be built under the planning laws);
- (d) the main impact on the amenity of properties along High Street is from traffic and other issues relating to that traffic rather than the type of dwelling or number of dwellings on individual properties;
- (e) similar covenants have, in the past, applied over the majority of the lots in the neighbourhood. In excess of 50% of these lots have had the covenants varied, discharged or ignored to facilitate alternative forms of development. The remaining covenants are unlikely to assist in preserving the original neighbourhood character, particularly along High Street;
- (f) the covenant does not limit the number of storeys that can be constructed and there are examples of both single and double storey dwellings in the neighbourhood;
- (g) the covenant does not specify the amount of land which must be left free of development, for open space, gardens or landscaping. There are several examples in the neighbourhood where developments occupy a larger site coverage than the original housing stock;
- (h) there will be minimum impact on any neighbouring properties;
- (i) all other properties having the benefit of the covenant are so remote from the Land that there will be no significant impacts from overlooking, overshadowing and other amenity issues;
- (j) there will be no noticeable reduction in the space available for light and air in the locality and the curtilage around the proposed four dwellings is likely to be equivalent or greater than that available around many of the other new

dwellings in the neighbourhood;

- (k) there will be a minor increase in the density of the population of the area. But due to the location of the Land on High Street, the area can absorb this increase without detriment to other properties;
- (l) the covenant does not specify a maximum size of any dwelling or prevent any dwelling being used as a boarding house or similar establishment. It could therefore not have any implication for the density of the population in the area;
- (m) there will be no reduction in the quality of life for beneficiaries of the covenant within the neighbourhood. The present rear yard of the Land does not contribute to their enjoyment and is generally remote from them;
- (n) modification of the covenant as proposed would not constitute a precedent for further similar developments as more than 50% of the original lots in the subdivision have already been the subject of changes.

27 The fact that the proposed modification will not be a precedent is evident from the following summary of the developments in the neighbourhood. The analysis of the neighbourhood undertaken by Mr Easton shows that it has been the subject of significant re-subdivision since its initial creation, broadly as follows:<sup>41</sup>

- (a) 1015 High Street – five townhouses;
- (b) 1029 High Street – three single storey dwellings;
- (c) 1039 High Street – four single storey dwellings;
- (d) 1041 High Street – five attached dwellings (covenant modified or discharged);
- (e) 1049 High Street – three single storey dwellings;
- (f) 1065 High Street – five single storey dwellings (covenant modified or discharged);
- (g) 1067 High Street – five single storey dwellings (covenant modified or

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<sup>41</sup> Easton Report [9].

discharged);

- (h) 1079 High Street — five double storey townhouses (covenant modified or discharged);
- (i) 6 Gellibrand Crescent — two dwellings (covenant modified or discharged).  
There has been a further subdivision since the covenant was modified as a result of the decision in *Stanhill*; <sup>42</sup>
- (j) 9 Hughes Parade — three double storey townhouses;
- (k) 10 Asquith Street — 13 dwellings;
- (l) 38 Sturdee Street — three dwellings;
- (m) 34 Sturdee Street — two dwellings;
- (n) 22 Sturdee Street — three townhouses;
- (o) 14 Sturdee Street — three dwellings;
- (p) 12 Sturdee Street — three single storey dwellings;
- (q) 13-15 Jackson Street — three dwellings (covenant modified or discharged);
- (r) 23 Jackson Street, 26 Rosenthal Crescent and 26 Rodman Street — three dwellings (covenant modified or discharged);
- (s) 31 Rosenthal Crescent — four dwellings;
- (t) 35-39 Rosenthal Crescent (covenant modified or discharged).

28 Any traffic impacts as a result of the approval of the application will not result in any increased burden on the beneficiaries of the covenant. The concept plans for the proposed redevelopment show that it is intended that sufficient off-street parking will be provided to support the demands of the additional dwellings, thereby limiting any potential traffic or parking impacts.<sup>43</sup>

29 The Land is located on the periphery of the Plan of Subdivision, fronting on a main road. This places the Land in a different context from a majority of the land within

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<sup>42</sup> [2005] VSC 169.

<sup>43</sup> Easton Report [7.7].

the Plan of Subdivision, further limiting the creation of any precedent. This distinctive site context of the Land limits the ability of the modification to be used as a precedent for land to the west of High Street, although I note that there are many precedents set already.

30 Mr Gambaro made a number of complaints, some of which had to do with the removal of the single dwelling covenant and the proposition that there would be an increased density of population:

- (a) Mr Gambaro was particularly concerned with the precedential value of the multi-dwelling development proposed on the Land. As I have already pointed out, the precedent has been set both in relation to the Plan of Subdivision as a whole but, more relevantly, in relation to the properties along High Street. There is no possibility that the modifications sought in this case to remove the single dwelling restriction will have any precedential value;
- (b) Mr Gambaro was worried about a change to the 'heritage' of the neighbourhood character. He maintained that Reservoir is of historical significance in providing individual single dwellings on properties to establish self-sufficient living, with vegetable gardens and food producing trees. The gardens in the neighbourhood are significant and remain as large individual spaces. The transformation of gardens into dwellings will affect the heritage of the area detrimentally. The plaintiff responded that this is a point that was set out in the letter of objection written by Mr Gambaro's daughter but not particularly supported by Mr Gambaro in his evidence given in Court. The answer is, however, that the neighbourhood has significantly changed in any event and the preservation of large gardens, particularly along High Street, has been, and looks like it will continue to be, eroded;
- (c) Mr Gambaro also complained of traffic management along High Street and future congestion in the surrounding area, not only during construction but ongoing due to the number of vehicles using the surrounding area for parking.

He was particularly concerned that the rubbish collection system was affected by parked vehicles. I have to say that upon my view of the Land and its locality, the level of on-street parking was not noticeably high, compared with my inspection of other suburbs in the Melbourne metropolitan area. In any event, the proposed plan makes allowance for one garage and one other off-street parking space for each dwelling;

- (d) Mr Gambaro was also concerned with the impact of the development on the environment. He believes it will affect the natural habitat of native fauna in the area by the continuing loss of trees and vegetation due to the land being cleared for multi-dwelling developments. It can be seen from the photographs that there is a vegetable garden at the rear, and trees to the front, of the house on the Land, but little of significant value for local fauna. There are street trees of significant size which should not be affected by the development. There will, in any event, be a landscaping plan developed as a result of the necessity to have a planning permit;
- (e) Mr Gambaro was also concerned about the increase in domestic animals affecting native fauna. This is not controlled by the covenant nor is it likely to be impacted by this covenant being modified. There is nothing to stop an owner of land in the area having any number of pets, particularly cats;
- (f) Mr Gambaro was concerned with the increase in the noise resulting from having more residents on the one property. In my view, having regard to the noise level generated by traffic on High Street as it presently stands, this is a matter of no significance. According to his evidence, the noise from the train already wakes him up at night;
- (g) Mr Gambaro also complained of the impact of the development on what he described as the urban fabric of Reservoir. This, he maintained, would impact on the infrastructure in the area, including schools and social services. In my view, these are matters that are adequately dealt with under the Darebin

Planning Scheme and more properly to be dealt with in that way. Except to the extent that they are a consequence of an increase in the population in the area, they are beyond the scope of the covenant.

31 Mr Gambaro also raised that:

- (a) there would be a negative impact on the value of his property;
- (b) the construction of units or townhouses on the Land would be likely to increase the number of dwellings being rented out and impact upon stormwater drainage along High Street.

32 There is no proper evidence of the impact of the development on the values of properties along High Street. My experience in dealing with applications for the modification of restrictive covenants, particularly those restricting developments to a single dwelling, indicate that the reverse is much more likely to be the case; that is, the value of Mr Gambaro's land is likely to be increased by the prospect of its development.

33 The notion that increased tenanting of properties in the area might detract from the object of a single dwelling covenant seems to be based on the proposition that higher density housing when rented will result in a lower standard of maintenance. My observation of the neighbourhood during the view is that the standard of maintenance of properties is patchy at best. In my view, this objective is in any event beyond the scope of the covenant.

34 In relation to the impact on stormwater drainage, there is no real evidence that the construction of four dwellings on land 300 metres to the south of Mr Gambaro's land is likely to impact on that drainage. The evidence Mr Gambaro gave indicated that the stormwater fall was from north to south and it appeared his concern was the inability of providing for stormwater from the roofs of the four units actually to be directed to the stormwater drain running along High Street. This factor too is, in my view, beyond the scope of this covenant.



35 Having regard to Mr Easton's evidence, and my view of the neighbourhood of the Land, I agree with the plaintiff's submission that there will be no substantial injury to any of the benefited properties, particularly that owned by Mr Gambaro. On the view I undertook of the area around the subject land, I observed the character of the surrounds, including the many multi-dwelling developments in the neighbourhood and the significant volume of traffic on High Street. There is a distinct lack of any sense of 'tranquillity' along High Street, let alone an environment that permits a quiet existence. The same cannot be said of the areas to the west of the Land, where despite a number of multi-dwelling developments, the atmosphere is significantly more peaceful.

### Conclusion

36 For the above reasons, the covenant burdening the Land should be modified as proposed by the plaintiff.

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### CERTIFICATE

I certify that this and the 18 preceding pages are a true copy of the reasons for Judgment of Derham AsJ of the Supreme Court of Victoria delivered on 22 November 2018.

DATED this twenty second day of November 2018.

