



**Association of Consulting Surveyors (Victoria) Inc Seminar
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Restrictions on Plans of Subdivision

I have been asked to provide an overview on the legal issues relating to the creation, variation and removal of restrictions on plans. I have been asked to review the basics for those of you who do not need to do this very often, so please bear with me if I am going over old ground to some degree. Some issues of interpretation will also raise their ugly heads as I proceed through these areas. Whilst there is necessarily discussion on restrictive covenants, with respect to practical issues I am focusing on restrictions.

Legal development of restrictive covenants

It may be of assistance to remember that essentially a restriction on a plan is a kind of agreement between the owners of the land which has the benefit of the restriction, and the owners of the land which is burdened by it, and is therefore a form of restrictive covenant.

Restrictive covenants began essentially as agreements between neighbouring landowners relating to the use of land, in times when there was far less regulation of land use by authorities. After these agreements were made, they came before the courts when one or other of the parties sought to enforce them. It took some time for the courts to recognise enforceable covenants in relation to the use of land, as courts were for some time generally loath to allow private restrictions to 'clog' dealing with land. More time again passed before courts allowed such covenants to be enforced against subsequent owners of burdened land. The judges placed much emphasis on the concept of notice in the early days, and courts took the view that it was not fair that a person purchase land in the knowledge of an agreement struck with the neighbour, to then seek to act in a manner inconsistent with that agreement. Through the cases over time the courts developed a list of essential elements of an enforceable restrictive covenant.

The essential requirements for an enforceable restrictive covenant are:

1. It must be negative;
2. It must benefit (or 'touch and concern') the land owned by the covenantee (benefited party);
3. It must be intended to run with the land; and
4. It must be recorded on the register.

A restriction on a plan of subdivision must also meet all these criteria.

Negative in Nature

A restriction or restrictive covenant must, as the name suggests, restrict the use of the burdened land, and it must therefore be negative. It will therefore need to be couched in terms like "the registered proprietor *shall not* allow any dwelling to be erected on the burdened land unless it has a minimum floor area of 170 square metres" rather than "the registered proprietor of the burdened land shall construct a dwelling of 170 square metres or greater size". This means there is a limit to the kind of things which should be included.

Beware of restrictions or restrictive covenants which claim to be restrictive but really include positive obligations, dressed up as negative ones. The rule of thumb is that if you can comply with the covenant by doing nothing, it will generally be acceptable. For example, a covenant/restriction which prohibits the construction of a dwelling unless it has a minimum floor area will be acceptable as it does not require a dwelling to be constructed. However, one which requires that a dwelling with a minimum floor area be constructed will be seen as a positive obligation and therefore not acceptable.

Benefit to the benefited land

There must be some benefit to, or protection of, the benefited land, and not just the owner of the benefited land. Essentially, this means that the basic agreement between the original land owners (or the developer and its purchasers) concerns the land itself and not, for example, purely commercial interests. This requirement is often referred to in the case law as the requirement to 'touch and concern' the covenantee's land. Things such as prohibitions on multiple dwellings and setting minimum standards for construction are generally seen to be of benefit to the covenantee's land.

Intention to run with the land

The intention to run with the land is implied into many restrictive covenants pursuant to the *Property Law Act 1958*, however wording should always be incorporated which makes it clear that it is intended to bind subsequent owners. It is usual that restrictions will include wording that makes it clear that the restriction runs with the land, for example words such as 'the registered proprietor for the time being of any burdened lot shall not...' indicate that the restriction is not personal to the parties that own the benefited and burdened land at the time the restriction is created. Similar wording is often used to clarify that the benefit also runs with the benefited land. Care should be taken in this regard.

Recording on the register

In order for a purchaser of land to be bound by a covenant or restriction which burdens it, they must have had knowledge of it before purchasing the land. Therefore, in order to prove such knowledge, it will be necessary for the covenant/restriction to be recorded on the register. It is important to remember that mere recording does not ensure enforceability and does not add any strength to the legal effect, or change the legal characteristics, of the restriction/covenant. If a restrictive covenant exists but is not registered, and a purchaser of torrens title land will not be bound. If the land is general law land, if a purchaser is a 'bona fide purchaser for value without notice' of the covenant, it will not be enforceable against that purchaser.

Creation of restrictions and restrictive covenants

I am sure you are all familiar with the restrictive covenants which are included on a transfer of land. When the transfer of land is registered by Land Registry, the covenant is recorded on the title.

The creation of a restriction on a plan of subdivision is often seen as an easier way in which to create obligations which are intended to apply to many lots in one dealing, rather than including similar obligations in several separate transfers of land. This means that there is no chance of inconsistency between the restriction which applies to each lot. It also means that the obligations are created and are recorded on the register as soon as the lot is created with its own folio, rather than later, when building permits and further planning permits may have been applied for and/or issued. It may also be easier to specify a limited number of lots (e.g. neighbouring lots only) as the benefiting lot, rather than all the lots on the plan, and reduces paperwork and the possibility of inconsistency.

Section 24(2)(d) of the *Subdivision Act 1988* provides that upon registration of a plan of subdivision any restriction is created, varied or removed as specified in the plan. The term 'restriction' is defined in the *Subdivision Act 1988* as a restrictive covenant or a restriction which can be registered or recorded in the register under the *Transfer of Land Act 1958*. There is some legal argument about whether this definition is perhaps faulty as the *Transfer of Land Act 1958* only refers to restrictive covenants and therefore that restrictions are not recordable on title pursuant to either Act. It appears to be widely accepted, however, that a restriction is a form of restrictive covenant.

Section 88(1) of the *Transfer of Land Act 1958* has recently been amended and from 1 May 2010, provides that the Registrar has the power, and is taken to have always had the power to record on a folio of the register (a) a restrictive covenant affecting the parcel(s) of land to which the folio relates, if all the registered proprietors of the land to be affected by the covenant and any mortgagees of such land agree to the creation of the restrictive covenant; and (b) subject to subsections (1AA) and

(1AB) and (1AC), any instrument purporting to vary or release the operation of the restrictive covenant.

Removal or variation of recording on the register

Section 88 of the *Transfer of Land Act 1958* allows for the removal of a restriction from the register. This is a mechanical process only i.e there needs to be some evidence that the restriction no longer exists in order for Land Registry to remove the recording from the register.

Section 88(1AA) provides that if a restrictive covenant was created by a plan of subdivision or consolidation the recording must not be deleted or amended unless it is released or varied by a plan of subdivision or consolidation, or a planning scheme or permit, or an order of a court.

Section 88(1AB) provides that if a restrictive covenant was authorised by a planning scheme or permit under the *Planning and Environment Act 1987* must not be deleted or amended unless it's released or varied by a plan of subdivision or consolidation, or a planning scheme or permit, or an order of a court.

Section 88(1AC) provides that if a restrictive covenant was created or authorised in any way other than by a plan of subdivision or consolidation or a planning scheme or permit under the *Planning and Environment Act 1987* it may be deleted or amended if it's released or varied by a plan of subdivision or consolidation, or a planning scheme or permit, the agreement of the benefiting land owners and their mortgagees, or an order of a court.

This means that if you create the restrictive covenant on a plan, you will need to vary or remove it by plan or subdivision or consolidation, planning scheme or permit or an order of the court.

Support for applications for removal and variation of recordings of restrictions

Method 1:

An application may be made to the Supreme Court under Section 84 of the *Property Law Act 1958* for the modification or removal of a restriction/covenant. The Court needs to be satisfied that:

1. by reason of changes in character of the property or neighbourhood or other reasons the restriction has become obsolete or that the restriction would impede the reasonable use of the land without securing practical benefits to others (unless so modified); or
2. that those with the benefit of the restriction have expressly, or impliedly (by their acts or omissions) consented to the discharge or modification; or
3. that the modification or discharge will not substantially injure those with the benefit.

The payment of compensation may be ordered by the court if the modification or discharge is granted in relation to any loss suffered by the benefiting parties. It is in the discretion of the court to grant the application or not, so the onus is on the applicant to establish that one of the listed grounds exists **and** why the court should exercise its discretion in the applicant's favour. The Court may also attach conditions to the order.

There has been inconsistent case law on the interpretation of this section. In *Stanhill Pty Ltd v Jackson* [2005] VSC 169, a wide view of the court's powers was taken:

- ❖ 'Obsolete' was interpreted to mean 'outmoded or out of date', which is wider than previous interpretations which required the restriction to be virtually valueless to the benefiting land owner with respect to the original purpose of the covenant, or impossible to comply with.
- ❖ The impediment to reasonable use was said to be established if the restriction impedes reasonable use of the land acting reasonably. Town Planning requirements were taken into account to determine what a reasonable use was. Previous to this, the court has said that a restriction would not impede reasonable use if another use was still possible.

- ❖ "Injure" was held to mean 'to harm' and "substantially" was held to mean something 'of real significance and importance'. This had previously been held to require some detriment to the amenity of the land, and a real and appreciable injury.

As you would appreciate, as the applicant need only make out one of the three limbs of section 84 to be successful, the wide reading given to it in *Stanhill* would appear to make it quite easy to obtain an order for removal or modification. However, more narrow approaches have been taken by the court in other cases and generally the court will not easily modify or remove a restriction or covenant. Careful consideration of all of the relevant facts, including the development of surrounding land and the objectives of the covenant needs to be made to determine whether there is a significant possibility of obtaining such an order.

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 effect anymore. Or, take for example the common restrictive covenant that prohibits excavation except for the construction of a dwelling. This will on a literal reading prevent the construction of a swimming pool, but it may be able to be argued that it was not intended to do this, and that this is too broad an interpretation, especially if there are a number of swimming pools in surrounding lots. This particular kind of restrictive covenant has been read down in recent years as it has been assumed that when they were created the intention was more to stop commercial excavation rather than that which is associated with residential use.

An application can be made under s84 of the *Property Law Act 1958* by any person interested in any land affected by any restriction arising under covenant or otherwise as to the use thereof of the building on the land. This includes the original covenantor (*Re Markin [1966] VR 494*), however the court also said that the court should be slow to exercise its discretion in favour of the original covenantor and that there should be a strong bias against him or her.

This will be a lengthy and costly process.

Method 2:

An application may be made for a planning permit which allows removal or variation of a restriction (within the meaning given in the *Subdivisions Act 1988*). There are 2 different provisions regulating the issue of such a permit, depending on the date of creating of the restriction.

If the restriction was registered under the *Subdivision Act 1988*, or lodged for recording or registering under the *Transfer of Land Act 1958* before 25 June 1991, then pursuant to Section 60(5) of the *Planning and Environment Act 1987*, the responsible authority must not grant such a permit unless it is satisfied (a) that no owner of a benefiting lot (other than one who has given consent within 3 months of the application) is likely to suffer any detriment of any kind (including perceived detriment) as a consequence, **and** (b) if that owner has objected to the grant of the permit, the objection is vexatious and not made in good faith.

If the restriction was registered under the *Subdivision Act 1988*, or lodged for recording or registering under the *Transfer of Land Act 1958* after 25 June 1991, then pursuant to Section 60(2), the responsible authority must not grant such a permit unless it is satisfied that the owner of any land benefited (other than one who has given consent within 3 months of the application) will be unlikely to suffer: (a) financial loss; (b) loss of amenity; (c) loss arising from change to the character of the neighbourhood; or any other material detriment as a consequence of the removal or variation.

It is very difficult for a responsible authority to satisfy itself of these things, and I would expect that if any objections were made, the authority would prefer VCAT to make the decision that the objection was vexatious or not made in good faith. The second limb of the test under s60(2) has been interpreted quite broadly, for example objectors have been found to be acting vexatiously because their objection was not based on the protection of the matters which the covenant sought to protect for example in the case of *Castles and Maney v Bayside City Council [2004] VCAT 864* where the

objective of the covenant was having houses with frontages facing streets, whereas the objection was made on the basis of overdevelopment.

It is usually very difficult to satisfy council of this unless the consent of all benefiting lot owners is given. Depending on the number of benefiting lots, it can also be extremely difficult to get the consent of all of the benefiting lot owners.

Methods 3 and 4

An application to amend the relevant planning scheme in order to remove the restriction can be lodged. In addition a combined planning scheme amendment application may be made. The requirements for successful applications of this kind are beyond the scope of this presentation. They will require a community benefit test to be met and a panel will consider whether the planning merits of the application should take precedence over the upholding of private rights.

Method 5

There are several common law principles which may enable a burdened land owner to obtain an order that a restrictive covenant is of no effect, or is modified. These include:

- ❖ abandonment, however this may merely be a defence to an action for enforcement; and
- ❖ unity of possession and title (ie the burdened and benefited land are owned by the same person). It has been suggested that this does not apply to torrens title land.

Enforceability

The party who owns the land which has the benefit of the restrictive covenant/restriction has the ability to enforce it. Generally, an application is made to the Supreme Court for an injunction and/or damages. Action should be taken quickly if a restriction or restrictive covenant is breached, as the Court may consider that the benefiting party has acquiesced in the breach, or impliedly consented to the breach.

If a restriction has been created pursuant to a condition in a planning permit Section 114 of the *Planning and Environment Act 1987* gives the responsible authority and any other person the ability to apply for an enforcement order for breach. This is however, essentially an application to enforce the condition of the planning permit, not the restrictive covenant/restriction itself.

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. If the approved building envelope is created by way of restriction then the issues discussed above will apply to that restriction. In addition to those requirements, to be an *approved building envelope* it:

- ❖ must be in a planning permit for subdivision;
- ❖ 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.

Drafting points

The following points will assist with creating an enforceable restriction.

1. Make sure the wording does not refer to the land being transferred - this is only relevant to a restrictive covenant which is being included on a transfer of land. In a restriction it is better to identify land by describing it as the 'burdened land' or a 'burdened lot'.
2. Ensure that the provisions are truly negative. Re-read each of your subparagraphs to make sure that they are all negative when standing alone. I have often seen 'add ons' which

appear after a properly drafted restriction which are positive, such as "The registered proprietor for the time being shall not construct any fence on the burdened lot except a fence which is 1.2m high, or less. Any such fence shall be constructed of timber." The second sentence is a positive requirement. The whole restriction needs to be redrafted to something like "The registered proprietor for the time being shall not construct any fence on the burdened lot except a fence which is constructed of timber and is 1.2m high, or less."

3. Make sure the burdened and benefited land is clearly identified. Think about further subdivision down the track. The restriction will not be subdivided with the land.
4. Make sure a sunset date is included, if this is appropriate. In most cases, a sunset date will be appropriate as the objectives which are to be protected by the restriction will have been satisfied within a finite period. There is no limit to the time frame you can specify, however, if no time frame is specified then the restriction will remain on title forever. This may then necessitate an application under s84 of the *Property Law Act 1958* in the future which could have been avoided.
5. Consider who should have the burden and benefit of the restriction. With most restrictions which create approved building envelopes a table of burdened and benefited lots is created, so that only the neighbouring lots have the benefit of a restriction. This makes removal or variation much easier, but also makes sense as the owner of a lot 3 streets away from the burdened lot is very often not affected by whether the restriction is complied with. Of course, there will be restrictions which do need to have broader application in order to achieve their objectives.
6. The wording of the restriction must be very clear. Think about whether you are using technical terms or terms which may have a particular meaning say in a planning sense, and a different meaning in its general use. Consider defining terms if you think there may be more than one interpretation. For example, the term 'front boundary' is often assumed to be the shorter of two street boundaries, but there are several registered documents which define the front boundary as the boundary which provides the most direct access to the front door. That definition may result in a different outcome, and may make certain parts of your restriction difficult to put into practice before a residence is completed as it will not be possible to define which of the boundaries in the front boundary in that case.
7. Make sure that the obligations are really for the benefit of the benefiting land, and not simply a commercial interest.

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