

IN THE MATTER OF the Property Law Act 1958

and

IN THE MATTER OF an application by Milbex Pty Ltd and Zina Deuel for modification of a restrictive covenant pursuant to section 84 of the *Property Law Act 1958*

MILBEX PTY LTD (ACN 109 687 952) and
ZINA DEUEL

Plaintiffs

JUDGE: BYRNE J
WHERE HELD: Melbourne
DATE OF HEARING: 1 August 2006
DATE OF JUDGMENT: 10 August 2006
CASE MAY BE CITED AS: Re Milbex Pty Ltd
MEDIUM NEUTRAL CITATION: [2006] VSC 298 1st Revision 16th August 2006

RESTRICTIVE COVENANT - covenant for one dwelling per lot - whether modification will not substantially injure beneficiaries - discretion

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr JH Gobbo QC and Mr M Townsend	Tisher Liner & Co

HIS HONOUR:

1 The plaintiffs, Milbex Pty Ltd and Zina Deuel, are registered proprietors as tenants in common of the land situate at and known as 210 Tennyson Street, Elwood and being the whole of the land more particularly described in Certificate of Title volume 10261 folio 414. They seek an order pursuant to s. 84(1)(c) of the *Property Law Act* 1958 modifying the restrictive covenant over the subject land.

2 In 1918, the land was part of a larger holding of Henry Figsby Young comprising a little over 11 acres and bounded by Brighton Road, Glenhuntly Road, Tennyson Street, and Burns Street.¹ By a subdivision made about this time, Mr Young's land was divided by a street which became Heaton Avenue running in a south/westerly direction from Brighton Road to the corner of Tennyson Street and Glenhuntly Road. The land to the north of Heaton Avenue was divided into 34 lots. The six lots fronting Tennyson Street were Lots 21, 22, 23, 24, 25 and 26. By transfer dated 23 April 1920 Mr Young transferred to one Alfred John Griffiths five of these lots, Lots 21, 22, 23, 24 and 25 imposing upon these lots a restrictive covenant of which the relevant provision is as follows:

“(a) That not more than six buildings shall now or at any time hereafter be erected on the land hereby transferred and that each of such buildings shall be a detached private dwelling house with the usual and necessary outbuildings thereto and each of which said dwelling houses shall front Tennyson Street shown on the said Plan of Subdivision and that none of such dwelling houses shall be roofed with iron or any inflammable material nor shall any of the said dwelling houses be used as a shop or for the purpose of any trade manufacture or business or otherwise than as and for a private residence and further that each of such dwelling houses exclusive of outbuildings and fencing shall not be of less value than seven hundred pounds such value to consist of the actual cost of labor and material alone.

3 Sometime later these five lots were again divided into six lots so that the subject land is part only of the old Lot 25. There is a dwelling erected on each of five of the lots

¹ Exhibit C.

and on the sixth a block of units. For practical purposes, therefore, the effect of the covenant, insofar as it concerns the subject land, is to prevent the owners from erecting a building on the property other than a detached private dwelling house.

4 What is now proposed is that the covenant be modified so as to permit a three-storey development containing seven dwellings and a basement car park on the subject land. This would provide for three apartments on the ground floor, three on the first floor and one on the second floor.

5 Section 84(1)(c) permits the Court to modify a restrictive covenant where it is satisfied that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction.

6 I attached to this judgment a plan which sets out the current subdivision of Mr Young's land. The numbers on the allotments are street numbers. The properties which are beneficiaries are shaded. It will be seen that Lot 26 on Mr Young's subdivision has now been divided into four titles, number 212 Tennyson Street and numbers 28, 26 and 24 Heaton Avenue. This has been done to permit the erection of four two-storey brick town houses on old Lot 26.

7 It will be seen from the plan that the beneficiaries of the covenant comprise the owners of some 30 properties including some which are remote from the subject land. On the plan I have marked with the letter O the lots from whom objection has been received. Ten of the beneficiaries have lodged an objection, but none of these has agreed to be joined in the proceeding.

8 There were, in addition, objections lodged by the owners of 14 properties which were not beneficiaries of the restrictive covenant. Of these, Mr Robert Fullinfaw, the owner of No. 2 Heaton Avenue was present in court. He expressed to me concern about the impact of proposed development but, as the owner of a property which is some distance from the subject land, he said that his concern was that the proposed development would represent an intrusion into the essentially one house per block character of the locality. Elwood has been subjected to very substantial flat

development over the past 40 or so years. Mr Fullinfaw said that the locality with which I am concerned represents one of only two pockets of single house residential character in Elwood which survive. He said that this was a matter of some satisfaction for him and his neighbours and a position which he and they wished to preserve. He said the continuance of the restrictive covenant was an important contribution to the preservation of this amenity.

9 It seems that, to some extent at least, the concern expressed by Mr Fullinfaw was shared by many of the householders in the area to the north of Heaton Avenue. Of 16 properties with a frontage or sideage to the north side of Heaton Avenue, 11 householders objected. Of these 16 properties, however, only eight were beneficiaries and of these there were four objectors. Of the 13 properties with frontage or sideage to the south side of Burns Street, seven householders objected. Again, of these, four of the objections were received from beneficiary properties. I should add that, following correspondence with the solicitors for the plaintiffs, seven of the 14 non-beneficiary objectors withdrew their objections. Finally, I record that most, but not all, of the objections were in a standard form.

10 The plaintiffs purchased the subject property in May 2004. On the land was, and still is, a large and rather run-down house which appears to date from the 1920s or 1930s. In September 2004 an application for a planning permit for the proposed development was lodged with the City of Port Phillip and on 15 April 2005 the permit was issued. For some reason, the fact of the restrictive covenant preventing the development for which planning permission was sought was not disclosed to the council or discovered during the application process.

11 I was told that the plaintiffs were unaware of or overlooked the existence of the covenant when they applied for the planning permit. This was disputed by Mr Fullinfaw but there was no evidence for or against this contention. What is known is that the covenant was on the title and available to be seen by any person searching it. But it was not disclosed until it was brought to the attention of council by Mr Fullinfaw in April 2005. In June 2005, the council applied to VCAT for cancellation

of the planning permit on the ground of a material misstatement or concealment of fact. This application to VCAT has been stayed pending the outcome of this proceeding.

12 I return now to the principal matter of concern in this application. This is whether the proposed modification will not substantially injure the beneficiaries. This finding must precede any consideration of discretionary matters.

13 In my consideration of this question, I have had the considerable benefit of a recent analysis of s. 84 by Morris J in *Stanhill Pty Ltd v Jackson*². My task is to examine the position of the beneficiaries as things now stand in the light of the development permitted upon the subject land and to compare this with their position if the modification were made. If there is no detrimental difference or if this difference is not substantial, s. 84(1)(c) is satisfied. In undertaking this task, I am mindful of the caution which should be brought to bear in order to protect the objectives of the covenant.

14 For this purpose, I have had regard to what has been said by the town planner, Giovanni Gattini, in his report and the report of Charmaine Dunstan, a traffic engineer, both retained by the plaintiffs. I have looked at the photographic evidence. I have also, with the consent of the plaintiffs and Mr Fullinfaw, made an unaccompanied visit to the subject land and the locality, examining these from the street. This was to better understand what has been put before me. This has been of particular assistance, given the concerns expressed by Mr Fullinfaw about the impact of the proposed development on the character and amenity of the locality. I identify as the relevant locality for this purpose, the area bounded by Tennyson Street, Heaton Avenue, Brighton Road and Burns Street.

15 My conclusion is that there is a single dwelling character in Burns Street and Heaton Avenue, particularly on both sides of Heaton Avenue and the south side of Burns Street. The character is rather different for those properties fronting Brighton Road

² [2005] VSC 169.

and Glenhuntly Road. The subject land, however, is entirely surrounded by fairly densely developed properties. To the north, at No. 208 Tennyson Street is a rather 1970's style block of flats with exposed plumbing facing the subject property. To the south are the four town houses with the frontages to Heaton Avenue and their back to the subject land. To the west is No 22 Heaton Avenue which is a large property of two-storeys. Facing the subject land is a small triangle of parkland bordered by Tennyson Street (which divides at this point) and Glenhuntly Road. Immediately in front of the subject land the north arm of Tennyson Avenue is blocked off so that through traffic into Glenhuntly Road is prevented. Further beyond Glenhuntly Road the subject property faces tennis courts and parkland.

16 Two of the beneficiary objectors are the owners of the town houses at No. 212 Tennyson Avenue and at No. 26 Heaton Avenue. Counsel for the plaintiffs pointed out that it would be possible, consistent with the restrictive covenant, for their clients to build a three-storey single dwelling on the subject land. The development which would be permitted by the proposed modification would not be more intrusive than such a dwelling for those beneficiaries whose properties abut the subject land.

17 Nevertheless, it must be accepted that the proposed development would lead to a substantial site coverage and to a greatly increased density of the population living on the subject land. I doubt very much, however, whether this would impact in a direct way upon the beneficiary properties abutting the subject land because entry to the subject land is obtained only from Tennyson Street.

18 None of the other beneficiaries is directly affected by the presence of the opposed development. Nevertheless, I sympathise with their concern which is to prevent an intrusion which might lead to the future detriment of the character of the neighbourhood. That such a concern is capable of amounting to a substantial injury is apparent from the observations of Eames J in *Greenwood v Burrows*³.

19 If the subject land fronted Heaton Avenue, I could understand their concern. But,

³ (1992) V Conv R 65,184 at 65,199-20 and the cases there referred to.

situate where it is, it seems to me that it cannot be said that the proposal would have the effect that Mr Fullinfaw and the other objectors fear. It should be noted, too, that the only properties presently bound by the covenant are the four lots on Tennyson Street to the north of the flats at No 208 Tennyson Street.

20 In short, I am satisfied that the proposed modification to the restricted covenant and the development which it would permit would not substantially injure the beneficiaries.

21 As to discretionary matters, I can see no other reason which would cause me to hesitate in granting the modification. Planning and traffic aspects raise no concern. This appears, not only from the reports of the plaintiffs' witnesses, but also from the fact and terms of the council's planning permission.

22 The application therefore will be granted. I will make the order proposed.

CERTIFICATE

I certify that this and the 5 preceding pages are a true copy of the reasons for Judgment of Byrne J of the Supreme Court of Victoria delivered on 10 August 2006.

DATED this 10th day of August 2006.

Ha Tran
Associate to Justice Byrne

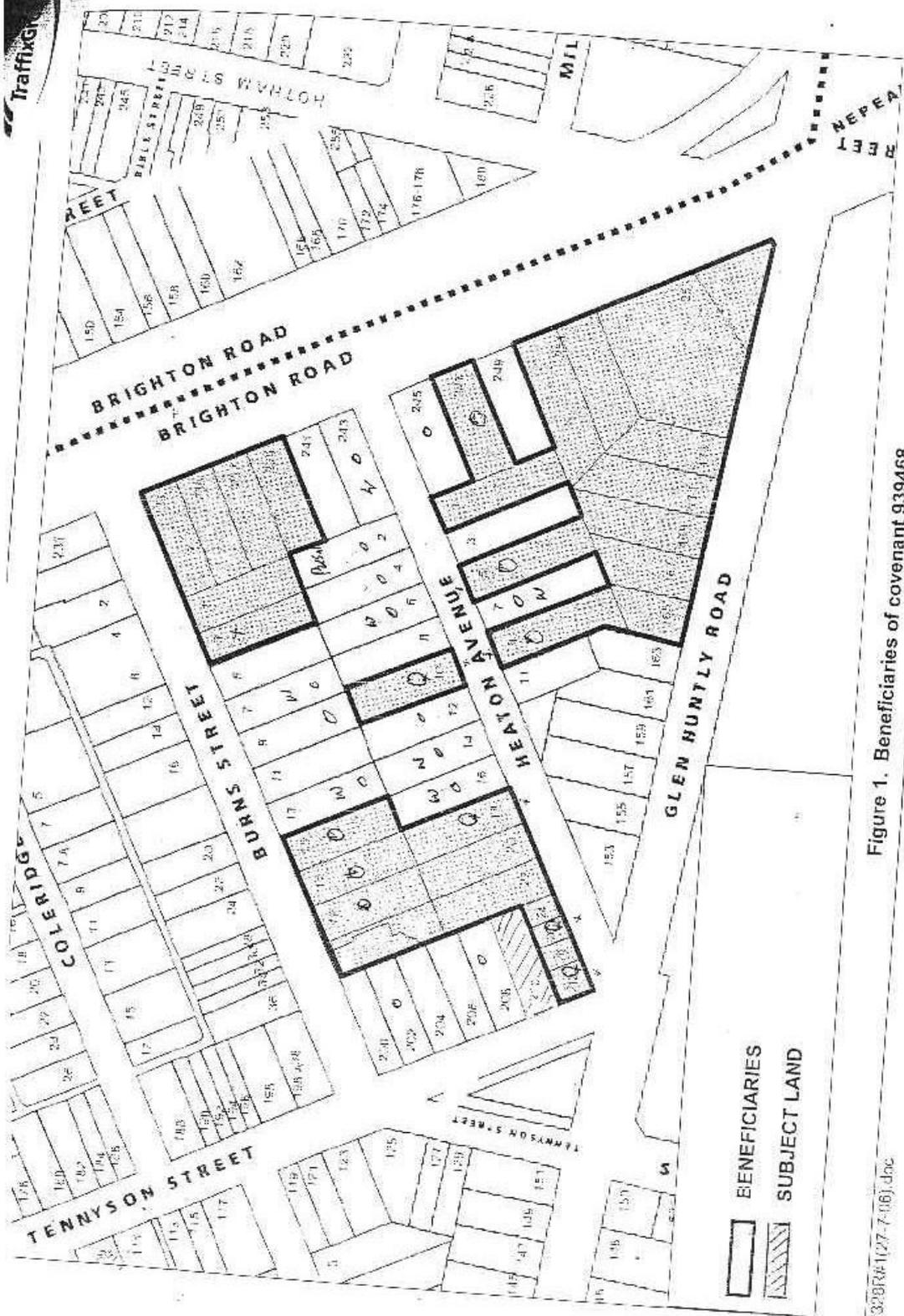


Figure 1. Beneficiaries of covenant 939468

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