

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2876/2005
PERMIT APPLICATION NO. D/916/2005

CATCHWORDS

Planning; Planning and Environment List; restrictive covenant; application for removal (rather than modification) thereof; objections of owners of land benefiting by covenant; whether such objections “not made in good faith”; s.60(5)(b) Planning and Environment Act 1987; whether “pro forma” grounds indicate lack of good faith; good faith relates to objection and its grounds, rather than statement of grounds; lack of good faith could be due to dishonesty, insincerity, corrupt or malicious purposes, personal grudge or prejudice or ulterior motive; speculative concerns rather than specific ground based on provable facts does not necessarily mean objection not made bona fides; a weak but arguable case (but not vexatious) might still be bona fide; restrictive covenant relates to property law rights, not to planning considerations; strength of case in relation to argument of lack of bona fides for weakness not to be judged on planning considerations; distance of benefited land may be relevant but not decisive of bona fides; detriment of any kind; case for modification of restrictive covenant to allow specified development is narrower and easier to establish than total removal of covenant creating much wider possibilities with possible attendant detriments.

APPLICANT	Steven Slaveski
RESPONSIBLE AUTHORITY	Darebin City Council
RESPONDENT/OBJECTORS	Matteo Villani and others
WHERE HELD	Melbourne
BEFORE	Russell Byard, Acting Deputy President
HEARING TYPE	Full Hearing
DATE OF HEARING	27 March 2006
DATE OF ORDER	11 April 2006
SUBJECT LAND	Address 27 Mahoneys Road Reservoir Title Particulars Lot 1025 on Plan of Subdivision No. 008481 being the land in Certificate of Title Volume 0498 Folio 545. Land Area and Dimensions A slightly irregular but generally rectangular allotment of land with a frontage of approximately 17.7 metres to the south side of Mahoneys Road, a depth of approximately 53 metres and an area of approximately 932 square metres.
CITATION	[2006] VCAT 593

ORDER

This application for review is refused and no permit is issued.

RUSSELL BYARD
ACTING DEPUTY PRESIDENT

APPEARANCES AND EVIDENCE

Mr. John Klarica, consultant town planner of Calibre Planning Pty Ltd, appeared for the responsible authority. He presented written and oral submissions.

Mr. William Chow, town planner of Zoneworks Planning and Design, appeared for the applicant. He also presented written and oral submissions.

Mr. Matteo Villani, objector, appeared in person for himself and Antonietta Villani. He made oral submissions.

Mr. Larry De Cata, objector, appeared in person and made oral submissions.

Mr. Jim Anastasiou, objector, appeared in person and made written and oral submissions.

Various plans, photographs and other documents were tendered in evidence. The evidence and submissions in documentary form have been retained on the file of the Tribunal.

NATURE OF PROCEEDING

Application under s.77 of the Planning and Environment Act 1987 (PE Act) for review of a decision of the Responsible Authority to refuse to grant a permit.

PROPOSAL

Removal of a restrictive covenant

PLANNING SCHEME AND ZONING

Residential 1 Zone and subject to a Development Contributions Overlay under the Darebin Planning Scheme.

GROUNDINGS OF REFUSAL

1. The proposal to remove the restriction contained in Certificate of Title Volume 05498 Folio 545 (Instrument of Transfer No. 1398362) is contrary to Section 60(5) of the Planning and Environment Act 1987.
2. The proposal will cause financial loss to owners benefiting from the covenant by allowing more than one (1) dwelling on the land.
3. The proposal will cause a loss of amenity to owners benefiting from the covenant by allowing more than one (1) dwelling on the land.
4. The proposal will cause a loss from a change to the character of the neighbourhood to owners benefiting from the covenant by allowing more than one (1) dwelling on the land.
5. The proposal will cause material detriment to owners benefiting from the covenant by allowing more than one (1) dwelling on the land.
6. The proposal will cause material detriment to owners benefiting from the covenant by removing restrictions on advertising hoarding, quarry operations, and use of the land for shops, laundries and factories.

GROUNDINGS OF APPLICATION FOR REVIEW

1. The proposal is not contrary to section 60(5) of the Planning and Environment Act 1987.
2. The proposal will not cause loss of amenity, financial loss or material detriment to other owners benefiting from the covenant.
3. The proposal cannot have any effect on neighbourhood character.
4. The covenant is outdated and seeks to prohibit activities which are now effectively controlled by the Darebin Planning Scheme.
5. The restriction placed on the number of dwellings that can be built on the land is unreasonable and contrary to the planning outcomes sought for the area by the Darebin Planning Scheme.

REASONS

- 1 This case concerns land known as 27 Mahoneys Road, Reservoir. It is a residential allotment in a Residential 1 zone and it appears to be part of a very extensive subdivision dating back to the 1920s. However, it further appears that the subdivision may have proceeded in parts. In any event, the land is subject to a restrictive covenant and restrictive covenants in similar terms affect properties in an area on the south side of Mahoneys Road bounded generally by Balfours Street, Lindenow Street, Carson Street, Hughes Parade and High Street including, within that area, Merrilands Road, Morris Street and Asquith Street. I have been provided with a plan indicating the location of lands having the benefit of the covenant that applies to No.27, and they all fall within the area I have just described.
- 2 The owners of the review site have foreshadowed that they wish to develop the land with a further dwelling. There is a single dwelling on the land at present. This application for review however, and the permit application giving rise to it, is not in relation to the question of whether planning permission should be granted for that development. On the contrary, it is limited to the question of whether the restrictive covenant should be removed. The proposed development would be contrary to the restrictive covenant. As such, a planning permit for development cannot be granted at this stage. Section 61(4) of the Planning and Environment Act 1987 (PE Act) does not allow the granting of a permit for something that would contravene a restrictive covenant. It is necessary to remove or appropriately modify the restrictive covenant so that the proposal would not be contrary to the covenant, and such removal or modification must take place before or at the time planning permission for the development is sought. In this case, the applicant has chosen to apply for total removal, rather than modification, and has sought such removal prior to making any application for planning permission for the development.
- 3 There were 169 lots in the relevant portion of the subdivision and 112 of those lots have the benefit of the covenant applicable to the review site.
- 4 The application for a permit to remove the covenant is made to the responsible authority. Notice was given to the owners of land benefiting from the covenant and a number of objections were received including 9 or 10 who are the owners of land that enjoys the benefit of the covenant. The responsible authority claimed there were 10 such objectors including S. Constanzo of 22 Morris Street. The applicant admits to 9, not having been aware of S. Constanzo. On checking the Tribunal file I cannot find a statement of grounds from S. Constanzo, nor do I find a copy of an objection from that person, although the responsible authority claims to have forwarded copies of the objections of owners of land enjoying the benefit of the covenant. This appears to account for the discrepancy between 9 and 10. However, I do not think anything really turns on that point.

- 5 Mr. Jim Anastasiou lodged an objection and appeared at the hearing although his property at 39 Merrilands Road is outside the area described and his property is not denoted as one of those having the benefit of the covenant that applies to No. 27.
- 6 The restrictive covenant in question is noted on the relevant Certificate of Title and appears in Transfer of Land No. 1398362 dated 16 January 1929. The terms of the covenant are that the purchaser binds herself and her successors
- That –
- (a) No hording for advertisement purposes shall be erected on the said Lot hereby transferred.
 - (b) No quarrying operations shall at any time hereafter be carried on in or upon the said Lot and no stone earth clay gravel or sand shall at any time hereafter be carried away or removed from the said Lot except for the purpose of excavating for the foundation of any building to be erected thereon.
 - (c) No shops laundries factories or works shall be erected on the said Lot and not more than one dwelling house shall be erected on any one Lot and the cost of constructing each house shall not be less than Four Hundred Pounds (inclusive of all architect's fees and the cost of erecting any outbuildings and fences).
- 7 As can be seen, the restrictive covenant imposes a number of restrictions and requirements. However, the most pertinent (in view of the foreshadowed development) is that which specifies that no more than one dwelling house shall be erected. There are several methods of removing or modifying covenants, but the one selected by the applicant in this case is to seek a permit for that purpose. There are severe restrictions imposed by s.60 PE Act in relation to this sort of application. These restrictions are particularly strict in relation to a restrictive covenant created before 25 June 1991. This covenant was created before that date. In those circumstances, it is the particularly severe restrictions of s.60(5) PE Act that apply.
- 8 That sub-section starts by creating a ban on the granting of permits for the removal or variation of covenants and then provides for an exception to that blanket ban, where the responsible authority (or in this case the Tribunal on review) is satisfied of certain things. The things that the Tribunal must be satisfied of are specified in paragraphs (a) and (b) of s.60(5). It must be satisfied in relation to both (a) and (b). If it is satisfied as to one, but not the other, then the ban applies, and no permit can be granted.

Objections not Made in Good Faith

- 9 In this case, it is convenient to consider the requirements of (b) first. It provides that a permit for removal cannot be granted unless the Tribunal is satisfied

- (b) if the owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.
- 10 The owner, in this context, means the owner of land that has the benefit of the covenant. In this case there are quite a number of pieces of land that have the benefit of the covenant and of them the owners of 9 have objected. In saying this, I am leaving out S. Constanzo as I am not sure whether that person really did object. I am also leaving out Mr. Anastasiou on the basis that his land does not have the benefit of the covenant. When I say 9, that means 9 objections. In some cases there are two owners who have made a joint objection.
 - 11 Thus there were 9 objections from owners of land having the benefit of the covenant. When the applicant applied for this review, notice was given to them and statements of grounds were filed in relation to each of the objections thus making those owners parties to this proceeding.
 - 12 I was referred to a number of cases during the hearing. I think some of the propositions established in those cases are well known, well accepted and clearly correct. In the circumstances, where I think that is true, I propose to here assert those propositions without here going through those authorities and the supporting arguments therein.
 - 13 So far as s.60(5)(b) is concerned, once there is an objection from one or more owners of land benefiting, that puts an end to the possibility of there being a permit unless the Tribunal is satisfied that each objection is either vexatious or not made in good faith.
 - 14 In the present case Mr. Chow, the town planner who appeared on behalf of the applicant, made it clear that he was not seeking to rely on the proposition that any of the objections were vexatious. Thus, he must leave me satisfied that each of the objection were not made in good faith.
 - 15 I think this means that there is an onus on the applicant to leave me so satisfied. It is not enough if I think that there is a possibility of lack of good faith, or that it is as likely as not that there was a lack of good faith. I must be “satisfied” that the objection was not made in good faith. If one of them was, that puts an end to the matter and means that no permit can be granted.
 - 16 It has often been said that s.60(5) sets a very high bar to be surmounted by an applicant seeking a permit. One of the reasons why the bar is considered to be so high is that it is very difficult, except perhaps in exceptional cases, to show a lack of good faith in relation to the making of an objection. Generally speaking there is nothing on the face of the objection, or in the circumstances, to suggest a lack of good faith.
 - 17 This does raise the question of what might amount to a lack of good faith in relation to the lodging of an objection. A lack of good faith might be found where there is evidence of dishonesty or insincerity. For example, an objection made for dishonest, corrupt or malicious purposes or to indulge a personal grudge or prejudice, might be held to show lack of good faith. An

objection lodged for an ulterior motive, that is to say, a motive that is not genuine to the purposes of the restrictive covenant or the application for its removal, might well suffice. However, it is obvious enough that such mala fides (that is bad faith as opposed to good faith) will generally be hidden, if it exists.

- 18 Mr. Chow put his case alleging lack of bona fides on two bases.

Do Pro forma Grounds Necessarily indicate Lack of Good Faith?

- 19 His first was reliance on the so called pro forma nature of the grounds. He argued that if all objectors relied on the same grounds in the same form, this would be indicative of collusion and so lack of genuineness. However, the grounds he sought to rely on were not the grounds set out in the objections, but the grounds in some of the statements of grounds filed in response to his client's application for review.

Grounds of Objection, not Statement of Grounds

- 20 The first thing to be said about this is that it is the written objections, rather than the statements of grounds, that are in question. When the objections are considered it is found that they vary in word, in content and setting out. Except in two or three cases, there is no basis for saying that there has been a "pro forma" set of grounds of objection, and thus no basis for suggesting an element of collusion. Even those that are similar, are not all the same. In relation to the few that are similar, it does not necessarily follow that the objections lack genuineness or lack bona fides, even if the similarity might suggest that some mutual assistance has gone on. Mr. De Cata is an intelligent young man with a good command of English. Some of his neighbours are older migrants with a less secure command in English. If he has assisted them, as he claims, and they have accepted his assistance, that does not necessarily indicate a lack of genuineness.
- 21 In any event, if some objectors did copy grounds originally drafted by another objector, there must have been an original, and I cannot see any basis for supposing that the original was not genuine. It must be remembered that, in this case, one genuine objection (as opposed to objections not made in good faith) it is enough to prevent the grant of a permit.
- 22 Of course, it is not surprising if neighbours share some of each others concerns, thus giving rise to objections dealing with similar topics.
- 23 I am not at all satisfied in relation to Mr. Chow's first basis, namely the supposed similarity of grounds.

Speculative Concerns

- 24 The second basis was to say that the objections are, in effect, not genuine because they are, in his view, speculative concerns not supported by facts or evidence of facts. He wants to reverse the onus, and put it on the objector

to establish a case based on evidence justifying the objection and the various grounds in the objection. However, I do not think that the genuineness of an objection for the purposes of paragraph (b) is to be assessed on whether the various grounds can ultimately be proved or logically established on the basis of proven facts. Bona fides here is more a matter of genuineness or honesty, rather than whether Mr. Chow or I ultimately are impressed with the validity of the grounds. In any event, it must be remembered that the grounds here does not mean grounds based on town planning merits in accordance with the purposes and policies in the planning scheme, as would be the case in relation to a normal planning appeal. The rights given by the covenant are property law rights, not something that arises in relation to planning considerations or planning merits. The interest that the owner of land benefiting might have in the maintenance of a restrictive covenant, is not limited to his or her, or anybody else's interest in sound planning.

- 25 Even where the interests that are relevant to the covenant overlap with planning considerations, any assessment would be on a different basis. A particular covenant might create a right of a sort in relation to which planning offers no right to protection.
- 26 It is not enough to say that any case that might be mounted in support of an objection or a ground of objection is a weak one. A proposition that is totally unarguable might be vexatious, but a proposition with perhaps a weak basis can nevertheless be perfectly bona fide and honestly believed in by the objector.
- 27 Furthermore, the fact that an objector has put in an objection, in circumstances where he or she is the owner of land benefiting that is 100 or 300 metres away does not necessarily mean lack of genuineness. In this case the area containing the various pieces of land with mutual covenants extends over only 6 street blocks. There may possibly be circumstances where the land having the benefit is so remote in all relevant ways, that it raises questions as to the genuineness of the objection. However, a particular piece of land, having the benefit in relation to various other pieces, might value that benefit in varying degrees in relation to differing pieces, but there might also be a genuine interest in maintaining the covenant as it applies to the area, and a genuine anxiety that a peice meal nibbling away, lot by lot. That might have an undesirable cumulative effect of putting the general benefit of the pattern of covenants at naught, and change the area in which the covenants apply in a way that the covenants were intended to defeat. It is not a matter of whether this argument would finally be upheld as valid. Clearly, it might be genuine or bona fide in the relevant sense. I am not at all satisfied, on the basis of either of Mr. Chow's arguments (or otherwise) that these various objections are not bona fide. I come to this conclusion, in this case, without the need for any meticulous analysis of the 9 particular objections, although I have read them.

- 28 It follows from my not being satisfied that the objections and each one of them was not made in good faith, that I cannot grant the permit sought and the application for review must be refused accordingly.

Detriment of any Kind

- 29 What I have said already is sufficient to dispose of this case, without going into the question of whether or not I am satisfied in relation to s.60(5)(a). This is a difficult and much debated provision. As no written consents to the permit sought had been given by the owners of land with the benefit of the covenant, it becomes a question of whether I am satisfied that each such owner “will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal” of the covenant.
- 30 The scope of consideration here extends to all owners of all land benefiting, and not only those who have objected. Furthermore, the concept of “any detriment” in this context is clearly a very wide one, and it is not a matter of there being some minor detriments outweighed by countervailing benefits, whether to the benefiting owner or to the community in general. If there is any detriment, whether or not outweighed by other considerations, then a permit can only be granted if such detriment is thought to be “unlikely”. Although I do not proposed to go into the matter in detail in the circumstances, I am not satisfied in relation to s.60(5)(a) either.
- 31 I really raise this paragraph because of an unusual argument raised by Mr. Chow in relation to it. It has generally been thought, and correctly in my view, that it is more difficult to obtain the complete removal of a restrictive covenant than it would be to obtain a modification to accommodate a specific development. In the latter circumstance an assessment can be made of the affect of the proposed development, including any detriments it might occasion, so that an assessment can be made as to the detriment that might be consequential on granting the modification. In other words, the scope of possible detriment is limited down to that attributable to the proposed development to which the modification would be tied.
- 32 However, a complete removal puts in issue, not only the potential detriments that relate to a particular proposed development, but every possible detriment of every possible development enabled by the complete removal of the covenant. It is hardly surprising then that most successful applications that have been made, including ones to which sub-section (2) of s.60, rather than sub-section (5) apply, have been for modifications rather than complete removal.
- 33 Mr. Chow has sought to turn this understanding on its head. I think him doing so is really part of his reversing of the onus in attempting to put an obligation on the objector rather than the applicant. He says that where a particular development is proposed its consequences can be comprehended and thus an assessment made as to whether the development will cause detriment. He considers his client to be in a much freer position in

proposing complete removal because then there is no development and thus its consequences cannot be appreciated and no detriment can be assessed. He simply ignores potential detriments of the potential developments enabled by total removal.

- 34 Perhaps the fallacy of this line of reasoning is that he is talking about the consequences of a development rather than the consequences of the removal of the restrictive covenant. It is true that s.60(5)(a) does use the word “consequence” but it is consequence of the removal of the restrictive covenant that has to be assessed. The consequence of complete removal is that the restriction ceases altogether so that a wide scope of possibilities is opened up. In that case it becomes a question of whether it is likely that any detriment of any kind would arise in relation to any of the possibilities thus created.
- 35 Mr. Chow complains that this involves speculation. Perhaps it does. There can never be more than an appreciation anticipated detriment unless until the results of removal or modification are realised by something happening on the ground. It is part of the concept of a restrictive covenant to prevent things, rather than to realise them. Thus, the potential must necessarily be theoretical to that extent.
- 36 I thought Mr. Chow argued his client’s case persuasively and with ability, but I think, for the reasons given above, that there is a fallacy in his argument based on presence of the word “consequence”.

Conclusion

- 37 I am not satisfied in relation to paragraph (a) or (b), although I specifically rely on (b) for the reasons given earlier. It follows that, by virtue of s.60(5), this application for review must fail and no permit is granted.
- 38 As an addendum, I observe that Mr. Chow asked me to consider whether, if his client failed in relation to having complete removal of the covenant, his client could amend his proposal to seek modification rather than removal of the covenant. This appears to be something of a reversal of his “consequence” argument. Be that as it may, I am not willing to amend the permit application. If some alternative is to be sought, a new application should be made. However, in view of the difficulties involved in removing or amending a covenant in face of the opposition of owners of land benefiting, Mr. Chow’s client might be better advised to consider whether some other procedure offers a better hope of success.

RUSSELL BYARD
ACTING DEPUTY PRESIDENT