



Elizabeth Linedale presented an edited version of this paper at the Association of Consulting Surveyors (Victoria) Inc Biennial Seminar on 4 March 2009.

MCPs, Approved Building Envelopes & Notices of Restriction - the Legal Perspective

I have been asked to briefly mention other forms of building controls used by developers and how they relate to approved building envelopes. I have also been asked to share some problems that I have come across with respect to interpretation of MCPs and will mention a few other things which I think are easily forgotten, and may therefore trap land owners and developers.

Other forms of building controls:

- ❖ Contractual terms
- ❖ Design and Siting Guidelines/Architectural Review Panels
- ❖ Restrictive Covenants
- ❖ Restrictions on Plans
- ❖ Approved Building envelopes created through a restriction on a plan (and incorporation of MCP's or a section 173 Agreement
- ❖ Combination of a number of the above

Each should to be considered by reference to:

- ❖ their effect on Part 4 of the Building Regulations 2006 ("**Part 4**");
- ❖ enforceability (how and by whom); and
- ❖ difficulty in varying or removing them

to determine which best achieves the desired outcome.

Contractual terms

Contractual terms on their own have no effect on the requirement to comply with Part 4.

A vendor and purchaser may agree on almost any contractual term, and this often means that a developer can simply stipulate the kinds of building controls it desires in its contracts. Depending on the market at the time of sale, and sometimes on who the purchaser is, there is often little negotiation about this in my experience.

The main problem with contractual terms is that they are only enforceable between the parties to the contract. So if a developer sells to a buyer, who then sells on to a second buyer, the developer cannot enforce the provisions in its contract against the second buyer. You will see some provisions under which the first buyer agrees not to sell the property without having built on it or passing on the same building controls conditions in their sale contract. Sometimes, developers include provisions in their contracts which require their purchaser to sell the property back to them if they have not built on the land within a specified period. Alternatively, developers may require that if the land is sold before it is built on, the second purchaser enter into a separate contract with the developer including land use provisions.

A contractual term can be varied with the agreement of the parties to the contract, so this is relatively easy, *presuming all parties are in agreement*.

Design and Siting Guidelines/Architectural Review Panels

These will also have no effect on the requirement to comply with Part 4.

The obligation to comply with design guidelines and/or obtain the approval of a committee or panel before constructing is usually incorporated into the contract by a special condition. This makes it subject to the same difficulties with enforcement as a normal contractual term.

As these are usually simply contractual terms, they may also be varied with agreement.

If Design and Siting Guidelines are included in restrictions or restrictive covenants then the rules applying to those (discussed below) will apply. However, there is some argument about how enforceable they will be if incorporated this way as the actual design guidelines are not registered on title.

Restrictive Covenants

Restrictive covenants also do not affect the requirement to comply with Part 4. The owner of the land will need to comply with both the restrictive covenant and Part 4.

I am sure you are all aware that a restrictive covenant is usually created on the transfer of land, and therefore becomes a registered encumbrance at the same time as the purchaser becomes the registered proprietor of the land. The covenant must be negative in nature so will be couched in terms like "the registered proprietor shall not allow any dwelling to be erected on the land unless it has a minimum floor area of 170 square metres". This means there is a limit to the kind of things which can be included. For example I have seen restrictive covenants which prohibit a person from building a house on the land unless they completed the landscaping within 4 months of the date upon which an occupancy permit was issued for the house. The problem with such a restrictive covenant is that if the owner builds a house and for whatever reason cannot complete the landscaping within the specified time, they are in breach of the restrictive covenant. This would theoretically give the benefiting land owners the ability to obtain an order to remove the dwelling. I think it would be very difficult for a judge to agree to such an order. It therefore becomes impractical.

As the restrictive covenant is registered with the transfer of land, it runs with the land. Whilst it is essentially a contract between the vendor and the purchaser, it will bind the land, and any person who owns the land, until it is removed, or it lapses in accordance with its own terms. Therefore, it has a greater enforceability. However, the benefit of, and the ability to enforce, the restrictive covenant also runs with land - the land specified as the benefiting land in the covenant.

A restrictive covenant must also have some connection with the benefited and burdened land i.e. a restriction on the use of one lot which benefits the use of the other lot.

Once a restrictive covenant is created it can be varied or removed with the consent of the owners of all the benefiting lots, by planning permit, or an application can be made to the Supreme Court for an order.

A successful application for a planning permit will ultimately usually require the consent of the benefiting parties. Section 60(2) of the *Planning and Environment Act 1987* requires the responsible authority to be satisfied that no owner of a benefiting lot is *likely to* suffer financial loss, loss of amenity, loss as a result of change of character or any other material detriment as a result of the removal or variation before granting such a permit. It is usually very difficult to satisfy council of this unless the consent of all benefiting lot owners is given.

If an application is made to the Supreme Court, the applicant will need to show good reason as to why the restrictive covenant should no longer apply e.g. there are so many breaches of the covenant in the neighbourhood that it has no meaning anymore. Or, take for example the common restrictive covenant that prohibits excavation except for the construction of a dwelling. This will prevent the construction of a swimming pool, but it may be able to be argued that it was not intended to, and that this is too broad an interpretation, especially if there are a number of swimming pools in surrounding lots affected by the same covenant.

Obtaining the agreement of every benefited lot owner or a Supreme Court order can be a very costly and a very lengthy process, and in many cases, especially where there is a large number of benefiting lots, may be practically impossible.

Restrictions on Plans

Unless they incorporate an approved building envelope, a Restriction on a plan will also not affect the requirement to comply with Part 4.

Restrictions on plans are essentially a restrictive covenant created on a plan. They must also be negative. Often they reiterate contractual obligations, for example, by stating that the owner will not construct a dwelling without the consent of the developer.

The same methods of variation and removal apply as for restrictive covenants. Restrictions on plans are enforceable by the owners of benefiting lots as named in the restriction. Therefore, once the developer has sold the last benefitted lot, it will also lose the power to enforce it.

Approved Building Envelopes created through a restriction on a plan (and incorporation of MCP's) or a section 173 Agreement

The approved building envelope is created usually by the incorporation of the MCP into the plan of subdivision through a restriction, or by a Section 173 agreement.

To create an approved building envelope it:

- ❖ must be in a planning permit for subdivision; and
- ❖ must be shown as a restriction on a plan or be included in an agreement pursuant to s173 of the *Planning and Environment Act 1987*.

If an approved building envelope exists then the consent and report of council is not required in relation to a design where the design does not comply with a regulation in Part 4 if the applicable approved building envelope deals with a matter that is regulated by Part 4 and the design of the building is consistent with all the siting matters dealt with by the approved building envelope that are regulated by Part 4.

Therefore, the approved building envelope operates like a pre-approved exemption to compliance with those parts of Part 4 which the approved building envelope deals with. However it will only provide an exemption for those siting issues which are dealt with in the approved building envelope - if a siting issue dealt with in Part 4 is not dealt with in the approved building envelope then the Part 4 regulations will still apply in relation to that siting issue.

The exemption to compliance with Part 4 is limited for "edge lots". If an adjoining lot is not on the same plan or subject to the same section 173 agreement, then the exemption does not apply with respect to many of the provisions of Part 4, so those edge lots have to comply with those provisions of Part 4 regardless of the approved building envelope. If you can create a s173 agreement over the whole development this would be cured, however, this is impractical at the beginning of a large development. The owners of edge lots will therefore be bound to comply with both the restriction which incorporates the building envelope, and Part 4.

If you are creating the approved building envelope by the incorporation of the MCP into the plan of subdivision through a restriction, then the rules relating to restrictions on plans must be followed. Therefore the actual restriction should be negative and should prohibit the construction of dwellings and other structures except in accordance with the MCP.

An approved building envelope is enforceable by a benefiting land owner if created by restriction on a plan. If the approved building envelope is created in a Section 173 agreement it may be necessary for the agreement to specify that enforcement rights run with the land if you wish individual lot owners to be able to enforce it.

To vary or remove:

- ❖ if the approved building envelope is created by restriction on a plan, it can be varied or removed in the same manner as referred to above for other restrictions on plans;
- ❖ if the approved building envelope is created by a Section 173 agreement the agreement can only be removed with the consent of all of the parties. Amendment of Section 173 agreements requires the consent of the Minister for Planning. This is obviously difficult and time consuming and it is often preferred to remove the existing agreement and replace it with a whole new one to avoid having to get this consent. Obviously this may cause difficulties with 'edge lots' if it is intended to record a new section 173 Agreement only over part of the original affected land.

The usual practice for a restriction on a plan is to nominate only those lots which abut or adjoin a burdened lot as the benefited lot with respect to that burden. Therefore, if there is a wish to remove or vary the restriction incorporating the MCP, only the consent of the named benefiting parties is required. This is usually between 1 and 3 lots. Compared with all the lots on the plan, this is a very low number and makes variation or removal far easier.

It also means that only the benefited lots may enforce the restriction and therefore the MCP and building envelopes. As these are theoretically the only lots which are affected by the positioning of the dwelling and other matters dealt with in the MCPs, it seems logical that the owners of these lots be the only people who can enforce the restriction.

Benefits of using approved building envelopes

- ❖ This is the only mechanism which gives an exemption to Part 4.
- ❖ One of the exemptions which is considered most valuable by many is the freedom to site a dwelling anywhere within the approved building envelope regardless of where the neighbours have built i.e. minimum and maximum setbacks in regs 408 and 409 (although must still consider other siting issues, e.g overlooking provisions).
- ❖ Approved building envelopes give developers the ability to consider the physical attributes of the land and design an approved building envelope which takes this into account to provide more freedom for their purchasers (as long as it is done properly). The ability to include diagrams including three dimensional diagrams also means that these MCP's can express far more than what can be expressed in words in a restrictive covenant or normal restriction on a plan.
- ❖ Approved building envelopes can give better solar and energy outcomes, for example by encouraging abutting garages either using building to boundary zones or actually stating that garages must be situated in particular positions, to protect solar access to neighbours.
- ❖ In practice approved building envelopes are used more as a right for land owners to build in accordance with the approved building envelope regardless of what the neighbour does (to some degree) rather than a right to stop the neighbour from doing anything in particular. This is used as a selling point for developers.

Problems in interpretation and use of approved building envelopes and MCPs

People often forget that the DSE Model MCP contains a note at the end which says that if there is conflict between the plan or profile diagrams and the written notes in the MCP, the specifications in the written notes will prevail. Many focus on the diagrams and don't realise that they are often overridden by the wording. There are also different treatments in this regard throughout the model provisions. Some provisions state that they are subject to the diagrams, others don't.

Care needs to be taken with specific wording in the MCP being used. For example, if the wording says that the provision applies 'unless otherwise dimensioned on the plan' an actual **dimension** will be required to override the written provisions (not just a scaled drawing).

Attention must be paid to definitions to make sure they align with the intention e.g. Front Street and Main Street Frontage are defined in the DSE Model MCP as the street frontage that allows the most direct access to the front door. I believe that this is overlooked on many occasions because

developers assume the front boundary to be the boundary abutting the street, and if there are two, the shorter of the two. I also think that it is often easier to draft your diagrams if you are certain about what each boundary is considered as front, side or rear regardless of what is built on the lot.

Edge lots remains a problem for those land owners - they need to realise that they are not exempt from many of the regulations in Part 4. (Reg 406(2))

- ❖ 414 - Side and rear setbacks
- ❖ 415 - Walls on boundaries
- ❖ 416 - Daylight to existing habitable room windows
- ❖ 417 - Solar access to existing north-facing windows
- ❖ 418 - Overshadowing of recreational private open space
- ❖ 419 - Overlooking
- ❖ 425 - Fence setbacks from side and rear boundaries
- ❖ 426 - Fences on or within 150mm of side and rear boundaries
- ❖ 428 - Fences and daylight to windows in existing dwelling
- ❖ 429 - Fences and solar access to existing north-facing habitable room windows
- ❖ 430 - Fences and overshadowing or recreational private open space

These provisions need to be kept in mind when drafting the MCP, diagrams and profiles for edge lots to ensure you are not creating restriction which is difficult to comply with. The Model MCP identifies edge lots but does not say anything about them, so it is not clear to someone reading the MCP that it does not relieve them of the obligation to comply with Part 4. Remember that the edge lots are still required to comply with the restriction creating the building envelopes, even if they are not given an 'exemption' to compliance with Part 4.

If the approved building envelope does not deal with something covered in Part 4, the owner must still comply with those regulations. For example, Reg 421 which has minimum private open space requirements is not referred to in the DSE Model MCP. If the property is not in one of the zones referred to in schedule 5 then regulation 421 will continue to apply.

It is imperative to read each of the provisions in the MCP you are using carefully and ensure that it achieves what you are aiming for. For example, the list of acceptable encroachments in the side and rear setbacks provisions is not an exhaustive list and you may wish to include other acceptable encroachments, especially if you have referred to other preferred structures in Design Guidelines.

People forget about the maximum lengths for walls on boundaries set in the wording and think that because the BBZ is shown along the whole boundary it will be acceptable to build a wall of any length within that zone.

If you are preparing a generic MCP for a whole estate make sure all the profiles cover all the lots in the estate. It's no problem to register a second MCP which does include additional profiles but if this is forgotten and an incomplete MCP is incorporated into a registered plan, you end up with a approved building envelope that is difficult to interpret because there is no relevant profile in the generic MCP.

Don't assume that because there is an approved building envelope you don't have to pay attention to what the neighbours have built. Some of the provisions in the DSE Model MCP still refer to what is built on adjoining lots e.g. overlooking provisions.

Know your market. If you are selling to people who are going to want to go to one of the big builders and pick one of their standard house designs then don't create an approved building envelope which won't allow them to do this.

Remember that the DSE Model MCP is not compulsory. Its contents need to be considered for each development to see whether it achieves what is desired in that particular case. Obviously

Councils are familiar with it and may prefer it to be used but there may be benefits in using other wording.

Restating Part 4?

People often comment that many approved building envelopes seem to simply restate Part 4. However, even if the same minimum and maximum setbacks are specified as in Part 4, there is more certainty for a land owner as they will not be required to set their house back in accordance with the setback on the neighbouring lot (assuming that next door is not an 'edge lot'). Whilst similar parameters may be set, the actual construction possibilities are often much wider on a lot which is affected by an approved building envelope when houses have already been constructed on the lots on either or both sides.

Using more than one of these methods of building control together

If you using a number of different forms of building controls, make sure you, and any future owner of the land, can comply with all of them. There should be no inconsistencies between the various building controls. This is especially important where there are restrictions on the plan separate from the restriction incorporating the MCP, or separate restrictive covenants, due to the difficulties and cost associated with varying and removing them.

Elizabeth Linedale

Partner

SEPTIMUS JONES & LEE

Level 5

99 William Street

Melbourne

Tel: 03 9613 6555

Fax: 03 9613 6500