

## VARYING AND REMOVING A RESTRICTIVE COVENANT

### What is a restrictive covenant?

A restrictive covenant is an obligation affecting a parcel of land for the benefit of another. It is generally in the form of a private legal agreement entered into by a purchaser and owner at the time of sale and is registered on the Certificate of Title.

Restrictive covenants are most commonly applied when an owner subdivides land for sale and wishes to apply some restrictions on the use and development of the lots. For example, a common covenant prohibits the use of land for quarrying or manufacture. Covenants have also been used to specify the type of building materials that can be used and even the minimum cost of construction of a dwelling on each lot.

Restrictive covenants bind any future owners of the land. Similarly, any subsequent purchasers of lots in the original subdivision, still held by the owner at the time the covenant is agreed, have the benefit of the covenant. These beneficiaries are able to enforce the terms of the agreement through the Supreme Court.

It should be noted that unless Council owns one of the lots that benefits from the covenant, Council is not party to these private agreements and is not able to enforce their provisions.

### How can I tell if my property is affected?

The existence of a covenant is recorded on the Certificate of Title for the land.

Land Victoria provides a service for searches for Certificates of Title and related instruments, such as covenants. A search can be conducted for a covenant at a nominal fee through Land Victoria or a professional Title Searcher.

#### Contact Details:

Title Registration Services (03) 8636 2010  
Land Victoria [www.land.vic.gov.au](http://www.land.vic.gov.au)  
Level 9, 570 Bourke Street  
Melbourne VIC 3000

### How do I vary or remove a restrictive covenant?

A planning permit is a legal document granting permission to allow a use or development (subdivision, buildings, and works) to proceed on specified land. Planning permit applications must be submitted to the municipal Council in which the land is situated.

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A planning permit cannot be granted by Council that authorises anything that would result in a breach of a registered restrictive covenant, unless the covenant is first varied or removed.

A covenant can be varied or removed through the following three (3) processes:

## **1. Planning Permit**

A planning permit application can be made by any person to vary or remove a covenant. This is the most convenient method.

If an application is made for a planning permit to vary or remove a covenant, Council will require the applicant to provide the following information:

- An application for planning permit form;
- The required fee;
- A copy of the Certificate of Title;
- A copy of the Instrument of Transfer detailing the covenant;
- A letter from a person with an understanding of property law which identifies which other properties have the benefit of the covenant;
- A copy of the original 'parent' title from which the subdivision was created and a copy of the plan of subdivision;
- A copy of all of the transfers of land from the original owner/subdivider to the first purchaser of the various lots within the subdivision.

As with most other planning permit applications, there is a right of appeal to the Victorian Civil & Administrative Tribunal (VCAT) for both the permit applicant and for any objectors. However, please note that both Council and VCAT are bound to follow the legislation contained within Section 60 (5) of the Planning & Environment Act 1987, which directs that if a beneficiary does object and that objection is not vexatious, but instead is made in good faith, the application must be refused.

## **2. Planning Scheme Amendment**

Any person can request Council to prepare an amendment to the planning scheme to vary or remove the covenant.

The applicant can also apply for Council to prepare an amendment to the planning scheme to vary or remove the covenant and at the same time to consider a permit application which would otherwise authorise something that would result in breach of the covenant.

Before an amendment to the planning scheme can be prepared, it must be authorised by the Minister for Planning. The amendment is then placed on public exhibition for at least 1 month which allows for the public and interested parties to make submissions. If there are submissions received that oppose the amendment, the Minister will appoint

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an independent panel to consider these. When this panel report is received, Council must adopt or abandon the amendment. An adopted amendment must be given to the Minister to make a final determination. If approved, the amendment will become part of the Planning Scheme and notice of it given in the Government Gazette.

### **3. Supreme Court**

An applicant and/or owner can apply to the Supreme Court for an order to vary or remove the covenant. Please note that the applicant must have legal representation by a barrister for this option.

The decision to apply to vary or remove a covenant should not be entered into lightly as the process can be expensive and time consuming and there is no guarantee that a variation or removal will eventually be issued.

### **What notification is required to vary or remove a restrictive covenant?**

An application for Planning Permit to vary or remove a covenant is required to be advertised to all persons who legally benefit from the covenant. Depending on how the covenant is applied, these persons could be neighbours or they could be located several blocks away from the subject land. Notification is carried out by sending a notice to these beneficiaries and allowing them at least 14 days to comment on the variation or removal.

If choosing to vary or remove a covenant through a planning scheme amendment, notification will be broader than just notifying beneficiaries and will include a public exhibition of the amendment for at least 1 month.

### **What if an objection is received?**

A person objecting to the variation or removal of a covenant must demonstrate to Council that they may suffer detriment (including perceived detriment) as a result of its variation or removal. They must also satisfy Council that the objection is not vexatious and is made in good faith. If an objection is received, then Council cannot legally issue a planning permit for the variation or removal of a covenant.

#### **PLEASE NOTE:**

For Covenants created after 25 June 1991, Council must consider, before deciding on an application, whether any beneficiaries are likely to suffer:

- Financial loss;
- Loss of amenity;
- Loss arising from change to the character of the neighbourhood;
- Or any other material detriment.

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However, Council is not bound to refuse a planning permit application to vary or remove a covenant created after 25 June 1991 based on a beneficiary objecting.

## **When is notification not required to vary or remove a restrictive covenant?**

Under Section 47(2) of the Planning and Environment Act 1987, an exemption is given from giving notice of a planning permit application for the variation or removal of a covenant, if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction. In order to prove a prior breach of the covenant, photos and other evidence should be provided to Council with any application.

## **Registration of a Plan of Removal or Variation of a Restriction**

To enable the restrictive covenant to be varied or removed from the Certificate of Title, an application for Certification of a Plan of Variation of Restriction must also be lodged with Council. Once approved, the Plan must be lodged by the applicant with Land Victoria for registration.

Registration formalises the change to the restrictive covenant.

## **What if I benefit from a restrictive covenant and object to its removal or variation?**

An objection to the variation or removal of a restrictive covenant must be in writing, include your name, address and contact number during business hours. There is a form that you can use which is available from Manningham's Planning Department or you can write a letter. An objection to the variation or removal of a covenant must demonstrate how you may suffer detriment (including perceived detriment) as a result of the proposed variation or removal. Council must be satisfied that the objection is not vexatious and is made in good faith. If an objection is received from a beneficiary, then Council cannot legally issue a planning permit for the variation or removal of a covenant.