

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

### What is a covenant?

Many residential lots in the City of Glen Eira have titles, which contain restrictive covenants. Covenants, or restrictions, can limit the use and development of the land in various ways. Restrictions that are common in residential areas in Glen Eira include:

- not more than one dwelling house and associated outbuildings may be erected;
- only single-storey dwellings may be erected;
- a dwelling must be constructed in brick or any other approved material;
- the roof of any buildings must be in slate or tiles;
- the value of the dwelling must not be less than \$400;
- no sand or earth may be removed from the land; and
- no quarrying on the land.

The covenant is noted on the title and the full details are contained in a separate document called the Instrument of Transfer. A covenant is not extinguished with the sale of land — the restriction is passed on to each subsequent purchaser (legal beneficiary).

Covenants were often placed on titles many decades ago at the time of the original subdivision. In effect these were private, defacto planning controls to ensure certainty about the type of development that would occur on adjoining blocks and in surrounding streets.

### Covenants and State planning law

Many covenants are now considered outdated and irrelevant due to their ad hoc nature and applicability.

Residents frequently suggest to Council that compliance today with an outdated covenant established decades ago seems odd. In many cases, Council agrees with the resident, but State law requires covenants to be treated seriously. More comprehensive and transparent planning control of development is now made through planning schemes, which can look at a municipality as a whole and make decisions on best possible land use given the overall needs of the community. However, covenants still apply and can still cause difficulties if a landowner wishes to develop their land, depending on what the covenant restricts.

### What is a legal beneficiary?

Owners of land within the same subdivision are not all necessarily beneficiaries of a covenant shown on the title for a particular lot. The extent of nearby land owners having the benefit of the covenant is dependent upon the wording of the covenant and the date that each lot was transferred from the parent title.

Given the different nature of covenants, a covenant restricting a particular lot may apply to every lot in the subdivision or it may only apply to a few lots. The legal beneficiaries of a particular covenant may be the owners of every lot in the street or they may be scattered through a large subdivision. The determination of beneficiaries is likely to require extensive title searches to establish transfer dates and entitlements of each lot within the original subdivision. **This type of search should be carried out by a suitably qualified legal professional.**

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

### Planning and Environment (Restrictive Covenants) Act 2000

State Parliament passed this bill on 30 November 2000. The whole of the Act came into operation on 13 December 2000. At a general level, the Act ensures that restrictive covenants play a larger role in planning decisions about how land is used or developed.

Planning permit applications, requests to amend a permit or plans, and applications to the Victorian Civil and Administrative Tribunal (VCAT) to amend a permit, are all affected by the changes to the Act.

Under the Act, **Council is prohibited to grant or amend a permit if anything authorised by the permit or amendment would result in a breach of a registered restrictive covenant.** The only exception is if a permit is also granted or has been granted to allow the removal or variation of the restrictive covenant. In this instance, Council would place a condition on the development permit which states that this permit is not to come into effect until the covenant is removed or varied (ie. certification of the plan under the *Subdivision Act 1988*).

The Act affects a registered restrictive covenant, which is defined to mean a restriction within the meaning of the *Subdivision Act 1988*. The *Subdivision Act 1988* refers to a restrictive covenant, or a restriction registered or recorded under the *Transfer of Land Act 1958* (eg. on a registered plan of subdivision). It excludes restrictive covenants affecting old law land (ie. under the *Property Law Act 1958*).

Council and applicants need to check both the plan of subdivision (if the land is a lot on a plan) for restrictions and the Certificate of Title for restrictive covenants registered or recorded on the title.

If the land is burdened by a restrictive covenant, an applicant for any type of planning application must give the responsible authority (Council) a copy of the restrictive covenant at the time of making the application. If the application is to remove or vary a restrictive covenant, or if anything authorised by the permit would result in a breach of the covenant, an applicant must also give the responsible authority, at the time of making the application, the following information:

- details of the land that is benefited by the restrictive covenant; and
- information required by the regulations (refer to the Planning permit section of this document).

### How is a covenant removed?

There are three methods available for the variation or removal of a restrictive covenant on the title:

- (a) pursue the variation or removal through the Supreme Court;
- (b) apply for variation or removal via a planning permit; or
- (c) apply for an amendment to the *Glen Eira Planning Scheme*.

All avenues for covenant removal or variation involve complex legal or planning procedures. Land owners and developers considering the removal or variation of a covenant are strongly encouraged to engage a solicitor or a planning consultant to submit the application on their behalf.

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

### A. Supreme Court

An application can be made to the Supreme Court, pursuant to Section 84 of the *Property Law Act 1958* to discharge or modify a restrictive covenant, in whole or in part. Applicants are advised to contact their solicitor about this course of action. Council is not involved in any action under this method.

### B. Planning permit

In 1991 the *Planning and Environment Act 1987* was amended to enable covenants to be removed or varied via a planning permit or planning scheme amendment. This was done to provide a less expensive means of removing dead wood covenants.

Clause 52.02 of the *Glen Eira Planning Scheme* (and all schemes in Victoria) provides that a planning permit is required to remove or vary a restriction.

Clause 52.02 of the scheme states:

“A permit is required before a person proceeds:

- under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction”.

A planning application form should be submitted to Glen Eira City Council and be accompanied by the following:

- a completed application form stating how the covenant is proposed to be removed or varied;
- a planning application fee (\$541)<sup>1</sup>;
- a copy of the original Parent Title from which all land in the subdivision (including the applicant property) was created;
- a copy of the original plan of subdivision;
- a copy of the applicant’s Certificate of Title and Instrument of Transfer in which the covenant was created;
- copies of all of the current titles of lots from the original plan of subdivision which benefit from the covenant. The title searches must be less than three months old;
- a letter from a suitably qualified legal professional providing legal opinion as to those properties which do and do not benefit from the covenant. The list should include the names and addresses of beneficiaries affected by the covenant. The Law Institute of Victoria can supply a list of accredited property law specialists; and
- details of whether the application is consistent with the overall strategic planning policy framework for the City of Glen Eira.

The application would be advertised by mail to adjacent neighbours (whether or not they are legal beneficiaries of the covenant) and all legal beneficiaries. A sign may also be erected on the site and a notice placed in the local newspaper.

If a covenant was created prior to 25 June 1991 (the majority of covenants which exist in Glen Eira) Council must have regard to Section 60(5) of the *Planning and Environment Act 1987*. It reads:

“(5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in sub-section (4) unless it is satisfied that:

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

(a) the owner of any land benefited by the restriction (other than an owner who, before or after making the application but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including perceived detriment) as a consequence of the removal or variation of the restriction; and

(b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith”.

Therefore, notification to all beneficiaries is required and Council, or VCAT (on appeal), must refuse a permit if it appears that there is a real chance or possibility that detriment will result.

If a covenant was created **after** 25 June 1991, it must be assessed under Section 60(2) of the *Planning and Environment Act 1987*.

### C. Amendment to the Planning Scheme

Section 6(2)(g) of the *Planning and Environment Act 1987* provides that a planning scheme may regulate or provide for the removal or variation of a covenant.

A request for an amendment to the *Glen Eira Planning Scheme* can be a lengthy, complex and costly procedure. The final decision on a planning scheme amendment rests with the Minister for Planning.

A variation rather than removal of a restrictive covenant should be sought — a variation results in a narrower expansion of development rights rather than a total removal which could potentially allow any sort of development permitted by the planning scheme.

In most circumstances the combined amendment and planning permit process, in accordance with Section 96A of the *Act*, is the most appropriate and time-efficient way to proceed with unit development and covenant removal. An application of this type enables consideration of the amendment to the planning scheme concurrently with the proposed development for the land, and they are processed via the amendment procedures. The documents for exhibition differ from a normal amendment in that a draft permit must be exhibited, and both elements (amendment and permit application) must be exhibited together. The benefit of this process is that a decision on the development is achieved at the same time as the amendment is approved.

The following information should be provided in the written request to amend the planning scheme:

- a copy of the original Parent Title from which all land in the subdivision (including the applicant property) was created;
- a copy of the original plan of subdivision;
- a copy of the applicant’s Certificate of Title and the Instrument of Transfer in which the covenant was created;
- copies of all the current titles of lots from the original plan of subdivision which benefit from the covenant. The title searches must be less than three months old;
- a letter from a suitably qualified legal professional that states which properties do and do not benefit from the covenant. The list should include the names and addresses of property owners affected by the covenant; and
- a written statement providing comments on the assessment criteria used by most panels when assessing a planning scheme amendment for removal or variation of the covenant (refer below).

**Note:** the combined application under Section 96A of the *Planning and Environment Act 1987* requires further documentation. Please contact Council to determine the required fee and documentation.

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

Recent panels have used the following criteria to assess restrictive covenant proposals for amendments to planning schemes and it is considered that the same criteria could also be used by Council to assess applications. This includes:

- the purpose of the restrictive covenant;
- the benefit of the covenant;
- changes which have occurred in the character of the neighbourhood and circumstances which impact on the relevance of the covenant;
- the detrimental impact on the amenity of the neighbouring properties;
- consistency with planning policies; and
- creation of an undesirable precedent.

The steps in the amendment process are as follows.

1. Written request by applicant to Council to consider a request to amend the *Glen Eira Planning Scheme*. An application fee of \$798 is payable upon request for consideration to amend the planning scheme.
2. The amendment will be exhibited. A copy of the amendment documentation will be sent to all legal beneficiaries and adjacent neighbouring owners or occupiers. A notice will be placed in a local newspaper and, if appropriate, on the subject site.
3. If any submissions are received, Council will consider submissions (\$798 fee for consideration of submissions) and may decide to abandon the amendment, make changes to the amendment, or request the Minister to appoint an independent panel to consider the submissions (the applicant is required to pay panel costs).
4. If no submissions are received, Council may resolve to adopt or abandon the amendment. If submissions were received and a panel was appointed to hear submissions, Council may resolve to adopt the amendment with or without changes recommended by the panel. The fee for adopting all or part of an amendment and submitting the amendment to the Minister for approval is \$524.
5. Consideration of a request for the Minister to approve an amendment incurs a fee of \$700 (payable to the Department of Environment, Land, Water and Planning).

**Note:** the above fees are applicable at 18 August 2009 and are subject to change as determined by the State Government.

## Certification

The obtaining of a planning permit or planning scheme amendment is the first stage of the procedure for the removal or variation of a covenant.

The second stage of the approval process is the certification stage. This is a technical and administrative process. If the requirements of the *Subdivision Act* and the *Planning and Environment Act 1987* have been met, Council must certify the plan.

The application for certification is prepared by a licensed surveyor and should include the following:

- an application form signed by the surveyor and the registered proprietor (Form 10, Subdivision [Procedures] Regulations 2011);
- a \$100<sup>2</sup> fee;

# TOWN PLANNING RESTRICTIVE COVENANTS

## Factsheet

- plan of removal or variation of restriction;
- two heavyweight (original) plans signed by a surveyor; and
- six paper copies of the plan.

Alternatively, a certification application can be lodged via SPEAR by a licensed land surveyor. Glen Eira City Council will assess the application and sign the plan if all statutory requirements have been met. The plan will be sent to the applicant. The plan can then be lodged at the Land Registry with a Form 15 (Subdivision [Procedures] Regulations 2011), which will enable a new title to be issued.

### Further information

Applicants are advised to speak to Council if they have any queries relating to restrictive covenants and the information presented in this document.

This note has been prepared based on information in the *Subdivision Act 1988*, the *Subdivision (Procedures) Regulations 2011*, the *Glen Eira Planning Scheme*, the *Planning and Environment Act 1987*, the *Planning and Environment (Restrictive Covenants) Act 2000*, the Department of Environment, Land, Water and Planning website and the *Property Law Act 1958*.

This note applies to Glen Eira City Council and the City of Glen Eira and does not replace any of the provisions contained in the abovementioned sources.

(Footnotes)

<sup>1</sup> Fee as at 18 August 2009. Fees are subject to change as determined by the State Government.

<sup>2</sup> Fees as at 18 August 2009. Fees are subject to change as determined by the State Government.