

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

VCAT REFERENCE NO. 1024/2004

**PLANNING AND ENVIRONMENT LIST**

**CATCHWORDS**

Covenants; removal or variation of restrictive covenants; section 47(2) Planning and Environment Act; principle of acquiescence applies only to the part of the covenant being breached.

<b>APPLICANT</b>	Peter Hill
<b>RESPONSIBLE AUTHORITY</b>	Campaspe Shire Council
<b>SUBJECT LAND</b>	286 Anstruther Street, Echuca 3564
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Helen Gibson, Deputy President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	7 July 2004
<b>DATE OF ORDER</b>	26 July 2004
<b>CITATION</b>	[2004] VCAT 1399

**ORDER**

- 1 Pursuant to Section 149A of the *Planning and Environment Act 1987*, I declare that section 47(2) of the *Planning and Environment Act 1987* does not apply to a permit application to remove the restrictive covenant that applies to the subject land at 286 Anstruther Street, Echuca being Lot 2 PS 329232U and being part of Lot 1 PS 209978Y.

Helen Gibson  
**Deputy President**

**APPEARANCES:**

For Applicant	In person
For Responsible Authority	Ms Tamara Brezzi, Solicitor, of Deacons

## REASONS

### NATURE OF APPLICATION FOR REVIEW

- 1 Application P1024/2004 is an application for a declaration pursuant to section 149A of the Planning and Environment Act 1987. The application relates to a restrictive covenant that applies to the subject land at 286 Anstruther Street, Echuca. It was agreed by the responsible authority and the applicant that the declaration sought could be separated into parts as follows:
  - a Was the subdivision and sheds that apply to and exist on the subject land carried out or constructed lawfully at the time?
  - b Have the works been carried out for more than 2 years?
  - c If the above is found to be the case, does section 47(2) of the Planning and Environment Act 1987 apply to a permit application to remove the restrictive covenant which applies to the subject land?

### BACKGROUND

- 2 The restrictive covenant which applies to the subject land has two parts to it:
  - Only one private dwelling may be constructed on the land;
  - Any external outbuilding or shed shall only be constructed with materials of brick veneer, stone, colourbond or corrugated iron (in muted environmental toning) and have an area not greater than 40m<sup>2</sup> and a height no greater than 3 metres.
- 3 The problem so far as the applicant is concerned is that the subject land is only part of the land to which this covenant applies.
- 4 The subject land is Lot 2 on Plan of Subdivision 329232U. It is a large lot of 5775m<sup>2</sup>, which has a frontage to Anstruther Street and whose western boundary borders the Campaspe River. The subject land was part of a two lot plan of subdivision created in 1998. Lot 1 on this plan of subdivision, PS 329232U, has an area of 969m<sup>2</sup> and a frontage to Lord Court. There is a single dwelling on Lot 1, and a large shed with an area of 57m<sup>2</sup> and a height of 3.5 metres on Lot 2.
- 5 The combined area of the 2 lots in Plan of Subdivision 329232U was originally Lot 1 on Plan of Subdivision 209978Y, which was a 16 lot subdivision created in 1988. When the lots in this subdivision were sold, each transfer contained a restrictive covenant to the above effect with the benefiting properties being each of the other lots in Plan of Subdivision 209978Y. Thus, although Lot 1 on Plan of Subdivision 209978Y now comprises the two lots on Plan of Subdivision 329232U, the restrictive covenant still applies to the whole of the land. As this land as a whole has already been developed with a dwelling in accordance with the terms of the

covenant, the subject land (Lot 2 PS 329232U) cannot be developed for another dwelling without breaching the covenant.

- 6 The responsible authority does not dispute that the shed on the subject land exceeds the size and height of outbuildings specified in the restrictive covenant and as a consequence is in breach of the covenant.

#### **APPLICATION FOR REVIEW P1821/2004**

- 7 Application for review P1821/2002 sought permission to remove the restrictive covenant from the subject land following refusal by the responsible authority for a permit to remove the covenant and erect a dwelling on the subject land.
- 8 This application for review was refused by Deputy President Horsfall. He held that the relevant test concerning whether a permit could be granted for the removal or variation of the covenant lay in section 60(5) of the *Planning and Environment Act 1987* and that in the circumstances of the case the test set out in this provision could not be satisfied.

#### **BASIS OF DECISION**

##### **Section 47(2) Planning and Environment Act**

- 9 Mr Hill's purpose in seeking the declarations in this application P1024/2004 is to ascertain whether section 47(2) of the Planning and Environment Act would apply to a planning permit application to remove the restrictive covenant from the subject land. Section 47(2) of the Act exempts applications for the removal of covenants from the need to give notice under sections 52 and 55 of the Act in certain circumstances.
- 10 The section 52 notice requirements for an application to remove or vary a covenant include notice to the owners and occupiers of all land benefited by the covenant (section 52(1)(cb)). Section 55 of the Act relates to notice to referral authorities. Section 47(2) provides specifically as follows:
  - “47. Applications for permits
    - (2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the Subdivision Act 1988) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.”
- 11 Mr Hill was not specific about his reasons for seeking the declarations which are the subject of this application. The implication is that they are the first step in making further application to remove the restrictive covenant from the subject land as a means of facilitating future development. Even if I hold that section 47(2) does apply to such an application, and no notice is required under sections 52 or 55 of the Act, this will not preclude the responsible authority from the obligation to

consider the matters set out in section 60(5) of the Act. These were the matters that were considered by Deputy President Horsfall in application P1821/2002. He found that the tests were not satisfied and hence refused to grant a permit for removal of the restrictive covenant. Even if there are no objectors to any future permit application for removal of the covenant, the findings of the Tribunal in P1821/2002 will still carry significant weight.

- 12 However, the reasons why Mr Hill is seeking these declarations and the soundness or otherwise of those reasons are not directly relevant to the declarations themselves.
- 13 Turning to a consideration of section 47(2), it is Mr Hill's submission that the subdivision of the subject land and construction of the shed were both carried out lawfully and both were undertaken or constructed more than 2 years ago. The shed is in breach of the restrictive covenant. He therefore argues that the land has been used or developed for more than 2 years in a manner which would have been lawful under the Act but for the existence of the restriction. As a consequence, these circumstances bring the situation within the ambit of section 47(2) and therefore, he submitted, sections 52 and 55 do not apply to an application for permit to remove the restriction, ie the covenant.
- 14 The responsible authority argues that although there is an existing breach of the covenant, the breach relates to part only of the covenant, namely the shed. The breach of the covenant does not extend to the part of the covenant that restricts the use and development of the land to one dwelling. As a result, this does not allow the entire restrictive covenant to be removed or make the entire application exempt from advertising under section 47(2). Even if the shed is lawful, the exemption from advertising will only apply to the removal of that part of the covenant that applies to the external outbuildings and shedding. It will not apply to the removal of the entire covenant including the restriction that only one dwelling be constructed on the whole of the parent title (ie Lot 1 PS209978Y). It was submitted on behalf of the responsible authority that this is consistent with the view taken by Deputy President Horsfall in application P1821/2002.
- 15 The facts relating to the subdivision and construction of the shed were not in issue before me. The Council agreed that the subdivision was lawful under the Planning and Environment Act. A building permit was issued for construction of the shed in 1995 and a copy of that building permit 1043/0335 was produced to me. Whilst a planning permit would now be required for construction of the shed under the Campaspe Planning Scheme, the Council acknowledged that no planning permit was probably required for the shed when it was constructed, although the Council did not produce any evidence about the relevant planning scheme provisions as they existed in 1995, which was before the new format Campaspe Planning Scheme was introduced.

## **Declarations sought**

### Were the subdivision and sheds lawful at the time?

- 16 There is no dispute that the subdivision was lawful. In the absence of evidence to the contrary, I am prepared to find that no planning permit was required for construction of the shed in 1995, which was when a building permit was issued.
- 17 I therefore find that Plan of Subdivision 329232U was carried out lawfully and that the shed on Lot 2 LP329232U was constructed lawfully.

### Length of time land has been used or developed

- 18 It was common ground between the responsible authority and the applicant that both subdivision and shed had been carried out or constructed more than 2 years ago.
- 19 I therefore find that the subdivision was carried out more than 2 years ago and that the shed was constructed more than 2 years ago.

### Does section 47(2) apply to an application to remove the restrictive covenant?

- 20 Notwithstanding my findings set out above, I find that section 47(2) of the Planning and Environment Act does not apply to an application to remove the restrictive covenant from the subject land for the following reasons.
- 21 The restrictive covenant has two components - the single dwelling component and the outbuildings component. The only breach of the covenant relates to the outbuildings component. I do not agree with the applicant that the breach of part only of the covenant by a development which occurred more than 2 years previously and which would have been lawful under the Act but for the existence of the covenant, is sufficient to trigger an exemption from notice of removal the whole of the covenant.
- 22 The issue here is whether the use and development referred to in section 47(2) must be in breach of all parts of a covenant or whether it is sufficient that it be in breach of part only of the covenant. I consider that the nature of the use or development that is in breach must be considered in relation to the restriction in question.
- 23 To decide what this provision means it is necessary to look at the purpose of the provision. I consider the purpose of the provision is to recognise the principle of acquiescence. This is the principle that assent to an infringement of rights, either express, or implied from conduct, will normally result in the loss of right to equitable relief.
- 24 I consider that to allow a breach of one part of a covenant to be used as an excuse to seek removal of the whole of a covenant, including parts which have not been breached, without giving notice to benefiting land owners could be open to abuse. A land owner wishing to remove a covenant without letting people know could deliberately breach one part of the restriction, which people may not notice or may not mind, then use that

breach as a lever to remove the whole of the covenant without notice under sections 52 and 55 of the Act. I do not consider that this is what the Act has in mind. Such a view would also be quite contrary to the very onerous provisions elsewhere in the Act where covenants are concerned, which protect the interests, and indeed even the perceived interests, of benefiting land owners. In the present circumstances it is quite possible that people having the benefit of the covenant may not be concerned about a breach relating to a shed whereas they may be concerned about a breach relating to a second dwelling.

- 25 In my view, acquiescence in the breach of one part of a covenant should not be construed as acquiescence in the breach of the whole of the covenant. In order for people with the benefit of a covenant to be denied notice of an application to vary or remove a covenant on the basis that they have acquiesced in a breach for more than 2 years, they must have acquiesced in a breach of all the relevant aspects of the covenant which are proposed to be varied or removed. It is not sufficient for them to have acquiesced in the breach of part only.
- 26 My conclusion is that if part of a covenant is breached, and the breach continues for 2 years without any action on the part of those having the benefit of the covenant, it is reasonable that no notice should be given of an application to vary by removal part of the covenant of which there is a breach. But this exemption from notice pursuant to section 47(2) of the Act should not extend to the removal of any aspect of a covenant of which there is no breach.
- 27 I therefore declare that section 47(2) of the *Planning and Environment Act 1987* does not apply to a permit application to remove the restrictive covenant that applies to the subject land at 286 Anstruther Street, Echuca.

Helen Gibson  
**Deputy President**