BREAK-ING FREE

REMOVING OR MODIFYING RESTRICTIVE COVENANTS IN VICTORIA

Common means of removing or modifying a restrictive covenant are via planning permit, orders under s84 of the *Property Law Act* 1958 (Vic) or amendment of the planning scheme. **By Matthew Townsend**

Victorian lawyers are often asked to advise on the prospects of removing or modifying a restrictive covenant – most commonly one that prevents the construction of more than one dwelling on a parcel of land.

This article provides an overview of the three most commonly used means of removing or modifying a restrictive covenant in Victoria:

- the granting of a planning permit pursuant to cl 52.02 of a planning scheme;[1]
- the making of orders pursuant to s84 of the *Property Law Act* 1958 (Vic) (*PLA*); or
- the amending of the relevant planning scheme.

THE PLANNING PERMIT PROCESS

For what might be described as "deadwood" covenants, an application may be made for a planning permit to remove or modify a covenant pursuant to cl 52.05 of a planning scheme. However, the operation of s60(5) of the *Planning and Environment Act* 1987 (Vic) (*PEA*) means that where there is a real prospect of genuine opposition, this avenue is to be avoided. Section 60(5) provides:

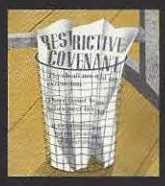
"The responsible authority must not grant a permit which allows the removal or variation of a restriction . . . unless it is satisfied that –

(a) the owner of any land benefited by the restriction . . . 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; . . .".

As described by DP Gibson of the Victorian Civil and Administrative Tribunal (VCAT) in *Hill v Campaspe SC*,[2] this is "a high barrier that prevents a large proportion of proposals". For covenants created on or after 25 June 1991, a less restrictive test applies.[3]

A further disincentive to relying on this provision is the need to notify all, rather than just the closest, beneficiaries of the application: s52(1)(cb) *PEA*.

ILLUSTRATION **GREGORY BALDWIN**



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SECTION 84 OF THE *PLA*

Where some degree of opposition is expected from one or more beneficiaries, an application may be made to remove or modify the covenant pursuant to s84(1) of the *PLA*.

Section 84(1) is currently structured as a series of threshold tests to be satisfied before the court's discretion to exercise the power is enlivened. The two most commonly relied on are ss84(1)(a) and (c):

"(1) The Court shall have power . . . 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 . . .

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

An application under s84(1) usually involves the filing of an originating motion and summons for relief with the Supreme Court. This is returnable before an associate judge, who may inquire as to the nature and location of beneficiaries before determining the extent of advertising – often a combination of letters to the closest beneficiaries and the publication of an advertisement in newspapers circulating in the locality.

Orders may then be made for the return of the summons at a future directions hearing, which objectors may attend.[4]

A surprising number of applications attract no objections. On being satisfied that this is the case, the court may grant the application.

Alternatively, objections may be received and/or objectors may attend court on the return. If a mutually acceptable agreement on the application cannot be reached with the objectors, orders may be made for the exchange of further evidence before the matter is listed for mediation and/or final hearing.

Historically, the courts have taken a conservative approach to applications for the removal or modification of restrictive covenants. In the often cited words of Farwell J in *Re Henderson's Conveyance*:[5]

"I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes".

However, in 2005, in *Stanhill v Jackson* Morris J comprehensively reviewed the authorities in relation to restrictive covenants and found some of the restrictions adopted in earlier cases to be without justification:[6]

"It would be wrong of me to convey the impression that courts have universally adopted a conservative approach in interpreting the preconditions set out in s84(1). Covenants have been modified, in contested circumstances, in a number of cases. But the general approach to the section has been to place a substantial onus upon an applicant to demonstrate that the power is enlivened. Indeed, as the years have passed, there may have been a tendency to look for guidance, not so much to the words of s84, but to the words used by judges over the years in explaining the meaning of the words used in s84. One must question this practice".

In relation to s84(1)(a), Morris J held:[7]

"(a) the ordinary meaning of the word 'obsolete' is not that the thing which is obsolete is no longer of any use, rather, it means 'outmoded' or 'out of date';

(b) the ordinary, grammatical meaning of the expression 'the reasonable user of the land' is simply a user of the land acting reasonably;

(c) what is reasonable will be gleaned from current attitudes and circumstances in relation to the use of land, including consideration of town planning issues;

(d) the reasonable user of the land will not be confined to just one use of land which might be regarded as reasonable;

(e) the ordinary meaning of the word 'impede' means to 'retard, obstruct, or hinder', not 'prevent'; and

(f) a restriction will impede the reasonable user of the land if the user cannot undertake any reasonable use of the land".

Further, in relation to s84(1)(c) Morris J found (at [37]) that the test of substantial injury contemplated an impact of real significance or importance:

"In my opinion, the language used in para (c) does not require a case to be made that the proposed discharge or modifications of a restriction will not harm the persons entitled to the benefit of the restriction. The hurdle is not this high. Rather it is sufficient to show that the proposed discharge or modification will not cause harm to the persons entitled to the benefit of the restriction which could be regarded as being of real significance or importance. This will require a judgment call in the particular circumstances being considered; it does not admit some universal answer based upon the attitude of the beneficiary, the original purpose of the covenant or any other similar factor".

Stanhill was considered favourably, if not directly applied, in *Re Milbex*,[8] *Dissanayake v Hillman*[9] and *Koller v Rice*.[10] However, in *Vrakas v Registrar of Titles* Kyrou J applied "the long-standing principles to the interpretation of s84(1)" while noting that Morris J's interpretation of s84(1) "has much to commend it".[11]

Morris J did, however, receive the following reproach in the *Australian Law Journal* for his decision in *Stanhill*:[12]

". . . single judges who approach cases on the basis that the majority of previous decision[s] on the same wording over the past 60 years are misguided, seldom do the public a service".

Similarly, in *Prowse v Johnstone* Cavanough J stated:[13]

"In my view, the long standing principles should be followed by single judges of this Court unless and until the Court of Appeal or the High Court rules otherwise".

Notwithstanding this criticism, by taking a first-principles examination of s84, Morris J has given applicants a broader basis on which to justify the removal or variation of a covenant. Further, little if any direct criticism has been made of Morris J's analysis of substantial injury in s84(1)(c). This is significant given that s84(1)(c) will often be the most promising basis for application to remove or amend a covenant.

The practical challenge is to reassure the court about the likely impacts of the proposed development scheme, while allowing sufficient flexibility in the subsequent town planning permit application process. As Morris J explained in *Stanbill*: "the lack of specific plans makes it more difficult for the plaintiff to discharge the onus of showing that a modification of a restriction will not substantially injure persons entitled to the benefit of the restriction" (at [69]).

In view of this judicial need for certainty, it would be sensible to allow the grant of a planning permit conditional on the subsequent removal or variation of the subject covenant, but this possibility was ruled out by VCAT in *Design 2u v Glen Eira CC*.[14]

Regrettably, the Victorian government elected not to remove this obstruction in its *Response to the Key Findings of the Initial Report of the Victorian Planning System Ministerial Advisory Committee*.[15]

Applicants now need to either substantially reduce the scope of development schemes in anticipation of a worst-case assessment by VCAT, or simply articulate building envelopes in which future applications for planning permission may subsequently be contained.

That said, it would be a mistake to frame an application under s84(1)(c) solely on town planning concepts of amenity. For instance, in *Fraser v Di Paolo* Coghlan J reviewed a number of authorities before observing:[16] "These decisions were made more than 30 years ago but they do give an insight into the importance of the rights which go with a covenant beyond town planning rights". In other words, substantial injury may occur merely through the diminution of proprietary rights, particularly if the decision may be setting a precedent.

Costs in s84 applications

When advising clients about the operation of s84, it is important to explain the principle in *Re: Withers*[17] that "unless the objections taken are frivolous, an objector in a proper case should not have to bear the bitter burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his".

An allowance should therefore be made for the payment of both sides' costs. When acting for objectors, this rule may be of corresponding significance.

THE COMBINED PERMIT/ AMENDMENT PROCESS

Interestingly, the third and least-used means of removing or amending a covenant is also that which is arguably capable of delivering the most ambitious proposals – namely, amending the planning scheme to remove or amend a covenant.[18]

In this process, the assessment is made according to ordinary planning principles:[19]

"First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria ...

"Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.

"Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.

"Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant".[20]

Here an applicant runs an entirely different risk. While the planning system might eschew Farwell J's disdain for profitable property ventures, to succeed an application will need the support of the local council and the relevant Minister at the time the amendment is both prepared and adopted.

Perhaps, then, we shouldn't be surprised that most applications to vary or remove restrictive covenants rely on s84 of the *PLA*, particularly when many beneficiaries appear to have neither the resources nor the confidence to challenge a well-resourced applicant in the Supreme Court.

Until the Victorian government embraces the Victorian Law Reform Commission's recommendation to grant VCAT concurrent jurisdiction to hear and determine applications under ss84(1) and (2) of the *PLA*,[21] this situation is unlikely to change. ●

MATTHEW TOWNSEND has more than 15 years' experience as a Melbourne barrister, practising almost exclusively in planning and environmental law, restrictive covenants, liquor licensing and the compulsory acquisition of land.

1. "A permit is required before a person proceeds ... under s23 of the *Subdivision Act* 1988 to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant."
2. [2011] VCAT 949 at [65].
3. *PEA* s60(2): "... must not grant a permit which allows the removal or variation of a restriction unless ... the owner of any land benefited by the restriction ... will be unlikely to suffer a) financial loss; or b) loss of amenity; or c) loss arising from change to the character of the neighbourhood; or d) any other material detriment – as a consequence of the removal or variation of the restriction".
4. See r52.09 of the *Supreme Court (General Civil Procedure) Rules* 2005.
5. [1940] Ch 835 at 846.
6. [2005] VSC 169; (2005) 12 VR 224, 231 [13], 239 [41]–[42].
7. Per Daly AJ in *Grant v Preece* [2012] VSC 55 at [55].
8. [2006] VSC 298.
9. [2007] VSC 426.
10. [2011] VSC 346.
11. [2008] VSC 281 at [48].
12. (2007) 81 *Australian Law Journal* 68, 71.
13. [2012] VSC 4 at [99].
14. [2010] VCAT 1865.
15. Response to Committee Finding 26, May 2012: http://tinyurl.com/ayawpeb
16. [2008] VSC 117 at [42].
17. [1970] VR 319-320 at 320.
18. See Division 5 of the *PEA* "Combined permit and amendment process" or the use of site specific controls pursuant to cl 52.03 as occurred in Amendment C143 to the Boroondara Planning Scheme.
19. *M.A. Zeltoff Pty Ltd v Stonnington City Council* [1999] VSC 270.
20. Amendment C46 to the Mornington Peninsula Planning Scheme at 25. Applied by the panels considering amendment C23 to the Stonnington Planning Scheme; C72 to the Manningham Planning Scheme; and C137 to the Mornington Peninsula Planning Scheme.
21. *Easements and Covenants*, Final Report #22; Recommendation 43, May 2011: www.lawreform.vic.gov.au/projects/property/easements-and-covenants-final-report.