

## Applications for removal or variation of restrictive covenants

When considering any planning permit application Council is required to find out whether the particular application might contravene a restrictive covenant which affects the land. If it does, then as a legal requirement, Council is not permitted to consider the relevant planning permit application.

### What should permit applicants do?

An applicant might decide not to proceed with the application or they might consider whether to attempt to remove or vary the covenant.

There are three methods by which covenants may be removed or varied. These are:

- An application to the Supreme Court of Victoria;
- A request to amend the Planning Scheme; or
- An application for a Planning Permit.

This information sheet relates to an application for a Planning Permit to remove or vary covenants. However the landowner should obtain legal advice in order to consider whether any of the other methods are appropriate in their circumstance.

The issue of covenants and their removal raises complicated questions of property law and planning law. While Council Officers can be of some assistance regarding procedure, potential applicants will need to obtain independent advice about the best approach for them and their prospects of success.

### Planning permit applications

If an application is made for a planning permit to remove or vary a restricted covenant then the Council will, by necessity, require the applicant to provide certain information and follow a specific procedure for the application.

After the matter is appropriately advertised, the rights of all relevant persons are considered and the property tests under the *Planning and Environment Act 1987* are applied, Council will make a decision on the application.

As with most other planning permit applications, there is a right to appeal to the Victorian Civil and Administrative Tribunal, both for the permit applicant, or for objectors to the permit.

### Information required from applicants

The applicant must provide various information for Council to make decisions about the advertising requirements for the application and also the merits for the application.

Council will require applicants to provide a letter from a suitably qualified property lawyer which confirms the existence of the covenant and indicates which other land and landowners have the benefit of the covenant along with copies of relevant title documents. The reason is that the cost of and responsibility for gathering information and making initial assessments of such matters lies with the applicant.

Often restrictive covenants are created in the transfers of lots on a plan of subdivision (that is the division of any original title into smaller lots). In these cases Council will require, in addition to a solicitor's letter, as a minimum:

- A copy of the original 'parent' title from which the subdivision was created;
- A copy of the plan of subdivision;
- A copy of all of the transfers of land from the original owner/subdivider to the first purchaser of the various lots within the subdivision; and
- Copies of each and every title created within the subdivision.

**Note: All title searches must be less than 30 days old.**

There are other ways covenants can be created and these need to be considered on a case-by-case basis.

Once Council has received all of the necessary information it will consider the matter and form its own views, as required under legislation.

## What advertising is required?

It is essential to identify all persons who benefit from the covenant because the application must, at a minimum, be advertised to every beneficiary of the covenant, together with a sign on site and a notice in the newspaper.

Council will generally require the permit applicant to write to each and every beneficiary of the covenant enclosing a copy of the application and inviting submissions, either in support or opposition. Usually a sign giving notice of the permit application will also need to be erected on the applicant's land.

Advertising the proposed variation or removal of the restrictive covenant is a separate process from any advertising required for a concurrent permit application.

## The tests Council must apply

If the restrictive covenant was created on or after 25 June 1991, Council must not grant the permit unless it is satisfied that the owner of any benefiting land will be unlikely to suffer:

- Financial loss; or
- Loss of amenity; or
- Loss arising from change to the character of the neighbourhood; or
- Any other material detriment.

In respect to restrictive covenants created before 25 June 1991, Council must not grant a permit unless it is satisfied that:

- Owners of land benefiting from the restriction will be unlikely to suffer any detriment of any kind (including any perceived detriment); AND
- If a benefiting owner objects to the granting of the permit, that objection is vexatious or not made in good faith.

The second of these tests, applying to covenants created before 25 June 1991 is difficult to satisfy. It is in two parts, first Council must consider all beneficiaries of the covenant (not just those who object) and second, Council must come to a positive view that any beneficiary who has objected was acting vexatiously or not in good faith. Both parts of the test must be satisfied.

The tests applying to covenants created after 25 June 1991 although slightly easier to satisfy also contain a number of complex questions.

It would be of particular benefit to the permit applicant to include in the application details of how the tests are supposed to be satisfied. As this is often a fairly complex assessment it is helpful for applicants (if they can) to obtain professional assistance from a town planning consultant or solicitor.

## Conclusion

The reason the above process and the tests are quite onerous is because the very purpose of the application is to remove the rights of the people who benefit from the covenant as a result of ownership of their land.

Removal or variation of restrictive covenants through the planning permit process is therefore something which should be approached after a great deal of 'homework'.

There are other mechanisms, as mentioned above, which can be considered if the permit application process fails or is considered, inappropriate. Of those procedures, only the planning scheme amendment process is carried out by Council. If you want to discuss this possibility we suggest that in addition to talking to Council's town planning department you also take advice from a town planning consultant or solicitor.