VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P555/2015
PERMIT APPLICATION NO. YR-2014/637

APPLICANT	Mark Dacre
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
SUBJECT LAND	2 Redmill Court, LILYDALE
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	31 August 2015
DATE OF ORDER	17 September 2015
CITATION	Dacre v Yarra Ranges SC [2015] VCAT 1453

ORDER

1 The decision of the Responsible Authority is affirmed.

2 In permit application YR-2014/637, no permit is granted.

Mark Dwyer
Deputy President

APPEARANCES

For Applicant	Jason Sumner, consultant town planner, of Apex Town Planning Pty Ltd
For Responsible Authority	Joel Templar, consultant town planner, of Perspective Planning Consultants

INFORMATION

Description of Proposal	Removal of covenant N640836D on Plan of Subdivision 204786L
Nature of Proceeding	Application under Section 77 of the *Planning and Environment Act* 1987 – to review the refusal to grant a permit.
Zone and Overlays	Neighbourhood Residential Zone (Schedule 1) Significant Landscape Overlay (Schedule 22)
Permit Requirements	Clause 52.02 – removal of restriction (covenant)
Land Description	Rectangular site of 848.5 m^2

REASONS

What is this proceeding about?

1 The applicant is seeking a planning permit to remove a restrictive covenant[1] from his land in Lilydale.

2 The covenant was registered on 4 August 1988 over all lots on Plan of Subdivision 204786L, which includes the applicant's land. There are 83 lots in the subdivision that have the benefit and burden of the covenant.

3 The covenant purports, amongst other things, to restrict development to 'one single dwelling house' on the lot.

4 Because the covenant was created or registered before 25 June 1991, s 60(5) of the *Planning and Environment Act 1987* applies. That provision essentially provides that a responsible authority (or, on review, VCAT) must not grant a permit which allows for the removal of the covenant unless it is satisfied that:

- the owner of any land benefited by the covenant will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal of the covenant; and
- if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

5 These two matters are therefore an essential pre-condition to the grant of a permit albeit that, if these matters are satisfied, other additional factors may be relevant to the ultimate exercise of a discretion to grant or refuse a permit to remove a covenant in a particular case.

[1] a restrictive covenant is a type of 'restriction', within the meaning of the *Subdivision Act 1988*. Although the legislation and planning scheme use the general term 'restriction', I have for convenience used the specific term 'covenant' in these reasons.

6 Following advertising of the permit application, one objection was received. The objection is from a benefiting landowner within the subdivision, but the objector's land is some distance from the applicant's land[2].

7 Yarra Ranges Shire Council (the Council) has refused to grant a permit on two grounds namely that:

- an objection has been received from a benefiting landowner, and the objection is not vexatious or frivolous; and
- the proposal fails the test whereby the Council is not satisfied that the beneficiaries of the covenant will be unlikely to suffer any detriment, including any perceived detriment, as a consequence of the removal of the covenant.

8 The applicant contests these grounds. As can be seen, the proceeding calls into question both limbs under s 60(5) of the *Planning and Environment Act 1987*. The two limbs in s 60(5) are separated by the conjunctive word 'and', and both limbs must therefore be satisfied in this case. I will deal with these in turn.

9 The objector was provided with notice of the VCAT application, but has not filed a statement of grounds or participated in the proceeding.

Will the beneficiaries of the covenant be unlikely to suffer any detriment?

10 The Tribunal must be satisfied that a benefiting landowner will be unlikely to suffer any detriment of any kind, including any perceived detriment, as a consequence of the removal of the covenant. The reference to '*any* detriment of *any* kind' is exhaustive of all forms of detriment, so the express reference to the inclusion of 'perceived detriment' in s 60(5)(a) must be taken to provide clarity where there might otherwise have been doubt. Perceived detriment must still be detriment, objectively considered, and the reference to perceived detriment cannot be taken to introduce any nebulous concern or objection that does not comprise detriment.

11 Given the specific wording of s 60(5) of the *Planning and Environment Act 1987*, a number of VCAT decisions have over the years referred to the "extraordinarily high" bar set by s 60(5), and have set out various principles relevant to assessing detriment in these circumstances. These decisions include *Carabott v Hume City Council*[3], *McFarlane v Greater Dandenong City Council*[4], *Hill v Campaspe Shire Council*[5], *Giosis v Darebin City Council (Red Dot)*[6] and *Yin v Monash City Council*[7].

[2] according to the applicant, the objector's land is 220 m away as the crow flies, or 460 m by road.
[3] (1998) 22 AATR 261 per Wood J, Macnamara DP, Byard SM & Moles M
[4] [2002] VCAT 696 per Strong J & Cimino M
[5] [2011] VCAT 949 per Gibson DP
[6] [2013] VCAT 825 per Wright SM
[7] [2014] VCAT 634 per Schpigel M

12 The Council referred me to a number of principles stemming from these decisions, which may be summarised[8] as follows:

a the Tribunal must be affirmatively satisfied that a covenant beneficiary will be unlikely to suffer any detriment of any kind if the variation or removal of the covenant is permitted.

b it is not necessary for an affected person to assert or prove detriment because the Tribunal must be affirmatively satisfied of a negative, namely that it is unlikely that there will be detriment of any kind.

c even if no objections are received from the owners of land benefited by the covenant, their interests must still be considered. The fact that benefitting owners have not objected does not impel the conclusion that they are unlikely to suffer detriment of any kind.

d the onus is generally on the applicant to demonstrate the unlikelihood of detriment resulting as a consequence of the covenant being varied or removed.

e if the application to vary or remove a covenant is not accompanied by a collateral application for approval of a specific development, it will generally not be possible (or it will at least be extremely difficult) for the responsible authority or VCAT to reach the conclusion that any form of development of the land permitted by the proposed variation or removal of the covenant will be unlikely to cause detriment, particularly where abutting or adjacent properties enjoy the benefit of the covenant.

f the concept of 'any detriment' is a very wide one and includes even minor detriments. An assessment under Section 60(5) does not involve the balancing of detriments against countervailing benefits, such as may occur in the exercise of discretion in a general planning matter. If there is *any* detriment of *any* kind, then a permit can only be granted if such detriment is considered to be unlikely.

g detriment (and, in particular, perceived detriment) does not rely on the establishment of a direct physical amenity impact – for example, from any form of multi-dwelling development on the land. In a town planning context, it includes broader concepts of detriment or non-physical amenity impacts, including perceptions of neighbourhood character or "an appeal to aesthetic judgment".

h VCAT does not need to find that detriment will occur as a probability, rather it is sufficient that there is a possibility, which is neither fanciful nor remote, that detriment may result.

[8] many of these are drawn from the helpful summary in *Yin* at [18] (which also contains citations to the decisions from which the relevant principle is drawn) and from *Giosis*.

i the compliance of a proposed development or use with current planning controls does not, of itself, and without more, establish that a covenant beneficiary will be unlikely to suffer any detriment of any kind.

13 Lest it be thought otherwise, I should perhaps say that these principles are not exhaustive, and are not a substitute for the actual statutory test in s 60(5)(a) itself. They are nonetheless useful matters to consider in the context of that test, and stem from what I might describe as a long line of relatively consistent decision-making by VCAT on the proper application of s 60(5).

14 Here, I am not satisfied that the beneficiaries of the covenant will be unlikely to suffer any detriment as a consequence of the removal of the covenant.

15 The applicant has not made the application for removal of the covenant in conjunction with any application for a specific development. Neither the Council nor VCAT therefore has any real basis for assessing possible detriment. This makes it very difficult, indeed virtually impossible, for a decision-maker to be satisfied that a beneficiary will be unlikely to suffer *any* detriment. As noted in *Giosis*, I must effectively consider all possible forms of lawful development that could occur on the land if the covenant was removed, and conclude that it is unlikely that any of them would cause detriment to a benefiting owner.

16 Here, although the application has been assessed by the Council, in part, as an application to vary the covenant by removing those parts of the covenant that restricts the development of the land to one dwelling (in order to facilitate a second dwelling), the actual permit application is for the removal of the whole covenant from the land completely. On its face, the existing covenant purports to prevent the erection of any building other than a single dwelling house and usual outbuildings, and imposes a restriction on the size of the dwelling. The removal of the covenant would potentially allow *any* development which is otherwise permissible in the Neighbourhood Residential Zone.

17 This makes the scope of enquiry of all possible forms of lawful development even more difficult. Even if this scope of enquiry is limited by removing from consideration those possible development opportunities that might be thought to be remote or fanciful or unlikely, the scope of enquiry is still necessarily broad. If the land is free from the effect of the covenant, I simply do not know whether the ultimate development of the land would be limited only to a second dwelling. Even if so limited, I do not have any basis for assessing the likely building envelope, scale, height, or design of that second dwelling. I do not know whether there would be any overlooking or overshadowing of neighbouring properties. I do not know whether there would be any vegetation removal or other consequential development. I do not know what the effects of a possible

future subdivision of the land might mean for its development if wholly freed from the covenant.

18 Even if the form of any development that might occur must, strictly speaking, still satisfy the requirements of the current planning scheme, I cannot be satisfied that the form of future development will be unlikely to potentially affect, or cause detriment to, the amenity of adjoining landowners by virtue of the matters above. There are too many possibilities, and too many unknowns, to form this conclusion.

19 In this proceeding, the only benefiting owner who has objected is located some distance from the land. As noted in *Giosis*, it could be argued for the applicant that this objector could suffer no direct physical amenity impact from any form of development on the land. However, as further noted in *Giosis* (and in *McFarlane*), it is not necessary for a potentially affected person to assert detriment. I must be positively satisfied of a negative, namely, that there is unlikely to be detriment of any kind. Here, as I have said, even non-objecting neighbours could potentially suffer some detriment from future development on the land, given that the form, scale and intensity of that development is presently unknown. I cannot be satisfied that it is unlikely that there will be detriment of *any* kind.

20 In order to reach this conclusion, I have also had regard to the nature of other development that has occurred within the subdivision that has the benefit and the burden of the covenant. If, for example, there had already been many cases of development of second dwellings or more intensive development within the subdivision, it might at least be more arguable (albeit still very difficult) to contend that a second dwelling on the applicant's land would be unlikely to cause detriment. However, that is not the case here. The subdivision comprises a relatively low density residential area. The covenant appears to have been largely honoured through single dwelling development in this subdivision, including in the immediate vicinity of the applicant's land. I do not give great weight to the applicant's examples of development in the municipality outside of the subdivision covered by the covenant.

21 Moreover, although I have focused on the potential physical amenity impacts on non-objecting neighbours, it is not possible to completely discount the potential for detriment (including perceived detriment) to the only benefiting landowner who has objected, merely on the basis that this objector is located some distance from the land. I deal with this issue also under the second limb in s 60(5)(b), later in these reasons, so I will not duplicate my reasoning here. However, even if the objection is characterised as relating primarily to traffic concerns, it is conceivable that the objector's concerns about increased traffic volumes and safety are a reflection of underlying concerns that may result from an incremental increase in the density of development if the covenant is removed. In a planning context, even a small increase in traffic volumes may well

comprise an actual or perceived detriment to a benefiting landowner, albeit that the likelihood of that detriment being suffered may then need to be considered. In any event, even if I am wrong about this, I am not concerned only with this sole objection in considering the first limb under s 60(5).

22 I said earlier that there has been a long line of 'relatively consistent' decision-making on these issues, which supports the view I have reached thusfar. However, the applicant referred me to, and sought to rely upon, two decisions that might be said to run counter to these principles. It is appropriate that I therefore refer to them directly.

23 In *Monks v Yarra Ranges Shire Council*[9], a VCAT member had granted a permit for covenant removal and, in doing so, had expressed the view that it was not enough for an objector simply to assert that he would suffer real or perceived detriment. It was added: "*He must actually provide real evidence of same (which I fail to see here)*". I respectfully disagree with the decision in *Monks*, to the extent it is based on this premise. There is commonly no strict onus in review proceedings at VCAT and, more particularly, the statutory test in s 60(5) does not require that an objector affirmatively prove the likelihood of detriment. The applicant for a permit generally carries the 'persuasive burden' of satisfying the decision-maker that a permit should be granted. Moreover, as indicated above, the test is not that the decision-maker be affirmatively satisfied that detriment will be suffered by an objector. The test is whether it is unlikely that any benefiting landowner will suffer any detriment of any kind.

24 The applicant also relies on the decision in *Wilde v Moonee Valley City Council*[10]. There, the then Deputy President Byard discussed what was meant by the term 'detriment', and what was meant by the term 'perceived detriment'. It was said that this latter term differs from a 'perception of detriment'. DP Byard indicated that, in applying the statutory test in s 60(5), a decision maker cannot make an assessment of whether it is unlikely that there will be detriment if the relevant detriment cannot be perceived, or where there is a perception of detriment that does not truly amount to detriment when objectively assessed.

25 I do not disagree with the view expressed by DP Byard in *Wilde* in the context of the case before him. I have also earlier indicated that s 60(5) requires a consideration about 'detriment' and whether it is unlikely, rather than a consideration of any nebulous concern or objection that might arise from the development of land.

26 *Wilde* is perhaps a good example of a situation where the 'extraordinarily high' bar set by s 60(5) is seen to be a not insurmountable bar. But the circumstances here are different, and I do not believe the decision in *Wilde* assists the applicant in the proceeding before me. In particular:

[9] [2012] VCAT 1832 per Martin M, particularly at [12]
[10] [1996] VICCAT 427 per Byard DP

- in *Wilde*, DP Byard emphasised that it was important to look at the particular development proposal and the particular variation of the covenant sought to see if that proposal, rather than some other fancied or possible proposal or variation, is unlikely to occasion any detriment. In *Wilde*, there was a contemporaneous application for a permit for a dual occupancy before the tribunal along with the application for a very specific and limited variation of a covenant. The tribunal in *Wilde* had an objective basis upon which to consider the likelihood of detriment, and it limited the variation of the covenant to allow only the very specific dual occupancy being authorised by the contemporaneous permit.
- here, in contrast, the decision-maker has no particular development proposal, and has an application to remove the covenant completely. Whilst the Council and VCAT should not consider a potential future development of the land that might be considered remote or fanciful, the decision-maker here, in considering whether detriment is unlikely, is faced with a wide range of possible forms of development that would be permissible under the planning scheme if the covenant is completely removed from the land. It is more difficult to establish that detriment of any kind is unlikely.
- because of this, even if the sole objector here was characterised as having only a perception of detriment, rather than there being perceived detriment, the applicant still fails in meeting the statutory test under s 60(5)(a). Because the form, scale and density of any future development is unknown, the applicant here is unable to affirmatively satisfy me that there is unlikely to be any detriment of any kind to any benefiting landowner, including a non-objecting adjoining landowner.

27 For all of the above reasons, I cannot be affirmatively satisfied, for the purposes of the first limb in s 60(5)(a) of the *Planning and Environment Act 1987*, that the beneficiaries of the covenant will be unlikely to suffer any detriment, including any perceived detriment, as a consequence of the removal of the covenant. The applicant has failed to satisfy me in relation to the first statutory precondition to the removal of the covenant.

Was the objection vexatious or not in good faith?

28 Although the application for review has failed in relation to the first statutory precondition, it is appropriate that I also briefly consider the second limb in s 60(5)(b) of the *Planning and Environment Act 1987*. The decision-maker must also be satisfied that, if a benefiting owner has objected to the grant of the permit to vary or remove the covenant, the objection is vexatious or not made in good faith.

29 Unlike sub-paragraph (a) in section 60(5), sub-paragraph (b) is directed only to a benefiting owner who has objected, and this provision requires a consideration of the objector's motives.

30 Interestingly, the applicant readily conceded that the sole objector in this case had made his objection in good faith, and it was not vexatious. In simplistic terms, this is enough to dispose of the matter on this ground.

31 However, despite this concession, the applicant raises two additional matters that require consideration.

32 The first of these is the character of the objection. Implicitly, the applicant contends that the sole objection to the Council was not really an objection in relation to the removal of the covenant, and should not be characterised as such, and that the objection is not therefore relevant to the test in s 60(5)(b) in this case. On this view, it does not matter whether the objection is vexatious or not, or made in good faith or not. It is argued to be a misconceived objection that does not amount to a relevant objection at all.

33 As I have indicated earlier, the applicant's view is that the objector has used the application for the removal of the covenant as a means of expressing to the Council unrelated concerns regarding traffic in the area.

34 I must accept the fact that the covenant has been deliberately applied across all lots in a relatively large subdivision. On its face, the objection starts by expressly stating: "I do not agree with the removal of covenant N640836D". It is not clear that this statement is necessarily qualified by the paragraphs that follow, relating to traffic concerns. Moreover, as I have indicated earlier, it is also conceivable that the objector's concerns about traffic are a reflection of underlying concerns that may result from an incremental increase in the density of development.

35 The second and perhaps related issue is that of 'constructive vexatiousness'. A useful discussion of this concept is set out by Senior Member Wright in *Giosis*, with reference to other authorities. The courts have applied the concept of constructive vexatiousness to regard litigation as vexatious if, irrespective of the motive of the litigant, the proceeding is so obviously untenable or manifestly groundless to be utterly hopeless. SM Wright quite properly cautioned about the direct translation of a judicial definition in one statutory context to a different statutory context. He indicated that this was particularly the case under the statutory test here, where s 60(5)(b) is clearly directed towards the objector's motive.

36 Here, as with two of the objections considered by SM Wright in *Giosis*, there is perhaps a good case that the objection in this case would be considered untenable, and have no prospect of success, if raised as a planning objection to a specific development proposal for a single second dwelling on the applicant's land in a cul-de-sac some distance from the objector's land. The traffic concerns raised by the objector are of a general nature. However, equally, there is no evidence that the objection was

calculated to annoy or frustrate the applicant, even though it may have that effect.

37 Ultimately, I return to the objector's express statement: "I do not agree with the removal of covenant N640836D", and the prospect that the objector's traffic concerns are a reflection about increased density of development in the area, which could arise through the removal of covenants that seek to limit development to a single dwelling on each lot in the subdivision. I do not consider, in the absence of more, that the objection is wholly misconceived or raises concerns wholly unrelated to the removal of the covenant. Equally, in the context of the removal of the covenant where there is no specific development proposal under consideration, I do not consider that the objection is so manifestly groundless as to amount to 'constructive vexatiousness' if indeed that concept applies in the present case.

38 The applicant has therefore failed to satisfy me in relation to the second limb, in s 60(5)(b). I do not consider that the objection made by a benefiting landowner is vexatious, or not made in good faith. However, little turns on this in the present proceeding, as the applicant has more clearly failed in relation to the first limb under s 60(5)(a) of the *Planning and Environment Act 1987*.

Conclusion

39 It follows that the decision of the Council is affirmed, and I direct that no permit be granted for the removal of the covenant from the land.

Mark Dwyer
Deputy President