



10 CONSULTING GROUP

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Expert Witness Report
191-193 Wattletree Road, Malvern
Removal of Restrictive Covenant

February 2011
Prepared by Robert Milner for the Supreme Court of Victoria

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1 Introduction

I, Robert Milner of 190 Gladstone Street, South Melbourne, am a Town Planner and Director at 10 Consulting Group Pty Ltd.

I hold an honours diploma in Town and Country Planning from Liverpool Polytechnic and I am a life fellow of the Planning Institute of Australia. I have a broad range of expertise in planning and development matters as outlined in my curriculum vitae, as attached to my affidavit.

I have been instructed by Russell Kennedy solicitors, on behalf of the defendants in relation to Supreme Court Matter No. 1313 of 2010 to prepare a report that addresses Section 84(1) of the *Property Law Act 1958* as it relates to the matter. Section 84(1) of the *Property Law Act 1958* provides that the Court may, by order, wholly or partially discharge or modify a covenant if it is 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*
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or*
- (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.*

I have been retained to provide my opinion as to whether the covenant applying to 191-193 Wattletree Road, Malvern, is obsolete, impedes reasonable use of the land, and whether its discharge or modification would injure the defendants as the persons entitled to the benefit of the covenant. My details as required under the Expert Witness Code of Conduct are included as Attachment 1.

I am of the opinion that the covenant is not obsolete. It was set in place to create a particular character, which was achieved and has been maintained. Further, the covenant does not impede the reasonable use of the land, as it provides for it to be developed with a house, which is reasonable and appropriate in the location. Continuation of the covenant provides the beneficiaries with certainty regarding the character and amenity of the area. Conversely, discharge of the covenant may result in the use and development of the site entirely out of keeping with the low scale and residential nature of Coonil Estate. Such a development on the site, and the potential this creates for further erosions to the character created by the covenant would result in a loss of amenity and detriment to the beneficiaries of the covenant. Such an outcome is demonstrated by the plans forming Exhibit MCP-2 and MCP-3, provided to form part of a possible modification to the covenant.



To arrive at my conclusion, I have undertaken investigations that I consider appropriate to inform myself as to the present and historic character of the neighbourhood, reasonable use of the land, and potential impact of the removal or modification of the covenant. These investigations have included:

- undertaking a site visit to the subject site and surrounding neighbourhood;
- inspection of the areas adjacent to the neighbourhood, where the restrictive covenant is not in effect;
- review of the existing planning controls of the area;
- review of the relevant neighbourhood character study;
- review of other cases; and
- the affidavits of other witnesses.

2 BACKGROUND

This matter refers to 191-193 Wattletree Road, Malvern (the 'site'). The site is described by Certificate of Title Volume 03607, Folio 309 as lots 7 and 8 on Plan of Subdivision 005320. The title was created in 1912 from the parent title of Volume 03442 Folio 352.

The Parent Title was registered in 1910 and illustrates the intended subdivision of Coonil Estate.

2.1 The Plaintiff's Land and the Defendants' Land

2.1.1 *The site*

The site, the plaintiff's land, fronts Wattletree Road, which forms the southern boundary of Coonil Estate. It is unusual in that the two lots of the parent title have been developed as one; development of the balance of the Estate generally reflects the subdivision pattern as set out in the original plan of subdivision.

The site has been developed with a two storey, brick, residential dwelling (Figure 1). As the title contain two lots, the dwelling has a larger frontage than many within the subdivision, although it is substantially located on the western lot.



Figure 1 – Development on the site

The balance of the site is developed with a swimming pool and landscaped gardens.

There are a number of large trees on the property that screen the dwelling and development on the site.

There is a cross over and vehicular access to the site at the eastern extent of the Wattletree Road frontage, and two additional pedestrian access points via gates in the front fence.

Having the one dwelling on two lots has resulted in larger side boundary setbacks than appear in the balance of the subdivision.

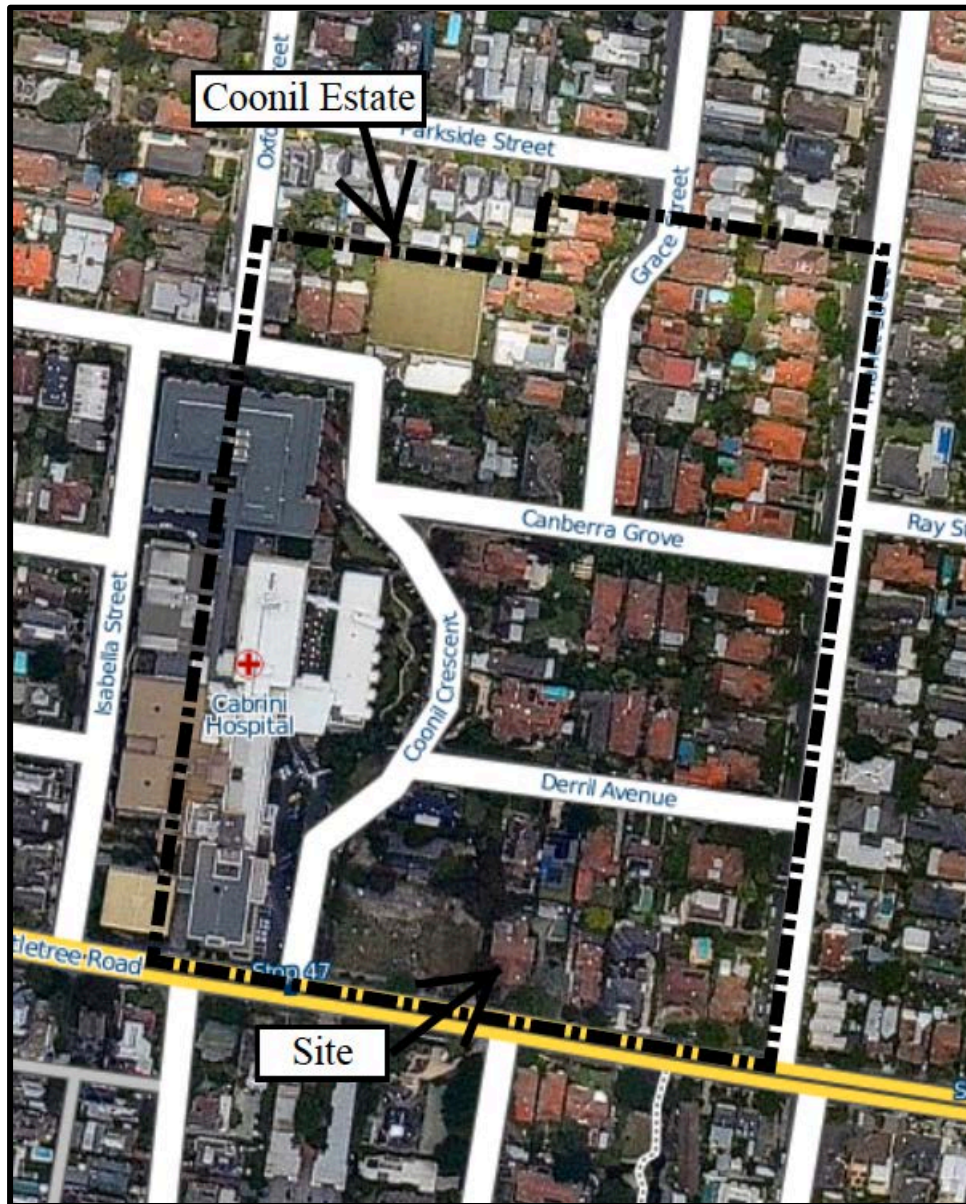


Figure 2 - Aerial photograph of subdivision

2.1.2 *The Defendants' Land*

The covenant is to the benefit of titles that were transferred out of the parent title after the title to the site was transferred out of the parent title. The relevant titles are highlighted in yellow on the plan forming Attachment 2. The relationship of the defendants' land with the plaintiff's land is also depicted in Attachment 2.



There are 33 defendants to this matter, representing 25 titles with the benefit of the covenant. Three of these titles are at 197 Wattletree Road, where the original Lot 10 has been re-subdivided into three lots.

The defendants' land represents properties throughout the Estate, including to the east and immediate north of the site.

2.2 Restrictions of the Covenant

The relevant portion of the covenant states:

“(The owner) his executors administers or transferees will not at any time or times hereafter quarry on the said land or cart or carry away any stone gravel soil or sand therefrom or make any excavations therein except such as may be necessary for laying the foundation of any building on the said land AND FURTHER that he or they will not erect more than one house on each of the said Lots and that any house so erected shall be of stone or brick or brick and stone with roof of slates or tiles on the main portion thereof at a cost of not less than Six hundred pounds each exclusive of stables and outbuildings and that such buildings shall not be used for any trade or business AND FURTHER that (the owner) his executors administers or transferees will not subdivide either of the said Lots into smaller allotments nor reduce the frontage thereof to smaller frontage than appears on the said Plan of Subdivision AND (the owner) hereby requests that the above covenants may appear on the encumbrance on the Certificate of Title to be issued in respect of the land hereby transferred and run with the land.”

The covenant is summarised by the Notice of Application to Discharge a Restrictive Covenant as preventing:

- quarrying or the removal of any stone gravel soil or sand;
- the making of excavations except for the laying the foundation of any building;
- the construction of more than one house on each of the two lots comprised in the title to the Land;
- any house being made of materials other than stone or brick or brick and stone with a roof of slate or tiles;
- the use of any building for any trade or business; and
- the subdivision of either of the two lots into smaller allotments or reduction of their frontage.

In addition, the covenant provides that any house constructed on the lots will not cost less than 600 pounds.

Combined with the contemporary context of the development of the Coonil Estate, these individual elements of the covenant have made a significant contribution to the character of the Estate.

3 Effect of the Covenant

3.1 Development of the Estate

The effect of the restrictions in the covenant and the era in which the Estate was developed can be experienced in visiting Coonil Estate today.

While the requirement regarding the minimum value of buildings to be constructed does not have currency, it does describe the character of the area that was being sought at the time of the subdivision.

Studies undertaken by Council (discussed in Section 4) refer to the Estate being an example of the new middle-class enclaves of the early 1900s. This can be seen to have been in part controlled by both the minimum value of a house, and also by the building materials specified.

The result is a consistency in built form, both in its quality, scale and building material.

Restrictions in the covenant that *“one house... (and) such buildings shall not be used for any trade or business”* clearly directs a purely residential use within the Estate. This appears to have been maintained in lots transferred out of the parent title despite the development of Cabrini Hospital at the western extent of the Estate.

The restriction on the ability to re-subdivide lots and vary the width of frontage has also had a visible effect on the development of the Estate. It has provided a very strong consistency in the rhythm of the built form and setbacks, with the majority of lots developed in accordance with the original plan of subdivision that provided consistent frontage widths. Further, the restriction on re-subdivision has contributed to the maintenance of single residential dwellings throughout the Estate.

For the reasons described above, the covenant has contributed to a strong, identifiable, and visually attractive neighbourhood character to which the site is a contributing factor.

3.2 Restrictions on contemporary development of the site

The provisions of the covenant with currency that restrict the use, development and subdivision of the site are as follows:

- Only one house may be constructed on each of the two lots;
- Houses must be constructed in brick and / or stone;
- No buildings on the site may be used for trade or business;
- Neither of the lots may be re-subdivided; and
- The width of the frontage of either lot may not be reduced.

It is relevant to note that the restrictive covenant addresses the site as two lots, despite them being transferred out of the parent title onto a single title.

As such, it appears that the most intensive development allowed on the site would be the construction of two houses (one on each lot).

3.2.1 *The Meaning of 'One House'*

The covenant refers to no more than *"one house on each of the said Lots"*. This is interpreted as a single dwelling covenant by the relevant heritage citation report, which refers to building restrictions that only allowed *"single dwellings... on each allotment"*¹. While I note that previous decisions infer that a 'house' may contain multiple units², the covenant under consideration in the current matter also provides that there may be no subdivision of either of the two lots into smaller allotments.

That the covenant provides for *"one house on each of the said Lots"* clearly indicates that the site is permitted to be developed with two houses, one on each lot, with each presenting as a single house.

This is in vast contrast to the proposals put forward by the plaintiff illustrating what may be developed on the site if the covenant is removed or varied.

The original affidavit of Maureen Carmel Prowse, when the proposal was only to remove the covenant, referred to exhibit MCP-2; a large, multi-unit, multi-use building which would straddle the width of the two lots, introducing non-residential uses to the neighbourhood and, presumably, requiring subdivision of the lots under a strata-title.

The second affidavit of Maureen Prowse refers to exhibit MCP-3, which proposes the same built form, however states that it is a 'unit' rather than 'mixed use' development, implying that the use would be entirely residential. However, I note that the corresponding amendment to the originating motion that proposes a modification of the covenant as an alternative to the removal of the covenant, includes the removal of the restriction preventing use of a building for any trade or business.

Such a development would be a substantial variation to the neighbourhood character established through the covenant.

¹ City of Stonnington, Heritage Citation Report; *Coonil Estate Precinct*; Hermes No 44974

² *Natraine Nominees Pty Ltd v Charles Corsie Patton and Robert Hodges Real Estate Pty Ltd*, SCV (6918 of 1999) Para 21; *Longo Investments Pty Ltd*, SCV (6301 of 2001) Para 9.



4 Neighbourhood Character

4.1 Discussion

Section 84(1)(a) of the *Property Law Act 1958* establishes that one of the tests to determine if a covenant is obsolete is “*by reason of changes in the character of the property or the neighbourhood...*” In order to define such a character, it is useful to establish what is being defined as the ‘neighbourhood’, as well as what is meant by ‘character’.

Character, and in particular neighbourhood character, is a concept that is given significant consideration in the Victorian planning system. As such, I have looked to some tools within the planning system to assist in defining and describing neighbourhood character.

4.1.1 Defining Neighbourhood Character

The 2001 Planning Practice Note issued by the Department of Infrastructure (subsequently Department of Sustainability and Environment, now within the Department for Planning and Community Development) in relation to understanding Neighbourhood Character defines Neighbourhood Character as “*the combination of the private and public realms. Every property, public place or piece of infrastructure makes a contribution, whether great or small. It is the cumulative impact of all these contributions that establishes neighbourhood character*”.

It goes on to say:

“In many areas building style is important to setting the character of an area. This includes not just typical form and massing, but may also include details, materials, and colours. Buildings do not need to be old or historically significant to have character that is important to people’s understanding and enjoyment of an area”.

It lists elements such as topography, street block length, street alignment, proportions, extent of rear gardens and private open space, landscaping and vegetation, patterns of use, diversity of housing, car parking, space around properties and site coverage, setbacks, building mass and height, and architectural rhythm as elements contributing to the character of a neighbourhood.

It is also significant to note that the ‘character’ of a neighbourhood can comprise both physical and amorphous elements. The Department of Planning and Development’s Ministerial Panel Review of VicCode 2 deliberated on the definition of neighbourhood character. It identified both the physical and intangible elements contributing to neighbourhood character, defining it as the “*interrelationship of various aspects of built form, topography, vegetation, density, subdivision pattern and activity, both in the public and private domain, combined with the feel of an area – the atmosphere perceived not only from the street but from the backyard, such as “peaceful”, “secluded”, “quiet”, or “green and leafy”.*



4.1.2 *Defining the Neighbourhood*

In addition to an understanding of the elements that make up neighbourhood character, it is also important to define the area of 'neighbourhood' within which the subject site is located.

The Cambridge Dictionary's definition of 'neighbourhood' is *"the area of a town that surrounds someone's home, or the people who live in this area"*.

The Planning Practice Note referred to above states the following in relation to how far a neighbourhood extends:

"In most cases, about five sites or buildings up and down the street, across the street and behind the site in question should be sufficient to identify the features of the neighbourhood that should influence the design. However sometimes it may be necessary to look further than this, depending upon the individual circumstances of the site and the neighbourhood".

This definition of neighbourhood has been constructed for the purpose of determining appropriate design features. The matter currently under consideration is not about detailed design or even site layout of a proposal, but rather the impact of a form of development. Accordingly, it is appropriate to look further than the immediately visible neighbourhood, as discussed below.

The perimeter or definition of a neighbourhood will differ in every circumstance and that generally the 'centre' of the neighbourhood will shift according to the location of the site in question. Furthermore, I consider that there are different types or levels of neighbourhood that relate to any given site. The first would be contained to that land close to a site in question, as a 'primary' neighbourhood. It might include, for example, the block in which a person goes for a stroll or walks their dog.

A broader neighbourhood might be a wider area of geographically related land, but which might be visually separated from the subject land. It might include, for example, the area through which a person travels to go to local shops.

Having visited the site, walked around the area, reviewed background documents and read the affidavits, it is my opinion that the boundaries of the immediate neighbourhood is defined by the significant infrastructure in proximity to the site which terminate the residential environment: Wattletree Road to the south of the site, and Cabrini Hospital to the west of the site. Although the site fronts Wattletree Road, and the site on which Cabrini Hospital is located was a formative component of the Coonil Estate, these, in my view, create boundaries to the neighbourhood.

To the north, I consider that the neighbourhood extends approximately two blocks back into the Coonil Estate, and east to Thanet Street. The neighbourhood is formed by its historic context, residential nature and consistent and connected streetscape. The footpaths, landscaping and built form create a very pleasant pedestrian environment.

This is explored further below.

4.2 Relevant Studies

The City of Stonnington has undertaken a number of studies which assist in defining and describing the neighbourhood in which the site is located.

The Stonnington Heritage Review, undertaken in 1996, brought together the work of previous studies undertaken by the former Cities of Prahan and Malvern.

In 2006, Stonnington City Council commissioned the Thematic Environmental History and Neighbourhood Character Study³, the latter of which made recommendations for subsequent Heritage Overlay Investigation Areas, and ultimately resulted in the Heritage Overlays implemented through Amendment C88 to the Stonnington Planning Scheme.

4.2.1 Neighbourhood Character Study

Stonnington's Neighbourhood Character Study, still in draft form, includes the site in the Malvern precinct. The Malvern Character Description and Design Guidelines are included as Attachment 3. The following are excerpts from the Malvern Character Description:

Precinct Description

This precinct is essentially a low scale area with a predominance of single storey dwellings and attic style second storeys... established gardens combine with fairly consistent street trees to create well-vegetated streetscapes.

Key Existing Characteristics

- *Setbacks are generally small with 4-5m front setbacks and 1-2m side setbacks, with some driveways and garages to the side of dwellings. Occasionally frontages are larger with 6-7.*
- *Building heights are mixed with newer dwellings tending to be double storey.*

Community Values

- *Established street trees.*
- *Canopy trees and lawns in private gardens.*
- *Large gardens and space between buildings.*

Preferred character statement

- *Maintaining and strengthening the garden settings of the dwellings.*
- *Reflecting the rhythm of existing dwelling spacing and allowing for side and rear planting.*
- *Ensuring buildings and extensions do not dominate the streetscape.*

³ Panel Report (September 2009) Stonnington Planning Scheme Amendment C80, C88 and C97

- *Allowing higher density development on properties abutting Wattletree Road, west of Tooronga Road.*

4.2.2 Coonil Estate Precinct

Coonil Estate Precinct (the ‘Precinct’) encompasses the majority of the original Coonil Estate subdivision, and a portion of an earlier subdivision to the north. The Precinct is defined by Heritage Overlay 375 (HO375), and described by a City of Stonnington Heritage Citation Report (the Citation).

HO375 in the context of the site is depicted below in Figure 3.

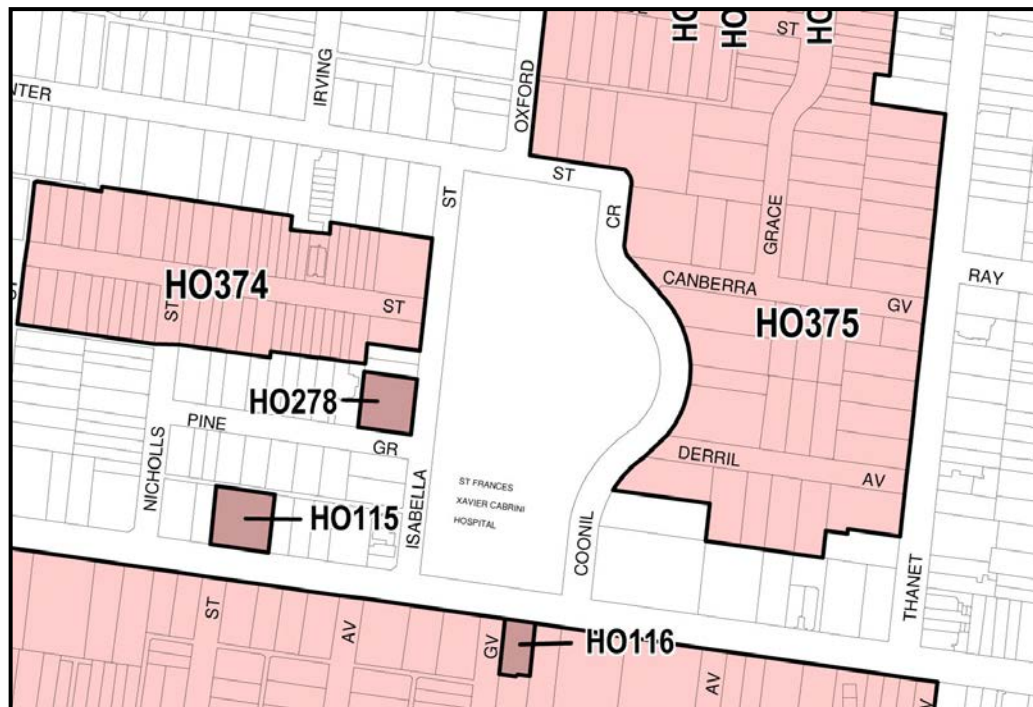


Figure 3 – Heritage Overlay 375

Although the site is not included within HO375, the Coonil Estate Precinct helps to describe and define the context and the character of the site and its neighbourhood.

The Citation notes that Coonil Estate was subdivided in 1910 – the same year that the electric tramline was opened along Wattletree Road. The subdivision created a number of streets to the north of Wattletree Road, as well as adding allotments fronting Wattletree Road (including the site).

The Citation includes a description of the Estate at the time of its subdivision from the Stonnington Local History Catalogue (Reg no. 10462), which states:



“Every street on the estate is being formed, channelled, metalled... In all there will be four new streets on the property... the land slopes gently from Coonil House, affording picturesque views of the hilly country of East Malvern and Glen Iris. ...The surveyors have departed from the ordinary rectangular form in devising the new streets. Coonil Street sweeps in a double curve from Wattletree Road... The allotments like the streets, break from the dull uniformity which mars much of the older suburban development.”

The Citation goes on to state:

“An unusual feature of the estate was the reservation of land by the vendor for a bowling green. Building restrictions prohibited wooden houses, and the terms of sale stipulated that no building could be erected, less than £600 pounds in value and single dwellings only could be erected on each allotment. Around 1912 Malvern Council had begun to declare brick areas - where timber houses were not permitted. These regulations and later minimum requirements for housing allotments were clearly meant to reinforce Malvern’s image as a middle class enclave.”

I note the term ‘single dwellings’ in this quote is an interpretation of the restrictive covenant that, for the restrictive covenant applying to the site uses the wording ‘one house’. The Citation goes on to make a number of references to the influence of the covenant on the character and development of the Estate, including the following:

“As a result of the 1910 building restrictions which prohibited timber construction and set a minimum house value, the Edwardian dwellings in the Coonil Estate are uniformly of brick construction and display consistent scale and architectural character”.

“(In comparison to the Claremont Avenue Heritage Overlay)... The Edwardian component of the Coonil Estate displays a much higher degree of uniformity in terms of its architectural character and red-brick construction – due in large part to the 1910 building regulations”.

“New houses in Coonil Estate were typically built to a series of strict regulations that prohibited timber construction and prohibited minimum costs. As a result, the substantial, but polite, built form underscores the middle class aspirations of the Edwardian era.”

The Citation includes a number of observations about both the architectural style and character of the Coonil Estate, including that the Estate is a residential area, characterised by good quality, freestanding red-brick villas, a predominantly single-storey nature and generous allotments providing landscaped setting for dwellings

The Citation was a supporting document to Amendment C88 to the Stonnington Planning Scheme, which applied permanent heritage controls to the Precinct.

Amendment C88 was combined with Amendments C80 and C97 for the purpose of the Panel hearing in September 2009. Council’s Statement of Evidence to the Panel, prepared by Bryce Raworth (conservation architect), notes that the Coonil Estate portion of the precinct is described as having a high degree of uniformity in both the



Edwardian architectural style and use of red brick. It is further noted that the precinct demonstrates an important phase of middle-class suburban development.

The Panel report notes that there was one submission to the Panel in favour of including Coonil Estate properties fronting Wattletree Road in the Heritage Overlay. However, the Panel agreed with Council's position of excluding properties fronting Wattletree Road, including the site, from the Heritage Overlay due to vacant lots and non-contributory buildings.

Nonetheless, the Heritage Overlay and Citation provide a dependable foundation for describing the character and aspirations of the neighbourhood.

4.3 Existing Neighbourhood Character

The existing character, within the immediate neighbourhood of the site, is depicted by the photographic montages contained in Attachment 4. While there is a distinction between the properties fronting Wattletree Road and the northern parts of the Estate, there is also a distinct connection that, in my view, is best described through the sense of neighbourhood.

As identified by the Heritage Citation, the covenant has had a formative impact on the development of the Estate, creating a strong consistency in the built form of the Estate. Historical aerial photographs confirm that this character is consistent with the original development of the Estate (Attachment 5).

Furthermore, the street layout and design creates continuity and connectivity, with tree lined pedestrian footpaths on both sides of the street creating a pleasant walking environment. The Citation recognises that the significance of the Precinct is not just historic – it is also aesthetic.

There is a strong presence of red brick, Edwardian dwellings. Although these are predominantly single storey, there are some attic storey additions. Hipped and gabled roofs are predominantly constructed with terracotta tiles. These middle class family homes of the early 1900s are well maintained, and set amongst tended gardens.

While I acknowledge that the site is partially removed from this environment due to its location at the southern extent of the Estate and frontage to Wattletree Road, the pedestrian connectivity of the streets and historical context, in my view, intrinsically link the site to the Estate to the north.

Although not included in the Heritage Overlay, the characteristics sought through the covenant are also evident on properties on Wattletree Road; with the property on the corner of Wattletree Road and Thanet Street (201 Wattletree Road) displaying the distinct characteristics identified in the area (Figure 4). As previously described, it is my view that this dwelling presents as the commencement of the immediate neighbourhood of the site.



Figure 4 – 201 Wattletree Road

To the north, along Thanet Street, there is a clear distinction between the character to the east, outside the Estate, and those to the west, within the Estate.

The character within the Estate is of a distinctly residential nature, typified by one and two storey red brick dwellings. There is an intimacy in the neighbourhood character created by the modest size of the lots, matched by a complementary scale to the dwellings and landscaped setbacks. Footpaths throughout and the landscaped streetscape add to the aesthetic of the pedestrian environment.

Along Wattletree Road, the immediate neighbourhood extends to the west. There are four properties between Thanet Street and the property, and a further three to the west of the property before Coonil Crescent.

It is notable that not all the properties in this section of Coonil Estate are subject to covenant. The covenant has been removed from the properties to the west of the site over a period of time. These lots (forming 185 Wattletree Road) are currently undeveloped. Although they may have been vacant for some time, I believe that they should be considered more as a blank canvas, where the character they will provide is unknown, rather than assuming a divergence from the established character of the Coonil Estate.

Like the site, 185 Wattletree Road is within the Residential 1 Zone (R1Z) in which neighbourhood character is an important consideration; any future planning permit application for the development of 185 Wattletree Road will be expected to respond to the neighbourhood character.

While 185 Wattletree Road is part of the neighbourhood I have described here for the site, it also has an association with Cabrini Hospital, which might be considered to be part of its neighbourhood. Any development of 185 Wattletree Road might therefore reasonably be anticipated to respond to both the institutional, service delivery character of the Cabrini Hospital at a higher intensity of built form, and the residential, lower scale nature of the Coonil Estate. As such, it could be anticipated to provide a transitional role.

To the east of the site, the restrictive covenant over 197 Wattletree Road has been varied, allowing for the development and subdivision of three dwellings on the site (Figure 5). The subsequent development, in my view, provides a built form outcome in

contrast with the surrounding character and is indicative of one form of development that might occur if the restrictive covenant were to be removed.

Notwithstanding this, the predominant built form along the Wattletree Road frontage of the Estate and neighbourhood is still of a single, brick, house on each lot, within a landscaped setback.



Figure 5 – 197 Wattletree Road

5 **Obsolescence**

Section 84(1)(a) of the *Property Law Act 1958* states that a restriction ought to be deemed obsolete, inter alia, by reason of changes to the character of the property or the neighbourhood.

In circumstances where a covenant has been applied as part of the development of an Estate, in my experience, that such obsolescence occurs when it is either widely ignored (changing the character of the neighbourhood), or through its replacement with other forms of control.

5.1 **Compliance with the Covenant**

Both the neighbourhood character and description of the Coonil Estate establish that there is a high degree of compliance with the covenant within the Estate.

It is evident that there are some instances within the Estate where the covenant has been varied or removed, and of some instances where the lots have been subdivided in a manner that varies from the original plan of subdivision, however it is not clear if these all of these properties were subject to the covenant.

- At the northern extent of the site, the original Lots 59 and 51 have been re-subdivided, providing for the development of a dual-occupancy on the new lots.
- Original Lot 30, on the corner of Thanet Street and Canberra Grove has been subdivided into two lots.
- The covenant has been removed from the three properties to the west of the site, which were formerly Lots 4, 5 and 6.
 - The covenant was removed from Lot 4 in 1959.
 - The covenant was removed from Lot 5 in 2005.
 - The covenant was removed from Lot 6 in 2007.These properties are all currently vacant.
- To the east of the site, the covenant has been varied at the former lot number 10, allowing for the development of three, two storey dwellings on the site (197 Wattletree Road – Figure 5).
- There is a current planning permit application to vary the restrictive covenant over lot 18 (2 Derril Avenue) in regard to building materials.
- There has been a boundary realignment between 17 and 18 Derril Avenue.

There has also been a realignment of the subdivision between the original lots 38 and 39, however as this has not created an additional lot nor does it appear to reduced the width of any frontages, I do not consider this to be a variation to the covenant.

It is notable that these limited changes have not impacted on the residential nature of the neighbourhood and have, to a high degree, maintained the intent of the covenant.

Further, variations to the covenant within the Estate represent a very small proportion of the 63 lots included in the original plan of subdivision. Further, these variations

relate almost exclusively to the subdivision patterns of lots, resulting in some increased density on the periphery of the Estate. Building material requirements have been maintained consistently and, perhaps more significantly, requirements regarding residential use appear to be entirely adhered to, providing a distinctive character to the neighbourhood despite its proximity to the Cabrini hospital.

Both the limited number of changes to the restrictive covenant and degree of compliance indicate that it has not been widely ignored. This is further illustrated by the number of objections to this matter by beneficiaries to the covenant.

5.2 Planning Scheme Controls

A significant change that has occurred since the application of the covenant is the introduction of land use and development control provided by planning schemes. It is my opinion, however, the planning scheme is an additional, but not a substitute system of control for a covenant.

Covenants continue to provide a private system of control, which owners accept as part of their purchase of property. It allows them a more direct control over their neighbourhood than is provided by the planning scheme. Their benefits are supported by the continued application of restrictive covenants in new estates.

The covenant provides, inter alia, that the use of the land will be residential, prohibiting any building on site from being *“used for any trade or business”*.

This degree of certainty regarding the use of the site is not, and cannot, be provided through the planning scheme.

Planning schemes control the use of land primarily through its zoning. The site is included within the Residential 1 Zone (R1Z). Although the R1Z provides primarily for residential development, its purposes include:

- *In appropriate locations, to allow educational, recreational, religious, community, and a limited number of other non-residential uses to serve the local community.*

As such, uses including convenience shops, food and drink premises, medical centres and non-residential accommodation may be approved for the site.

The R1Z also does not control the form and scale of development in the manner that is intended by the covenant. Notably, it provides for:

“residential development at a range of densities with a variety of dwellings to meet the housing needs of all households”.

While the covenant may not restrict development of each lot in the site to a single residential dwelling, nor does it provide for the multi-unit developments permitted within the R1Z; rather, it limits development to ‘one house’, on each lot, and does not permit further subdivision.

This is a level of control generally not contained within the Victoria Planning Provisions that provide the framework for the Stonnington Planning Scheme (the 'Scheme'). While I acknowledge there are other provisions of the planning scheme, including those regarding neighbourhood character, which additional restrictions and directions to the R1Z, none of these provide the certainty of the restrictive covenant. This is acknowledged in the second affidavit of valuer John Kenneth Dowling that states:

"In the first case, the restriction (the covenant) runs with the land and, unless removed or modified by agreement or by the Court, is a restriction in perpetuity. In the second case, the restriction (the planning scheme) is able to be varied or adapted according to perceived social needs, by statutory processes that permit intentional flexibility."

5.3 Conclusion

It is my view that the covenant is not obsolete, as it has neither been widely ignored, nor has it been replaced with other forms of control.



6 Impacts of Continued Existence

The restrictive covenant permits the development of a house on each of the lots, and the residential use of each of those houses.

6.1 Reasonable Use and Development of the Land

Given the context of the site, it is my opinion that the reasonable use is residential. This is reinforced by the planning scheme that, as discussed above, includes the site within the Residential 1 Zone (R1Z).

If the zone is taken to describe the reasonable use of the land, it is my opinion that the covenant does not impede such use of the land, rather it supports it, in that it requires residential use of the land, and provides for the identified neighbourhood character.

Appropriate development of the site is guided by a number of different provisions of the planning scheme. In addition to considerations regarding neighbourhood character set out, inter alia, in the zone, Particular Provisions Clauses 54 and 55 provide objectives and standards with which residential development up to three storeys must comply. More strategic guidance is provided by Stonnington Planning Scheme's Local Planning Policy Framework (LPPF).

Contained within the LPPF is the City of Stonnington's Strategic Framework Plan. The Strategic Framework Plan includes the site in an area identified as one of the 'Selected arterial roads where *Medium Density Housing and Shop Tops are encouraged and High Scale Development may be Supported*".

The Strategic Framework Plan appears to be reflected in the Draft Neighbourhood Character Study for Malvern, which notes that its preferred character will be achieved by *Allowing higher density development on properties abutting Wattletree Road, west of Tooronga Road*".

Although the Strategic Framework Plan provides for a more intensive development of the site, it needs to be noted that this is a high level strategic plan which provides a direction for the entire municipality; it does not provide a lot by lot analysis. The appropriate form of development for individual properties needs to be made by balancing the direction provided by the Strategic Framework Plan against numerous other elements, including the characteristics of the local area.

Some precedent has been set for a higher density of development on the site by the development of 197 Wattletree Road. There is also a higher density of development in areas beyond the Estate.

The restrictive covenant therefore prevents development of the site which might otherwise be considered. It could be argued that this is reasonable to a degree for the following reasons:

- owners of the site and properties affected by the covenant bought into the Estate with every opportunity to be aware of the restriction;

- the covenant is responsible for the character and reputation of the Estate; and
- while the R1Z seeks to provide for a range of housing densities, it also seeks development that responds to neighbourhood character.

While the expectation of a more intensive development along Wattletree Road than is permitted by the covenant may be set by the Strategic Framework Plan and elements of the surrounding context, I would not draw the same conclusion about the expectation of a use that might be appropriate on the site.

As indicated by other recent development along Wattletree Road to the east of Cabrini hospital, and in keeping with the balance of the Estate, the restriction of use to residential is entirely reasonable.

6.2 Benefits

While the covenant restricts the use and development of the land that may be permitted if it was not in existence, this needs to be balanced against the benefits provided by the covenant.

The application of the covenant across the Estate has created an amenity that is valued by its residents. In my opinion, the covenant has provided for:

- development of single residential dwellings of a consistent standard;
- consistent frontages, setbacks and scale;
- gardens and landscaping which is well tended;
- a vegetated streetscape aided by a limited number of cross overs;
- an entirely residential Estate in the neighbourhood to the east of Cabrini Hospital; and
- an aesthetic, pleasant pedestrian and residential environment.

In addition to the elements contributing to neighbourhood character described above, the restrictive covenant provides greater security to beneficiaries of the type of development that may impact upon them if it is constructed on an adjoining property. This is further explored in the following section.

6.3 Conclusion

It is my opinion that the covenant does not prevent reasonable use of the land and that it provides significant benefits to the beneficiaries.

The intent of the covenant is providing for 'one house' does limit the form of development which may be expected on the site in the contemporary context if the covenant did not exist. However, the covenant also provides benefits regarding the consistency and maintenance of the character developed within the Estate.



7 Impacts of Removing or Varying the Covenant

7.1 Effect of Removing or Varying the Covenant

Naturally, in the circumstance that the restrictive covenant was removed or varied, any proposal to develop the site with a number of dwellings would require a planning permit.

While requirements of the Scheme would have potential to influence outcomes of the design, there is also provision for discretion.

I have been provided with a copy of plans prepared by Rachcoff Vella Architects dated February 2010, and project number 06910. The plans formed exhibit MCP-2, at the time when the originating motion was to remove the restrictive covenant. They propose a three storey development consisting of sixteen apartments, two commercial units and 36 car parking bays. They present one possible outcome for the site if the covenant were to be removed.

A variation to the originating motion in October 2010 seeks for the covenant to be either wholly discharged or modified by the removal of the pertinent components of the covenant to be replaced with a restriction that only the building illustrated by exhibit MCP-3, or a detached house, may be constructed on the site. These plans provide the same built form outcome as exhibit MCP-2, however do not propose the commercial component. However, the proposed variation does not foreclose on the opportunity for a subsequent planning permit application for the use of some of the 'units' within the building for a non-residential uses such as office suites. Such a proposal may be considered by Council given the proximity of the site to the hospital, however would be out of keeping with the intent of the covenant.

Both of these plans propose an outcome that is substantially in conflict with the neighbourhood character, established through the restrictions of the covenant.

The proposed development spans the frontage of two lots, providing far greater building massing than could be accommodated on one lot and far more bulk than is evident elsewhere in the neighbourhood. In addition to deconstructing the rhythm of the existing pattern, it would significantly impact on the consistency currently experienced in the neighbourhood. The existing landscaping character would also be diminished, and the residential character encroached upon.

A precedent for a higher density of development than permitted by the covenant has been set by 197 Wattletree Road, where three dwellings have been developed as a result of the variation of the covenant. As the site contains two lots, and is therefore twice the size of 197 Wattletree Road, a precedent has effectively been established for the development of six dwellings on the site. MCP-3 proposes 18 units on the site.

Although it is residential in use, it is my view that the development at 197 Wattletree Road is substantially out of character with the balance of the Estate. It does not display the low scale or red brick character, nor has it maintained the vegetation evident elsewhere (including on the site). It appears to be built boundary to boundary with



substantial site coverage, providing a breadth of frontage not evident elsewhere in the Estate and minimising landscaping opportunities. It presents two frontages to the street, departing from any interpretation for the requirement of 'one house' that has been maintained elsewhere in the Estate, and includes a basement entrance such that it reads as a three storey building. Such a development, in my view, is more fitting to the southern side of Wattletree Road, where it is further removed from the characteristics of Coonil Estate.

In the absence of the covenant, a similar outcome of a larger scale might be expected on the site, as the combined lots may provide for a greater height to be achieved and a more expansive frontage. MCP-2 and MCP-3 propose a three storey building, plus basement, with substantial site coverage. Such a development would be out of keeping both with the intent of the covenant and the established neighbourhood character. As such, neither the removal of the covenant nor a variation to allow for a building similar to that proposed is appropriate.

7.2 Future Impacts

In addition to the impacts through the built form that would be permitted on the site if the covenant was removed or varied, consideration needs to be given to the potential impacts it would have on future development and applications to remove or vary covenants in the area. While the present matter relates to the the covenant at 191-193 Wattletree Road, its removal or variation would continue a trend of removal and variation of covenants on the fringes of Coonil Estate.

Obviously this would not happen spontaneously, however I would consider that if the covenant is removed from the site, current or future owners within the Estate would soon seek to take the same action so that they to can enjoy the personal benefits of constructing additional dwellings on their property. Increasingly, the covenant would be considered obsolete and the neighbourhood character to have altered.

Removal of the restrictive covenant at the site would clearly set a precedent for future applications. The scale of development that may be permitted on the site would provide for further developments that impact significantly on the intimacy of the neighbourhood character.

In addition to changing the nature of the built form, removal of the restrictive covenant would provide for the encroachment of non-residential uses. Currently, a clear boundary is established by Cabrini Hospital. In my view this is an appropriate line to draw as densities decrease towards Tooronga Road. However the removal of the covenant is likely to encourage the location of uses associated with the hospital to locate in the neighbourhood, infringing on its purely residential character.

The variation of the restrictive covenant as proposed is unlikely to provide any benefit over the complete discharge of the covenant; it proposes to remove all pertinent parts of the covenant, and replace them the allowance to construct a building that represents a substantial development of the site without sufficient consideration to the context.

By joining as a party to this matter, beneficiaries of the covenant have indicated their preference to prevent further erosion of the special character of the area.

7.3 Effects on beneficiaries

Removal or variation of the covenant as proposed would provide for both an increased scale of development and the potential for the introduction of non-residential uses, eroding the benefits of the covenant.

Built form impacts would result from bulk and removal of vegetation. These impacts would have a significant impact on the experience of the neighbourhood, particularly at the introduction to the Estate of Wattletree Road.

I do note that Wattletree Road is not of the same integrity and consistency of character or maintenance of the covenant as other areas of the Estate. As such, the effect on beneficiaries would not be as great as if the site were in the centre of the Estate and neighbourhood. However, as has occurred elsewhere on the periphery of the Estate, any variation to the covenant should seek to maintain the underlying intent of the covenant and character of the neighbourhood, rather than enable use and development that is entirely inconsistent. This would reduce both the immediate impact on beneficiaries, and likely flow on effects to future applications to remove the covenant.

7.4 Conclusion

The example set by 197 Wattletree Road and the plans provided for the site suggest that substantial bulk and scale may be permitted on the site if the covenant were to be removed. The plans forming exhibit MCP-2 also propose a departure from the purely residential nature of the neighbourhood, which is permissible in the absence of the covenant and may be considered if the covenant were to be varied in the manner proposed.

Both immediately and increasingly over a period of time, these changes would erode the benefit of the covenant experienced through the distinctly residential, aesthetic, low scale and intimate character of the neighbourhood.



Attachment 1 - Details under Expert Witness Code of Conduct



Attachment 2 - Properties of beneficiaries and defendants



Attachment 3 - Malvern Draft Neighbourhood Character Study



Attachment 4 - Existing Neighbourhood Character Photographic Montage





Attachment 5 - Historical Aerial Photographs