

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

S CI 2014

IN THE MATTER of the *Property Law Act* 1958, section 84(1)

And

IN THE MATTER of a restriction imposed by Instrument of Transfer No. C201465 registered in the Register Book at the Office of Titles and on Certificate of Title Volume 08557 Folio 012

And

IN THE MATTER of an application by 29 Mervata Pty Ltd for discharge or modification of the restrictive covenant in the Register Book at the Office of Titles and affecting the land more particularly described in Certificate of Title Volume 08557 Folio 012

WHEREIN

29 Mervata Pty Ltd

is Plaintiff

AFFIDAVIT OF ROBERT WALTER EASTON

Date of Document: 19/9/14
Filed on behalf of: The Plaintiff
Michael Flemming & Associates
Solicitors
Level 5, 410 Collins Street
Melbourne Vic 3000

Solicitor's Code: 7433
Telephone: (03) 9642 5111
Facsimile: (03) 9642 5211
Email: michael@michaelflemming.com.au
Ref: MFA:mw:16193

I, ROBERT WALTER EASTON of 6B Milne Road, Mont Albert North, in the State of Victoria, Town Planning Consultant, **MAKE OATH AND SAY** as follows:

1. I am a Town Planning Consultant and principal of the firm of Easton Consulting, Planning, Development and Subdivision Consultants of 6B Milne Road, Mont Albert North. I have been retained by 29 Mervata Pty Ltd, the Plaintiff in this proceeding, to prepare a report and to express an opinion in relation to the modification of restrictive covenant affecting the land situated at and known as 34 Dion Road, Glen Waverley in



the State of Victoria being the land more particularly described in Certificate of Title Volume 8557 Folio 012 (“the subject land”) on the grounds set out in Section 84(1)(c) of the *Property Law Act 1958*.


2. I am duly authorized by the Plaintiffs to make this my Affidavit on his behalf and I do so from my own knowledge save where otherwise stated to the contrary.
3. I have been supplied with and read section 44 of the *Supreme Court (Rules of Civil Procedure) Rules (VIC) 2005* and the Expert Witness Code of Conduct and agree to be bound by it.
4. My qualifications comprise an Associate Diploma of Surveying from RMIT dated 1 January 1970 and a Diploma of Town and Regional Planning from Melbourne University dated 13 March 1974.
5. My experience includes in excess of 38 years as a Town Planner including the position of Manager, Subdivision Act with the Department of Planning prior to 1989. In that capacity I was the responsible officer for briefing material in regard to the preparation of the *Subdivision Act 1988* and other related amendments to the *Planning and Environment Act 1987* relating to restrictive covenants. This was the first major legislative link between general planning powers and restrictive covenants.
6. Since 1990 I have been in private practice as a Town Planner working on various matters including in excess of 250 covenant related matters for property owners.
7. My opinion is based upon the facts, matters and assumptions contained in the copies of the following documents which are referred to therein and attached to the said report:
 - (i) The register search statement for the subject land, Volume 8557 Folio 012;
 - (ii) Transfer No. C201465;
 - (iii) Certificates of Title 8551/381, 3221/195, 8556/953, 8557/003;
 - (iv) Covenant modification/discharge AG799827L, AG265550J, AH510352R, AG262252J, T471512V, T4714514P.



- (v) Plans of Subdivision LP67477, PS410294T, PS636132L, PS700264M, PS440259B, PS704398S, PS634578D, PS342675H, PS342674K;
 - (vi) Proposed plan of development prepared by ABP Consultants Pty Ltd;
 - (vii) Aerial photos obtained online from Near Map based on a flight date of 15 May 2014;
 - (viii) A base plan obtained online from the database of Vicmap Property;
 - (ix) Photographs of the subject site and surrounds; and
 - (x) Extracts of the City of Monash Planning Scheme.
8. All references and documents referred to herein and in the said report have been utilized in support of my opinion.
9. There is no opinion expressed in the said report that is not a concluded opinion because of insufficient research or insufficient data or for any other reason.
10. I declare that I have made all the enquiries that I believe are desirable and appropriate to express an opinion on the application as contained in the said report; and that no matters of significance which I would regard as relevant have, to my knowledge, been withheld from the Court in the said report.
11. It is my opinion that the modification will not substantially injure the persons entitled to the benefit of the restriction. Moreover, it is my opinion that it would be a reasonable and proper use of the land to be developed and or used in accordance with the Plaintiffs' proposal as referred to in my said report exhibited hereto.
12. I have set out my reasons in a Planning Report to the Plaintiff dated July 2014. Now produced and shown to me at the time of swearing this my Affidavit and exhibited hereto and marked "RWE – 1" is a true copy of my said report.
13. I confirm that the conclusions in the said report represent my opinion in my capacity as a Town Planning Consultant, based on my own personal knowledge and on information obtained by me in the various manners set out in my report.



SWORN by ROBERT WALTER EASTON)
at Ringwood in the State of Victoria)
this 19th day of September 2014)



Before me:



GLEN ANDREW EGERTON
267 Maroondah Highway, Ringwood
An Australian Legal Practitioner
(within the meaning of the *Legal*
Profession Act 2004)

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
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S CI 2014

IN THE MATTER of the *Property Law Act* 1958, section 84(1)

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WHEREIN

29 Mervata Pty Ltd

is Plaintiff

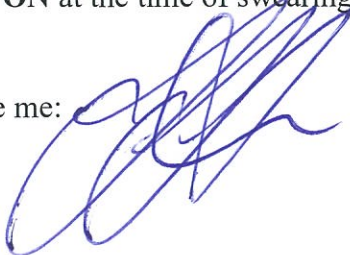
CERTIFICATE OF IDENTIFYING EXHIBIT

Date of Document: 19/09/14
Filed on behalf of: The Plaintiff
Michael Flemming & Associates
Solicitors
Level 5, 410 Collins Street
Melbourne Vic 3000

Solicitor's Code: 7433
Telephone: (03) 9642 5111
Facsimile: (03) 9642 5211
Email: michael@michaelflemming.com.au
Ref: MFA:mw:16193

This is the Exhibit marked "RWE-1" now produced and shown to **ROBERT WALTER EASTON** at the time of swearing his affidavit on 19 September 2014

Before me:



GLEN ANDREW EGERTON
267 Maroondah Highway, Ringwood
An Australian Legal Practitioner
(within the meaning of the *Legal
Profession Act 2004*)

EXHIBIT "RWE-1"
Copy Planning Report dated August 2014

easton consulting

planning, development & subdivision consultants

PLANNING REPORT

COVENANT MODIFICATION

**34 DION ROAD
GLEN WAVERLEY**

**SUPREME COURT OF VICTORIA
COMMON LAW DIVISION**

AUGUST 2014

REF: 10235

easton consulting phone (03) 9857 4387 fax (03) 9857 7165

p.o. box 26 DONCASTER Vic 3108

ABN 62 722 707 764

1 INTRODUCTION

- 1.1 I am a Town Planning Consultant and principal of the firm of Easton Consulting, Planning, Development and Subdivision Consultants of 6B Milne Road, Mont Albert North.
- 1.2 I have been briefed to prepare this report in relation to an application by 29 Mervata Pty Ltd for the modification of a restrictive Covenant No. C201465 ("the Covenant") (see page A3) affecting the land situated at and known as 34 Dion Road, Glen Waverley in the State of Victoria and being the land more particularly described in Certificate of Title Volume 8557 Folio 012 ("the land") (see pages A2) and further being Lot 60 on Plan of Subdivision LP67477 on the grounds set out in Section 84(1)(c) of the *Property Law Act* (VIC) 1958.

2 SIGNIFICANCE OF COVENANTS TO PLANNING

- 2.1 Prior to 12 December 2000 properties that were encumbered by a Restrictive Covenant were able to obtain a planning permit from council without the need to modify a Restrictive Covenant. However subsequent amendments to the *Planning and Environment Act* 1987 ("Planning and Environment Act") provide a mandatory link between covenants and ordinary Council planning permits for development.
- 2.2 Section 61(4) of the Planning and Environment Act now requires that
"If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant."
- 2.3 Consequently it is no longer possible to first obtain a planning permit in order to assist in the assessment of the tests set out in section 84(1) of the Property Law Act.

2.4 Under section 84(1)(c) of the Property Law Act the Court may modify or discharge a covenant upon being satisfied that:

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

3 THE LAND

3.1 The land is a generally rectangular shaped lot located on the east side of Dion Road Glen Waverley approximately 600 metres south east of the intersection of Waverley Road and Springvale Road and 30 metres North of Ranfurly Drive. It has a frontage of 21.3 metres to Dion Road and a depth of 35.4 metres.

3.2 It has an area of approximately 673 square metres (7250 sq feet). The site is presently vacant as the previous dwelling on the land has been demolished.

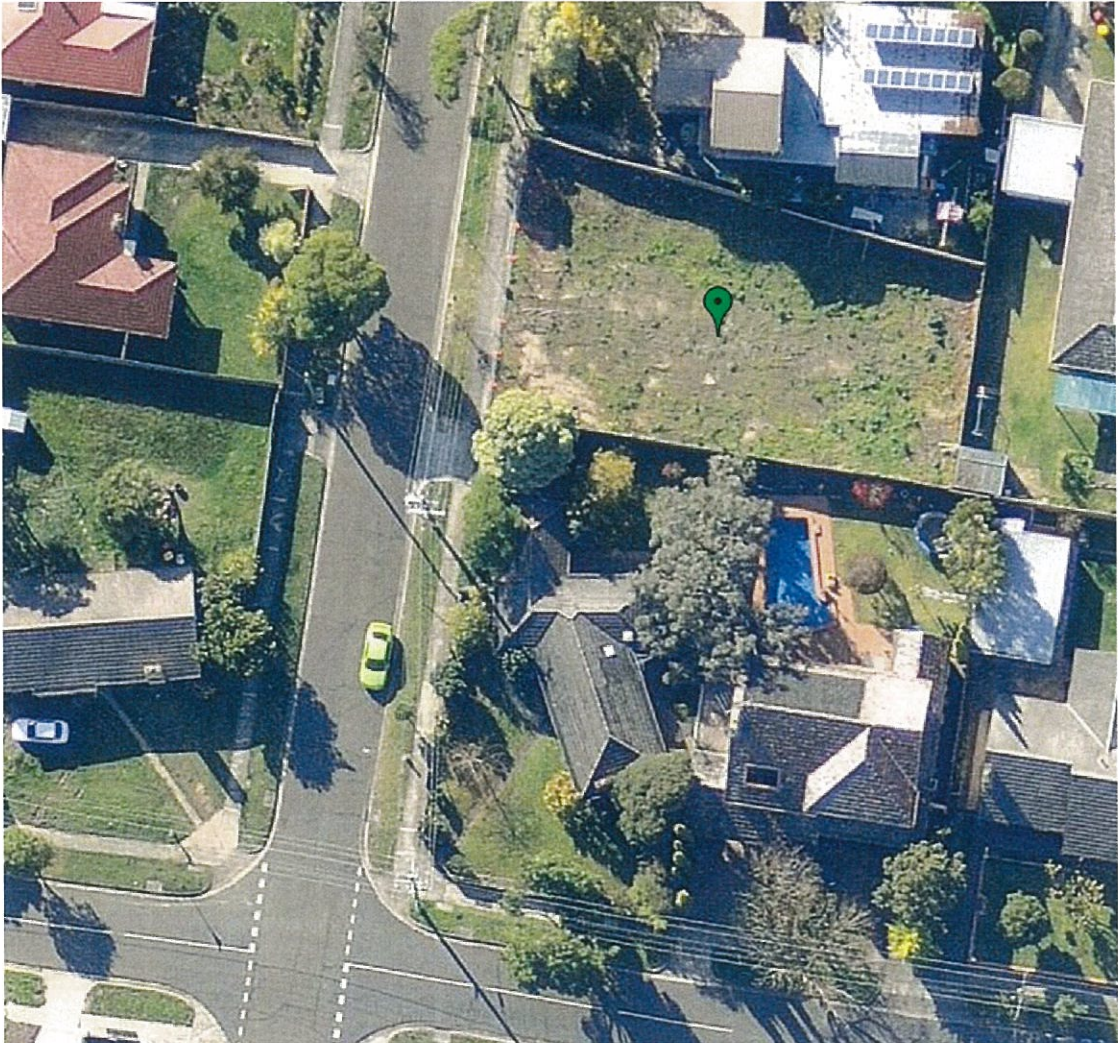


Figure 1: Aerial photo showing relationship between subject land and surrounding properties



Figure 2: Subject land, viewed from street frontage. Dwelling on the left is on 32 Dion Road.

4 DETERMINING THE BENEFICIARIES

- 4.1 The covenant was created on 26 April 1965 when lot 60 together with 67 other lots on Plan of Subdivision 67477 were transferred in a single transaction to Glenbay Heights Proprietary Limited. It was registered on title on 27 April 1965. There were a total of 68 lots in the single transfer all 68 lots are equally burdened by this particular covenant.
- 4.2 The transfer covenants with *..the transferrors their respective heirs executors administrators and transferees the registered proprietor or proprietors for the time being of the land comprised in certificate of title volume 8551 folio 381 and every part or parts thereof **excepting thereout the land hereby transferred.*** The underlined words have been added in handwritten notation on the covenant to confirm that the lots transferred did not have the benefit.

- 4.3 Certificate of title was Volume 8551 Folio 381 (see page A7 is normally referred to as the parent title to the covenant. Another title Volume 3221 Folio 195 (see page A14) was referred to earlier in the covenant. This was the Grandparent Title. However, the Grandparent Title was cancelled on 20 December 1966 being approximately 2 years after the parent title to the subject covenant was transferred from it. The only land remaining in the Grandparent Title at that time, was a single residential lot to the north of lot 2.
- 4.4 The parent title originally covered a large generally rectangular section of land as outlined in purple on the following Melway extract. It had an area of approximately 15 acres.

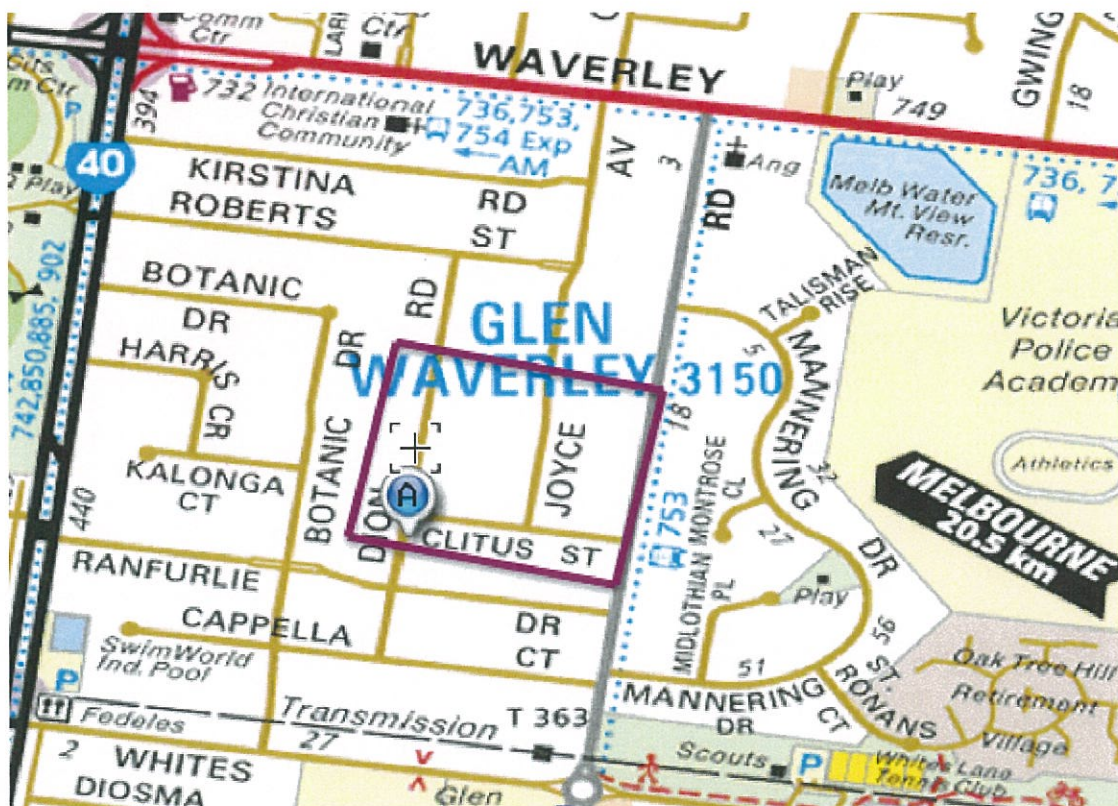


Figure 3: Melway extract with extent of Parent Title in purple. Subject land marked with an "A".

4.5 On page 2 of 6 of title 8551/381 it is noted that all of Lots 2 – 70 were cancelled from the parent title on 15 June 1965 and that there were no prior transfers from it. Therefore Lots 2 – 70 all remained in the parent title on 27 April 1965. However, Lots 3 – 70 are all burdened by the covenant meaning that by deduction there was only Lot 2 which was remaining in the parent title which is entitled to have the benefit of the covenant. I further suspect that the reason the parent title has not been totally cancelled is that the residual parts of the title relate to the roadways created in plan of subdivision No. 67477.

4.6 For the above reasons there is only Lot 2 and the roads on LP67477 having the benefit over this particular covenant. Lot 2 has further been subdivided since then into two lots and common property. The benefit also runs with those new lots and common property. The following plan shows all of the lots burdened by the subject covenant shaded pink, the subject land marked "S" and the lot having the benefit of the covenant shaded green.

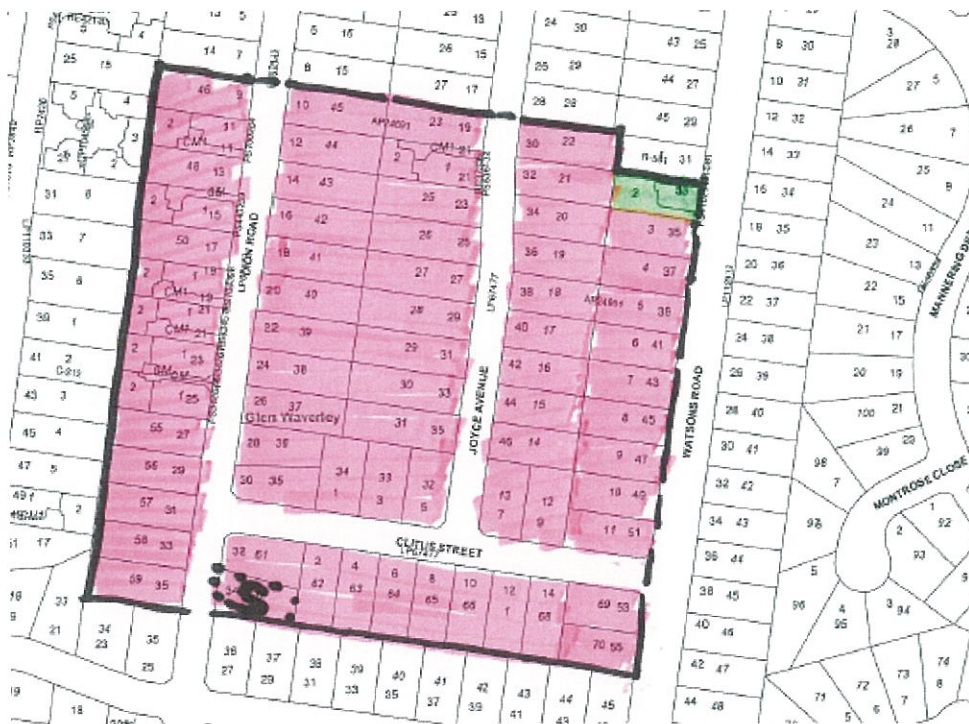


Figure 4: Outer bold line represents the parent title boundary. Lot marked "S" is the subject land. Lots coloured pink are burdened by the subject covenant. Lot coloured green has the benefit of the covenant.

5 THE COVENANT

5.1 The covenant is expressed in the following terms. I have underlined the section impeding the plaintiff's use of the land:

Shall not be built or constructed or erected on any one of the said lots hereby transferred (1) any building other than one private dwelling house of (2) brick, brick veneer, stone or concrete together with outhouses and garage for such private dwelling house

5.2 In my opinion the covenant has 2 distinct components. Part (1) is the main provision preventing the building of more than one dwelling on the land.

5.3 Part (2) is a crude attempt at quality control possibly in an attempt to prevent weatherboard and similar materials being used.

6 THE NEIGHBOURHOOD CONTEXT

6.1 The restrictive covenant contained in Instrument of Transfer No. C201465 was first imposed on the land in 1965. I therefore selected 1965 as the relevant starting date for determining the initial character of the neighbourhood for this purpose.

6.2 The land is located adjoining the southern boundary of the parent title.

6.3 In my opinion the best definition of the neighbourhood in 1965 is therefore the land originally contained within the parent title to the covenant. The neighbourhood I have defined is shown in purple in the aerial photo in Figure 5.

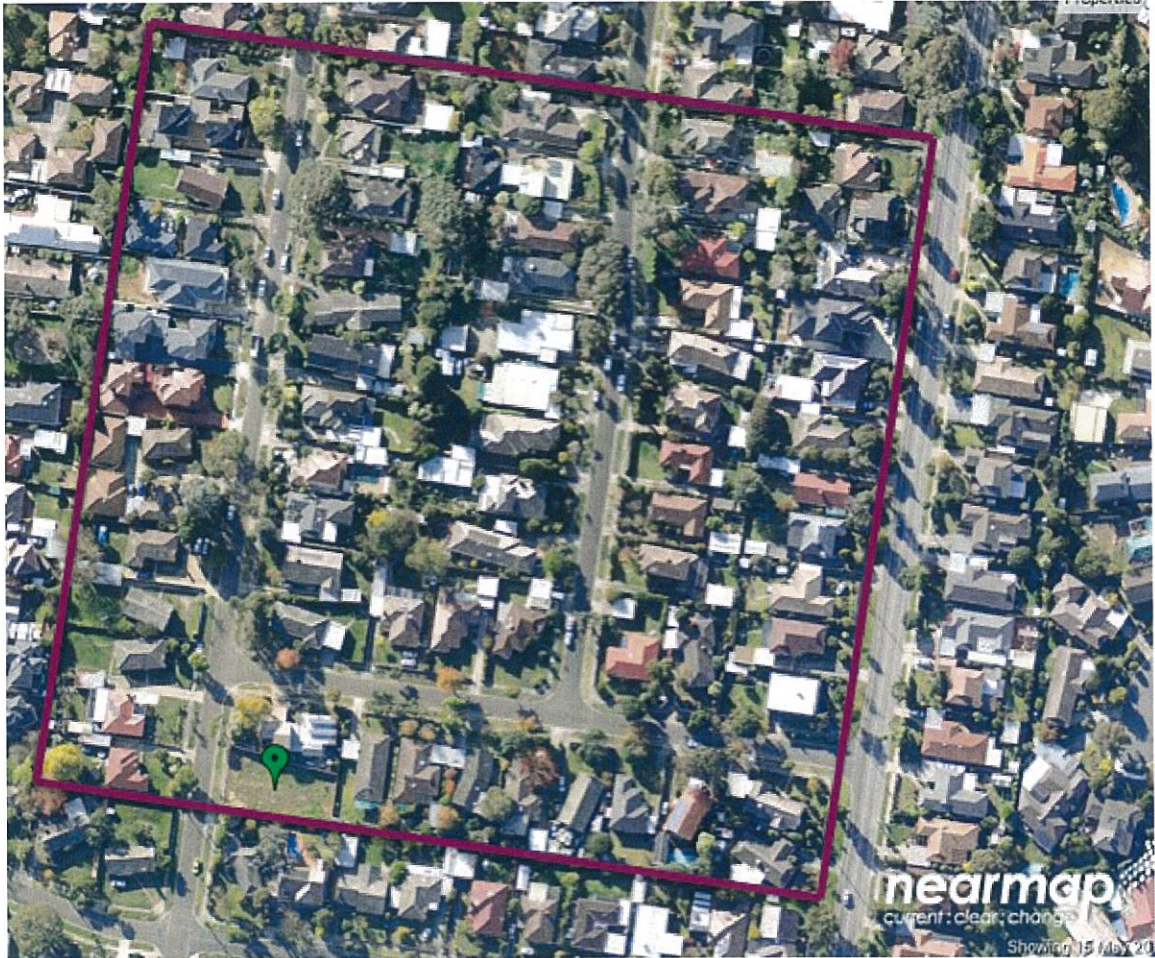


Figure 5: Aerial photo showing neighbourhood defined marked in purple. Subject land marked with a green pointer

7 THE NEIGHBOURHOOD IN 1965

- 7.1 This neighbourhood was created by LP67477 which was approved on 23 April 1965. It created 69 residential lots, all of which were approximately the same size as the subject land.

8 THE NEIGHBOURHOOD TODAY

8.1 I inspected the neighbourhood in July 2014. My assessment of the neighbourhood now discloses a number of changes. The most obvious changes are set out below.

8.2 The bulk of my investigations and inspections are as follows.

- (1) **Lot 2 (33 Watsons Road).** This is the only residential lot having the benefit of the subject covenant. It is located on the diagonal opposite corner of the subdivision to the subject land. It has been developed with a dual occupancy comprising a double storey dwelling at the front and single storey dwelling at the rear. The land has then been further subdivided by PS410294T (see page A24) in 1997. The original title 8556/953 (see page A22) applying to this site, did not contain a restrictive covenant.



Figure 6: No. 33 Watsons Road, viewed from east side of Watsons Road

- (2) **Lot 4 (37 Watsons Road).** This lot is burdened by the subject covenant. It has recently been developed with a new style double storey dwelling as seen in the following photo. Some of the rendered material on the balcony at the front, appears not to comply with the materials specified in the covenant.

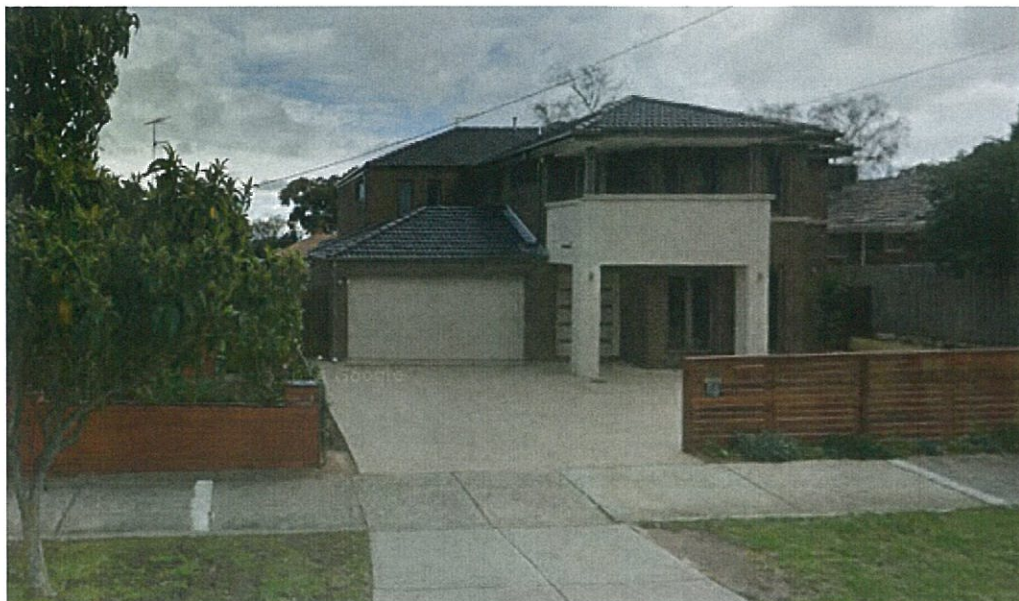


Figure 7: New dwelling No. 37 Watsons Road

- (3) **Lot 24 (21 Joyce Avenue).** This lot is also burdened by the subject covenant. It has been developed with a dual occupancy based on a double storey dwelling at the front and a single storey dwelling at the rear. The land was subsequently further subdivided by PS636132L (see page A27) in February 2011. The covenant applicable to this site was varied in the Supreme Court in August 2009 as seen in Instrument AG799827L (see page A29).



Figure 8: Dual occupancy at 21 Joyce Avenue.

- (4) **Lot 47 (11 Dion Road).** This lot is also burdened by the subject covenant. It is has been developed with a double storey dual occupancy and further subdivided

by PS700264M (see page A32) in January 2012. The subject covenant was varied in the Supreme Court in December 2008 as seen in Instrument AG265550J (see page A34) to enable two private dwelling houses to be constructed and further adding a reference to lightweight construction at the upper level.



Figure 9: Two dwellings at No. 11 Dion Road, showing lightweight building materials on the second level.

- (5) **Lot 49 (15 Dion Road).** This lot is also burdened by the subject covenant. It has been developed with two single storey dwellings and further subdivided by PS440259B (see page A37) in June 2001. The plan of subdivision also varies the subject covenant to enable two dwellings to be erected.



Figure 10: Two dwellings at No. 15 Dion Road

- (6) **Lot 50 (17 Dion Road).** This lot is also burdened by the subject covenant. It is presently being developed with a substantial double storey dwelling as seen in the following photo.



Figure 11: Double storey dwelling (by Metricon) at No. 17 Dion Road

- (7) **Lot 51 (19 Dion Road).** This lot is also burdened by the subject covenant. It has recently been developed with 2 double storey dwellings and further subdivided by PS704398S (see page A40) in April 2013. The subject covenant as it applied to this site was removed by planning permit No. 38210 as recorded in Instrument AH510352R (see page A44) in August 2010. There is a notation the front page of the Instrument that the applicant asserted, that no land had the benefit, while the responsible authority asserted that the land previously known as Lot 2 possibly had the benefit. This latter view, corresponds with the view expressed earlier in this report.
- (8) **Lot 52 (21 Dion Road).** This lot is also burdened by the subject covenant. It has been developed with 2 double storey dwellings and further subdivided by PS634578D in June 2011. The subject covenant was varied in the Supreme Court in Instrument No. AG262252J (see page A48) in November 2008 to allow 2 private dwelling houses and also to include a reference to lightweight construction at the upper level.



Figure 12: Two double storey dual occupancies at No. 21 Dion Road (on the left) and 19 Dion Road (on the right). Both dwellings use light weight render materials on various parts of the building.

- (9) **Lot 53 (23 Dion Road).** This lot is also burdened by the subject covenant. It has been developed with 2 single storey dwellings and further subdivided by PS342675H (see page A53) in August 1995. The variation of the subject covenant to allow two private dwelling houses is recorded in Instrument

T471512V (see page A56) a reference to which is also contained on the subject covenant.



Figure 13: Two single storey dual occupancies at No. 23 Dion Road (on the right) and No. 25 Dion Road (on the left).

- (10) **Lot 54 (25 Dion Road).** This lot is also burdened by the subject covenant. It has been developed with 2 single storey dwellings and further subdivided by PS342674K (see page A62) in August 1995. The variation of the subject covenant to allow two private dwelling houses is recorded in Instrument T471514P (see page A66) a reference to which is also contained on the subject covenant.

9 CHANGES IN THE NEIGHBOURHOOD FROM 1965 TO 2014

- 9.1** The neighbourhood originally consisted of 69 standard residential lots. The majority of these lots were the same size as the subject land. 68 of those lots were burdened by the same covenant applying to the subject land. Most original dwellings appeared to be basic single storey dwellings.

- 9.2 Today 8 lots have been developed with modern dual occupancies including 8 double storey dwellings and 8 single storey dwellings. There were also 12 double storey dwellings on original lots of which 2 were recent modern style dwellings. It further appeared that some of the double storey dwellings had used weatherboard or other light weight materials on the upper levels.
- 9.3 The only lot having the benefit of the covenant, has also been developed with a dual occupancy including a double storey dwelling using alternate building materials on the upper levels. This property was not subject to a restrictive covenant.

10 POTENTIAL IMPACT OF ANY DISCHARGE OR MODIFICATION

10.1 In order to consider any impact I consider that it is necessary to have regard to the following matters.

- a) Changes in the planning controls and the area between 1965 and the present.
- b) The nature of the proposal.

PLANNING CONTROLS

10.2 Since the covenant was established the nature of building and planning controls have altered radically. The main provisions related to site coverage, setback and building height are now similar for both a single dwelling and multiple dwellings. Coupled with this there is now a tendency for much larger buildings to be constructed as single dwelling houses as referred to earlier in this report.

10.3 It appears that all lots within this neighbourhood had areas ranging in size from approximately 650sq metres to 785sq metres. This corresponded with the minimum lot size which then applied in this area based on Column 4 of the Table to Clause 804 of the former Uniform Building Regulations.

TABLE 804.—SITE REQUIREMENTS FOR BUILDINGS OF CLASSES I. AND II. OCCUPANCY.

MINIMUM DIMENSIONS, ETC.					
	Column 1.	Column 2.	Column 3.	Column 4.	Column 5.
Class I.—House—					
Minimum width of frontage ..	10 m	12 m	15 m	16.5 m	18 m
Minimum depth ..	18 m	21 m	24 m	27 m	30 m
Minimum area of site ..	300 m ²	418 m ²	530 m ²	650 m ²	783 m ²
Class II.—Flats—					
Minimum width of frontage ..	12 m	15 m	18 m	19.5 m	21 m
Minimum depth ..	21 m	22 m	24 m	27 m	30 m
Minimum area of site ..	330 m ²	450 m ²	600 m ²	740 m ²	880 m ²
Minimum open space at ground level required for each flat that contains an area of—					
(a) 47 m ² or over ..	28 m ²	37 m ²	47 m ²	55 m ²	65 m ²
(b) less than 47 m ² ..	28 m ²	28 m ²	37 m ²	47 m ²	55 m ²

NOTE 2.—MINIMUM DISTANCE OF OUTER WALLS FROM BOUNDARIES.

	Column 1.	Column 2.	Column 3.	Column 4.	Column 5.
From frontage ..	3 m	4.5 m	4.5 m	4.5 m	4.5 m
From boundaries other than frontage:					
(a) One storey building ..	1.2 m	1.2 m	1.2 m	1.8 m	1.8 m
(b) Two storey building ..	1.8 m	1.8 m	1.8 m	2.4 m	2.4 m
(c) Three or more storey building ..	Ground and first storeys as for two storey building.				
	Storeys above first storey to be within line drawn from a point on the boundary at the level of the lowest window sill of the building and forming an angle of 70° to the horizontal.				

(c) SEE AMEND 3 CL 71(a) 8/11
805. Distance from Frontage.—No person shall construct a building of Class I. or II. Occupancy closer to the frontage of any

Figure 14: Extract of Table 804 of the UBR'S- Column 4 had a minimum area of 650 sq metres

- 10.4 The present planning controls now supersede the Uniform Building Regulations and have replaced them with common provisions related to site coverage, distance from boundaries, amount of open space provided and new provisions related to overlooking, overshadowing, length of walls on boundary and car parking requirements.

- 10.5 Under the provisions commonly known as ResCode within the planning scheme similar standards now also apply to both single dwellings and multi-unit developments. Amongst other things there are now common standards in relation to setback of buildings from front, rear and side boundaries, site coverage, height of the building, overshadowing of adjoining properties, overlooking of adjoining properties, and building height. The main difference in the implementation of the controls is that no planning permit is required for a dwelling on a lot larger than 500 sq metres while all multi-unit developments require a planning permit irrespective of the size of the lot.
- 10.6 The zoning of the land as General Residential Zone (Schedule 2) establishes the benchmark against which the present application needs to be assessed.
- 10.7 A copy of the General Residential Zone provisions are attached (see page A76). Amongst other things these confirm the requirements for a permit for 2 or more dwellings (in Clause 32.08-4) on a lot and the relevant link to Clauses 54 and 55 (Rescode)
- 10.8 The Council is required to take into account 33 detailed standard when considering any application. Due to the operation of Section 61 (4) of the Planning & Environment Act, the only bar to Council considering the application appears to be the reference in the covenant to "*other than one private dwelling house*"
- 10.9 Within the City of Monash the Schedule 2 to the General Residential Zone varies some of the basic requirements in the Rescode by generally increasing the standards. In particular, each dwelling in a multi-unit development is now required to have 75sq metres of open space (compared with the 40 sq metres in the rest of Melbourne). For this reason, the combined size of any subsequent dwellings in a multi-unit development will be less than the equivalent size of a single dwelling.

THE PROPOSAL

- 10.10** The plaintiff in this application owns the subject land, together with two other lots located immediately to its south. These properties are known as 27 & 29 Ranfurlie Drive, Glen Waverley. Copies of the 2 titles are attached (see page A72). Both of these lots are outside the area of the parent title and are not subject to a restrictive covenant. The plaintiff is considering an integrated development over all three lots comprising a total of 7 dwellings. Three of those dwellings will be on the subject land while some driveways accessing the other dwellings including some of their open space areas will also be located on the subject land. However, as the subject covenant only restricts “buildings” used for private dwelling houses, there is no restriction on non-building activities. The proposal in regard to the subject land is therefore to modify or remove the covenant so that up to three dwellings can be built on the subject land.
- 10.11** A plan showing the combined development over all three lots is contained in Figure 15. That part of the proposal contained within the subject land and subject to the restrictive covenant is outlined in purple. In regard to the subject land, that part of the proposal comprises two attached units oriented directly at Dion Road, at the front of the site, with a smaller 2 bedroom unit located behind it.
- 10.12** The 2 attached dwellings at the front of the site would be setback approximately 7.6 metres from the Dion Road frontage, being the nominated setback now specified in Schedule 2 to the General Residential Zone. This is the same setback that would apply if a dwelling of comparable size were erected on the land. The rear dwelling is setback 6.8 metres from the adjoining property to the north. This is a far greater setback than could otherwise be expected for a rear unit and is able to be achieved as the carparking area for that dwelling overlaps on to the rear of No. 29 Ranfurlie Drive.

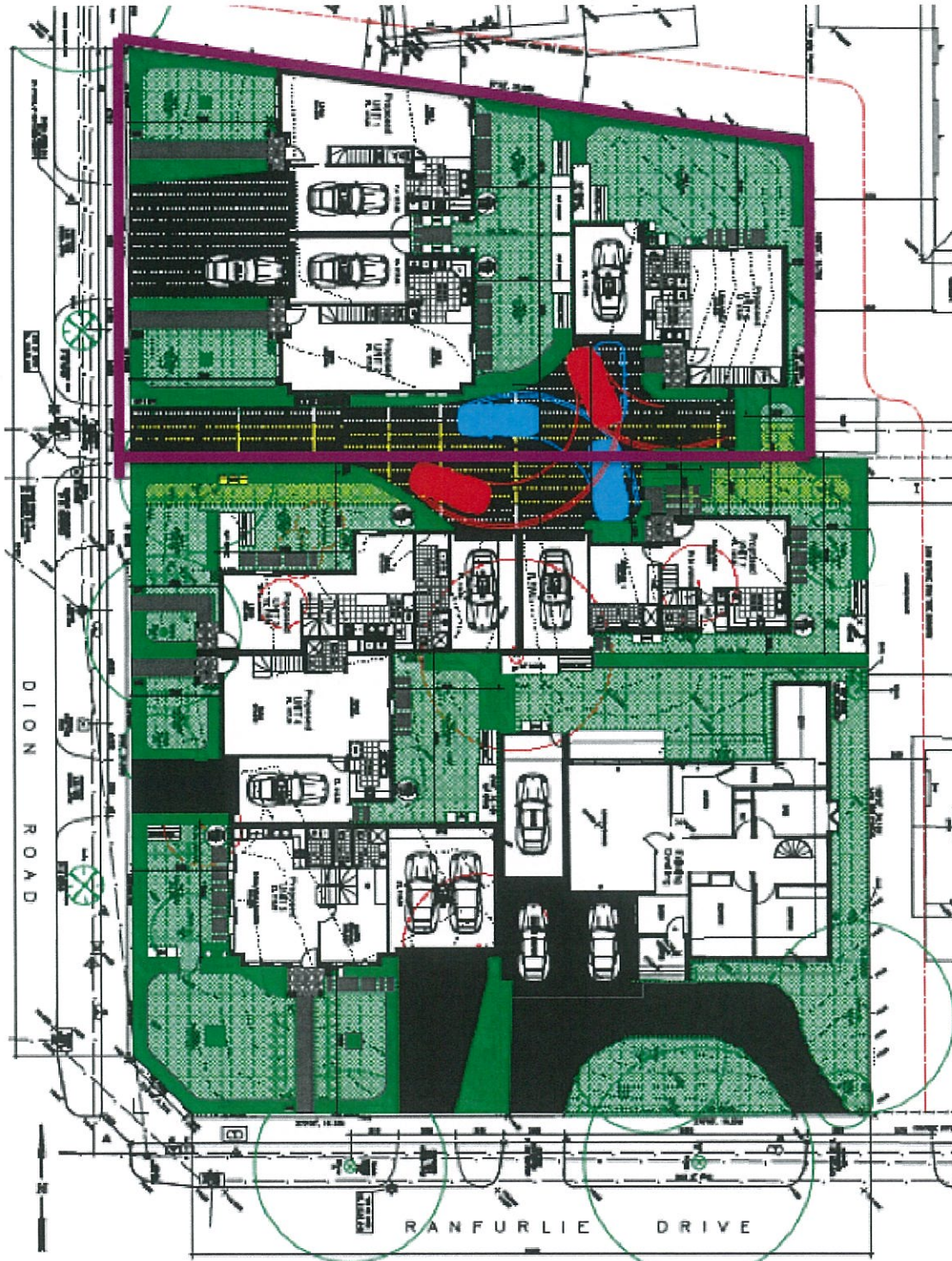


Figure 15: Proposed 7 dwelling development over 3 properties, of which the 3 dwellings contained within the purple area are subject to a restrictive covenant.

- 10.13** Any amenity impact on surrounding or nearby lots needs to be seen in the above context. Amenity impacts would also be assessed in detail when a planning application is made.
- 10.14** I consider that traffic impacts are not significant in regard to this covenant. The covenant did not contain any restriction on the number of vehicles. In addition the subject land is accessed via Dion Road, which is now a public road vesting in the City of Monash. It extends from Cappella Court in the south to Roberts Street in the north and only passes through the area within the parent title for approximately 1/3rd of its length.
- 10.15** Under section 84 (1) (c) of the Property Law Act the test applied in regard to the merits of the proposal is *that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.*
- 10.16** Having regard to the above provisions and my earlier comments I therefore conclude as follows:
- Viewed from the Dion Road frontage, the 2 attached dwellings near the front of the site are of comparable size to other large dwellings now constructed in the area. A far greater impact on the street frontage will result from proposed units 3, 4 & 5 which are located within 4.5metres of the frontage, but are outside the area subject to the restrictive covenant. In any event, closer setbacks such as this are allowable on the side boundary on corner lots. In addition, the properties directly opposite the frontage are burdened by the same covenant and therefore do not have the benefit of it.
 - The most affected property by the proposal is the adjoining dwelling to the north at 32 Dion Road. However, this property also does not have the benefit of the covenant and is itself developed with a double storey dwelling including weatherboard materials on the upper level, in contravention of the covenant.
 - The only property having the benefit of the covenant is No. 33 Watsons Road (Lot 2). This property is remote from the subject land, being 250 metres north

east of it, and fronting a busy road. In addition, that property has itself been developed with a dual occupancy, including a double storey dwelling and does not itself have a restrictive covenant. In my opinion it is inconceivable that there could be any impact on that property from the subject proposal.

- In regard to the surrounding area the impact from the proposal on the subject land, is comparable to the various double storey developments described earlier in this report. In particular, the combined size of the proposed dwellings on the subject land are similar to a large dwelling or dual occupancy which could otherwise be built.
- There will be no traffic impact on the beneficiaries of the covenant.

10.16 For the above reasons I conclude that the proposal will not *substantially injure the persons entitled to the benefit of the restriction*.

11 CONCLUSION

11.1 It is my opinion that the proposed removal or modification of the restrictive covenant will not substantially injure the persons entitled to the benefit of it.

11.2 In the alternative that the covenant is modified rather than removed I consider that the following modification would be needed.

- Replace the expression "*any building other than one private dwelling house of brick brick veneer stone or concrete together with outhouses and garage for such private dwelling house*" with the expression "*more than three private dwelling houses*".

Robert Easton
ARMIT (Surv), Dip T&RP



TABLE OF ATTACHMENTS

Page No.	Item
A1-A6	Title and Covenant to Subject Land
A7 – A13	Parent Title referred to in Covenant
A14 – A18	Grandparent Title
A19 – A20	Subdivision forming Neighbourhood
A21 – A71	Subdivision and Covenant Activity Since 1965
A72 – A75	Title to Adjoining Lots owned by Plaintiff
A76 – A85	Planning Scheme Extracts