REMOVING OR VARYING RESTRICTIVE COVENANTS AND EASEMENTS IN VCAT

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Summary

1. The *Subdivision Act* 1988 (**Subdivision Act**) and the *Planning and Environment Act* 1987 (**Act**) permit VCAT to make orders removing or varying restrictive covenants and easements (**restrictions**). These actions are predominantly heard in the Planning and Environment List.

2. An applicant has to satisfy a high test in order to be successful – not causing any detriment or perceived detriment to any affected parties.

3. It may be possible to characterise the objection of a beneficiary of a restriction as vexatious.

4. Alternately, it may be possible to argue that a proposed activity is not in breach of the terms of the restriction (thus no variation or removal of the restriction is required).

5. Despite the above hurdles, VCAT has varied restrictions. It is rare, however, that a restriction is removed in the absence of agreement from all interested parties.

Jurisdiction of VCAT

6. Easements can be acquired or removed pursuant to section 36 of the Subdivision Act in the Real Property or Owners Corporation Lists of VCAT, the latter being the relevant jurisdiction where the easement affects a subdivision in which there is an owners corporation.

7. The Act has a series of parallel provisions to the Subdivision Act that permit a person to apply to a local Council by way of an application for a planning permit for:

   (a) the creation, removal or variation of a restriction.[1]

   (b) The variation or removal of conditions “in the nature of easements” in Crown grants under the *Subdivision Act*.[2]

   (c) The creation or removal of easements or rights of way under the *Subdivision Act*.[3]

8. In any of the above situations, the matter will be heard on appeal from a Council decision in the Planning and Environment List of VCAT.

9. In this paper, I intend to focus on the process in that particular jurisdiction.

Application to Council

10. In order to make an application to Council, the applicant has to:[4]

    (a) Include a copy of the restriction with the application; and

    (b) Identify the allotments benefited by the restriction.

11. There is no need for an application to remove or vary a restriction to include an application for a particular proposal.[5] In my view, it is probably better if it does.

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1 Section 23 of the Subdivision Act; section 6(2)(g) of the Act.
2 Section 24A of the Subdivision Act; section 6(2)(ga) of the Act.
3 Section 36 of the Subdivision Act; section 6(2)(gb) of the Act.
4 Section 47(1) of the Act.
5 *Marras v Stonnington CC* [2004] VCAT 110 at [7].

12. When considering the application, the Act prevents the Council from granting a permit to vary or remove a restriction unless it is satisfied that the owner of any land benefitted by the restriction will be unlikely to suffer:[6]

    (a) financial loss;

    (b) loss of amenity;

    (c) loss arising from change to the character of the neighborhood; or

    (d) any other material detriment

    as a result of the removal or variation of the restriction.

13. This does not apply where the applicant also includes written consents from the owner of any land benefitted by the restriction. The Act requires that such consents are dated no more than three months before the date of the application.[7]

14. In addition, clause 60(5) of the Act provides that:

> *(5) 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*

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[6] Section 60(2) of the Act.

[7] As above.

> *(including any 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.*

15. Given the above provisions, in most circumstances, a Council will refuse an application to remove or vary a restriction where there is any objection lodged.

Detriment

16. The Tribunal has noted in some cases that the test imposed by section 60(5) of the Act is so "high and strict" that it "severely restricts the ability of the Tribunal (on review) to modify a covenant".[8]

17. However, the Tribunal's approach to interpreting this section of the Act is probably best identified from the following:[9]

> *1. It is for the Tribunal to determine whether it is satisfied on the balance of probabilities that any covenant beneficiary "will be unlikely to suffer any detriment of any kind if the variation is permitted." In other words it is not a question of whether the Tribunal is satisfied there will be detriment: the Tribunal must be affirmatively satisfied that there will be none.*
>
> *2. Compliance with planning controls does not, of itself, and without more, establish that a covenant beneficiary will be unlikely to suffer any detriment of any kind. Consideration of a*

proposal from a planning perspective often requires a balancing of competing interests. There is no such balancing exercise involved in the consideration of the issue which arises under paragraph (a). The nature of the enquiry is fundamentally different.

3. The mere assertion of the existence of a detriment is not sufficient to demonstrate its existence. On the other hand, loss of amenity will constitute a detriment, and in this regard amenity includes "an appeal to aesthetic judgment, which is difficult to measure, however the notion of 'perceived detriment' specifically contemplates that this consideration is relevant to the enquiry".

4. The determination must be made on the evidence before the Tribunal "including the appeal site and its environs".

5. It is not necessary for an affected person to assert detriment. This is so for two reasons: first, because the Tribunal must be affirmatively satisfied of a negative, namely that there will probably be no detriment of any kind; secondly, the Tribunal is entitled to form its own views from the evidence.

18. In light of the above, in any application before the Tribunal, the issues for determination will be:

(a) What is the nature of the restriction and how is that affected by the proposal?

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[8] *Castles v Bayside CC* [2004] VCAT 864 at [37]-[43].

[9] *McFarlane v City of Greater Dandenong* [2002] VCAT 696 at [15].

(b) Is an objection identified by a beneficial objector to the proposal likely or unlikely to occur?

(c) If it is likely, does it constitute a detriment? That is, is a claim of detriment a mere assertion or does it relate to a more substantive amenity issue?

(d) Are the objectors' objections vexatious or not made in good faith?

(e) Does the proposal otherwise comply with the relevant Planning Scheme?

(f) What evidence is before the Tribunal of the appeal site and its environs?

19. While I will address some of the above questions in more detail later in this paper, it is important first to examine the scope of the restriction to ascertain the extent to which the proposal requires its variation or removal.

20. Obviously, in an application for a complete removal, "every possible detriment of every possible development enabled by the removal" is put in issue.[10] This is not the case in an application for a variation – the scope for detriment to be caused is therefore much narrower.

21. There needs to be a clear link between the claimed detriment that will be suffered and a covenant in the restriction. If a restrictive covenant

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10 *Slaveski v Darebin CC* [2006] VCAT 593 at [32].

does not provide protection from an activity, that will be a relevant consideration for the Tribunal.

22. It may be relevant to the Tribunal that there has been significant development in the area around the subject land that puts the proposal into context as well as the claimed detriment.

23. Such development should inform the Tribunal as to whether there is a real chance or possibility that a detriment will result from the removal or variation of a restriction.

Vexatious objections

24. The Tribunal's consideration of what constitutes a vexatious objection in the context of a restriction is somewhat different to what would normally be considered to be frivolous and vexatious.[11]

25. The Tribunal has examined the question of vexatiousness, thus:

> *"I do not mean that they are not made in good faith in the sense of being dishonest. I do not mean that they are vexatious in the sense of being raised to annoy or embarrass the applicant, or anyone else. They may amount to a very weak case against the proposal, but I do not need to decide whether they are vexatious in the sense of being so unarguable as to be utterly hopeless. I am satisfied that they are vexatious in the sense that they are designed to achieve an ulterior purpose. The objections by the owners with benefit are designed not to uphold the covenant and*

> *its purposes in terms of urban design, but to seek to achieve the defeat of the development proposal for reasons [unrelated] to the covenant and because the Objectors do not like the proposal for such other reasons".*[12]

26. Possible detriments referred to in an objection might be weak or unlikely but may nevertheless be arguable, possible and so not obviously untenable or manifestly groundless or utterly hopeless.

27. Recently, the Tribunal has suggested that "the general rule of thumb has been that an objecting beneficiary typically needs to be located in a different street for the applicant to have a good case that the Section 60(5) test can still be satisfied".[13]

28. In light of the test, save for a factual situation such as the above, an argument that an objection is vexatious will be difficult to establish, though not necessarily impossible.

Interpreting the restriction

29. As I've noted above, it is a far easier task to apply to vary a restriction rather than have it removed.

30. Before getting to that point, however, the applicant must consider whether the words of the restriction in fact are a restraint on the form of the proposal.

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11 "Some vexatious objections imply poor conduct and/or poor behaviour on behalf of the objector, but legal 'vexatiousness' does not necessarily imply anything against the objector": *Georgakopoulos v Bayside CC* [2006] VCAT 1505 at [22].

12 *Castles* at [53].

13 *Goodwin v Bayside CC* [2012] VCAT 28 at [18] (a single dwelling restrictive covenant case).

31. It is trite to say that covenants in restrictions should be interepreted using the ordinary meaning of the words employed in them.[14]

> *"…[The] language of the covenant should be interpreted in a colloquial and ordinary sense and not in any technical or legal sense and that primarily is a question of the interpretation of the particular covenant before the court which must be searched to see if the context throws any light on the meaning of the words."*[15]

32. The tribunal has adopted the following principles in relation to the interpretation of restrictive covenants:[16]

    (a) The language of the covenant should be interpreted in a colloquial and non-technical sense.[17]

    (b) Slight changes in the wording used or in the order in which the words are used can have a significant effect on the meaning of a phrase or similar phrases in a covenant.[18]

    (c) The object is to discover the intention of the parties as revealed by the language they have used in the document in question.[19]

33. For example, a covenant may:

    (a) restrict a use rather than works.[20]

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14 *Gleaming Pty Ltd v City of Banyule* [2001] VCAT 18.
15 *Ex parte High Standard Constructions Ltd* (1928) 29 SR (NSW) 274 at 278-9, referred to in *Gleaming*, above.
16 *Brissac Investments Pty Ltd v Stonnington CC* [2004] VCAT 342 at [4].
17 *Ex parte High Standard Constructions Ltd* (1928) 29 SR (NSW) 274 at 278-9.
18 *Re Marshall and Scott's Contract* [1938] VLR 98 at 100.
19 *Tonks v Tonks* (2003) 11 VR 124.
20 *Dixon v Greater Geelong CC* [2003] VCAT 1082.

(b) not restrict the number of residents on the land nor the number of vehicles or traffic associated with one dwelling.[21]

Conclusions

34. The test that needs to be satisfied in the Act is a very high one.

35. Carefully examining the language used in the covenant and identifying which activities are restricted by the covenant may affect the basis on which an application is made.

36. There is a higher likelihood of success where an application merely seeks to vary as opposed to remove a restriction and the application is made in the context of a compliant proposal for the land.

37. Any claimed detriment must be likely to occur and relate to the operation of the covenant. If a restrictive covenant does not provide protection from an activity, that will be a relevant consideration for the Tribunal.

38. Finally, identifying the environs around the subject land and the context in which the proposal is situated may assist in the argument.

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21 See *Arikan v Moreland City Council* [2007] VCAT 249 at [10].