VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P402/2007
PERMIT APPLICATION NO. PLN06/0548

CATCHWORDS

Planning and Environment Act 1987 s. 60(2); variation of covenant; inadvertent mistake in application of covenant to wrong land; matters to be considered under s.60(2); application of parol evidence rule in considering intention and purpose of covenant; consideration of likelihood of loss and detriment to benefited owner; relevance of loss or disturbance not arising as a consequence of proposed variation of covenant

APPLICANT	Stockland Developments Pty Ltd
RESPONDENT/RESPONSIBLE AUTHORITY	Greater Dandenong City Council
OTHERS	1. Jasmin & Snjezana Copelj 2. Renata & Wladyslaw Giezynski
SUBJECT LAND	1-3 and 2-4 Fairview Close, KEYSBOROUGH
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	22 May 2007
DATE OF ORDER	6 June 2007
CITATION	Stockland Developments Pty Ltd v Greater Dandenong CC [2007] VCAT 969

ORDER

1 Pursuant to s 127 of the *Victorian Civil and Administrative Tribunal Act* 1998, the property address for the subject land in this application is amended from 61 Keylana Drive, Keysborough to 1-3 and 2-4 Fairview Close, Keysborough (being the land in Lots 411 and 417 on Plan of Subdivision PS525764Q).

2 The decision of the Responsible Authority is set aside. In permit application PLN06/0548, a permit is granted and directed to be issued for the land at 1-3 and 2-4 Fairview Close, Keysborough.

The permit allows the variation of a restriction on Plan of Subdivision PS525764Q by deleting reference to Lots 411 and 417 in the "Land to be

burdened" in Restriction B, and adding a Restriction C concerning Lots 411 and 417 in accordance with Plan of Variation of Restriction (reference 9182-(Version 2)) dated 20 July 2006 prepared by Taylors Development Strategists Pty Ltd.

Mark Dwyer
Deputy President

APPEARANCES:

Stockland Developments Pty Ltd	Mr Adrian Finanzio of Counsel, instructed by Deacons. Mr Finanzio called the following witnesses: • Mr Nicholas Hooper, Town Planner, of Taylors Development Strategists. • Mr Marco Negri, Town Planner, of Contour Consultants. Mr Finanzio also relied on an affidavit of Jack Hoffmann.
For Respondent/Responsible Authority	Mr Loudon Luka, Town Planner
Mr Jasmin & Mrs Snjezana Copelj Mrs Renata & Mr Wladyslaw Giezynski	Mr Jasmin Copelj, in person. Mr Wladyslaw (Michael) Giezynski, in person.

REASONS

1 This is a most unusual application for review in a number of respects:

- The applicant, Stockland Developments Pty Ltd, is a large and well-known land developer that had intentionally proposed and registered a restrictive "single dwelling" covenant over residential lots across much of a new housing estate in Keysborough. Stockland is essentially seeking to rectify a mistake whereby the covenant was inadvertently applied to two super-lots intended for further subdivision.
- The Land Registry has refused to register a further plan of subdivision of the two super lots by reason of the covenant. The integrity of the Land Register is such that there is no simple mechanism to correct the record, and Stockland is thus forced to seek a planning permit to vary the covenant, leaving it exposed to merits-based objections by others now benefited by the covenant, under s 60(2) of the *Planning and Environment Act* 1987.
- The Responsible Authority initially failed to determine the permit application, leading to the application for review being brought under s 79 of the *Planning and Environment Act* 1987. Subsequently, a detailed officer report to the Council recommended the grant of a permit, but the Council resolved instead not to take a formal position on the matter. Mr Luka, the Council officer representing the Responsible Authority at the hearing, was thus placed in an extremely difficult position in fulfilling the Responsible Authority's obligation to assist the Tribunal whilst adhering to the Council resolution – a task he performed with admirable dexterity.
- To compound the confusion, Stockland brought the application for review with a superseded property address – naming a road now some distance from the review site. [This was a matter I was at least able to address by procedural order at the commencement of the hearing.]
- One of the objectors (Mr & Mrs Giezynski) is an adjoining landowner but not a beneficiary under the covenant, and therefore had limited rights before the Tribunal in the context of s 60(2) of the *Planning and Environment Act* 1987 which considers the interests of those legally benefited by the restriction. Stockland was however content that I hear Mr Giezynski generally on broader planning issues.
- Only one objector (Mr & Mrs Copelj) was an owner actually benefited by the covenant, yet the submission by Mr Copelj was primarily directed to other longstanding grievances between he and Stockland which were not directly related to the proposed variation of the covenant, or the matters raised by s 60(2).

- At the hearing, the public gallery was filled not with objectors or the parties to the application, as is more commonly the case in planning matters, but with a multitude of builders and developers prevented from development of the super lots until the matter is resolved.

2 The frustration of everyone was self-evident, and I was urged to undertake a speedy hearing and provide a prompt decision.

Background

3 Much of the background can be gleaned from my introductory comments.

4 The two review sites are Lots 411 and 417 on Plan of Subdivision PS525764Q (now known as 1-3 and 2-4 Fairview Close, Keysborough).

5 All of the relevant land is zoned Residential 1 under the Greater Dandenong Planning Scheme. According to planning scheme maps for the area, the review sites are also covered by a Design and Development Overlay, a Development Plan Overlay, and an Environmental Audit Overlay. However, none of the overlays are material to the matter before me.

6 The lots are within a staged release of Stockland's 256 lot "Hidden Grove" Estate in Keysborough, and abut Greenview Terrace and Keysborough Golf Club to the south. Greenview Terrace has not been constructed, and I was informed it may never be constructed as a road in this location. A pedestrian and bicycle path and landscaping have been developed within the road reserve.

7 One of the super lots (Lot 411) is separated by a laneway constructed on the north side of the lot from Lot 410 (now known as 410 Fairview Close) owned by the main objectors Mr & Mrs Copelj, and Lot 312 (now known as 5 Longview Road) owned by the second objectors Mr & Mrs Giezynski. Both Mr Copelj and Mr Giezynski have constructed dwellings on their lots.

8 The events leading to the "mistake" with registration of the covenant were carefully set out in the Council's submission, and in an affidavit of Nicholas Hooper (a town planner and director of Taylors Development Strategists) filed by Stockland. In summary, the initial sequence of events was as follows:

- On 27 June 2003, the Responsible Authority issued planning permit PLN03/0086 for a staged subdivision of the Hidden Grove Estate.
- Over the next two years, various iterations of the subdivision plan were prepared. Importantly, the plan endorsed under the permit on 11 September 2003 showed six separate lots in place of each of what is now Lot 411 and Lot 417 (ie 12 separate lots in total, instead of the two). The initial versions of Plan of Subdivision PS525764Q lodged for certification also showed these 12 lots.
- On 12 April 2005, PS525764Q (Version 5) was lodged with the Council as a replacement plan. In lieu of the 12 lots shown on all

previous versions, the replacement plan showed only two lots (Lots 411 and 417).

- By letter dated 12 April 2005 (exhibit 9 in Mr Hooper's affidavit), Taylors Development Strategists advised the Council of a number of amendments to stage boundaries and commented:

> We have also been requested to combine the "Terrace lots" fronting Greenview Terrace into large lots, which will be subject to further subdivision when building design is known.

9 It was at this point, according to Stockland, that a "clerical error" was made. The single dwelling covenant previously proposed over all lots on the plan was maintained over the two new super lots – despite those two lots clearly being intended for further subdivision with a separate single dwelling on each of the subdivided lots. Plan of Subdivision PS525764Q (Version 5), incorporating this error, was duly certified by the Council and registered by the Land Registry. The single dwelling covenant thus became registered over Lots 411 and 417. The error was not discovered until Stockland sought to further subdivide these two lots on a subsequent plan of subdivision.

10 At the same time Stockland was preparing and lodging its plans of subdivision, it was also marketing and selling lots within the Estate. A large three-dimensional (3D) model of the Estate was present at the Tribunal hearing. In his affidavit, Jack Hoffmann (Stockland's Assistant Development Manager) noted that this model had been in existence at the display suite since April 2004 and I was informed that it had remained there throughout the marketing campaign for the Estate. I was also provided with marketing material from this period by both Stockland and Mr Giezynski. Despite a contention by Mr Giezynski that the marketing material was confusing, the 3D model and marketing material in my view clearly show six lots in lieu of each of what is now Lots 411 and 417. In some of the marketing material, the six lots are clearly marked as "Terrace Homes".

11 Mr & Mrs Giezynski purchased their lot as part of the Stage 3 release in late 2005, and Mr & Mrs Copelj purchased their lot as part of Stage 4 in April 2006 and settled the purchase on 20 June 2006. As indicated, Mr Giezynski conceded he was aware of the marketing material when he purchased his lot. Mr Copelj was more guarded and vague on this issue, having used his children to assist with the purchase. However, he ultimately conceded under questioning from the Tribunal that he had some knowledge at the time of purchase that the two super lots were intended for further subdivision and development.

12 By virtue of the different plans of subdivision for different stages, PS525764Q (incorporating Lots 410, 411 and 417 – i.e. Mr & Mrs Copelj's lot and the two super lots - and the relevant single dwelling covenant) applied only to the Stage 4 release. Mr & Mrs Copelj are therefore the

owner of a lot benefiting from the covenant (and have the benefit of the covenant registered on their title).

13 However, Mr & Mrs Giezynski's title emanates from an earlier stage of subdivision and does not directly benefit from the particular covenant in question. The covenant is not registered on their title. Therefore, despite the lots of both objectors being adjacent to the same super lot (being separated from it by the same laneway), and despite the Giezynski lot being more proximate to the super lot than any other lots benefited by the covenant, Mr & Mrs Giezynski do not have the 'legal' benefit of the covenant, and therefore do not enjoy the benefit of s 60(2) of the *Planning and Environment Act* 1987 in response to the present application for review.

The covenant

14 For relevant purposes, the covenant itself is effectively in three parts:

- Restriction B1 provides that the owner of a burdened lot must not build or permit more than one dwelling house to be built or remain on the burdened lot.
- Restrictions B2 to B4 (inclusive) provide Stockland with a level of control over the built form, sales signage, and display homes.
- The restriction ceases to have effect seven years after the date of its registration by the Land Registry. It therefore applies until 17 January 2013.

15 The variation sought by Stockland seeks to delete Restriction B1 from the two super lots. Restrictions B2 to B4 (inclusive) would essentially remain, but renumbered to be a new Restriction C on the new lots. The existing seven-year life of the restriction would also remain.

The legal issues

16 On behalf of Stockland, Mr Finanzio referred me to a number of authorities. It is not necessary to refer to them all here, save to note the following principles which initially emerge from them:

- The Tribunal does not have jurisdiction to simply "correct" the mistake in the registration of the covenant over the two super lots.
- The "purpose" of the covenant is initially to be construed according to the words of the covenant itself[1].
- In the absence of ambiguity, the parol evidence rule excludes extrinsic evidence of the intention of the parties in order to contradict the clear language of the document[2].

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1 See *Tonks v Tonks* [2003] VSC 195 and *Pletes v City of Knox* (1993) 10 AATR 155.

2 See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, per Mason J. at 347-8.

17 In the present case, the wording of the covenant is clear. As conceded by Mr Finanzio, it is exactly because the covenant on its face "means what it says" that the application for review has been brought by Stockland. This means that Stockland cannot simply argue before me that it did not intend to apply the single dwelling covenant over the two super lots, and seek to rectify that mistake. In order to succeed in its application, Stockland must satisfy the tests in s 60(2) of the *Planning and Environment Act* 1987 and thereby obtain a planning permit to formally vary the covenant.

18 Section 60(2) of the *Planning and Environment Act* 1987 provides as follows:

> The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the *Subdivision Act* 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer –
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> (a) financial loss; or
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> (b) loss of amenity; or
>
> (c) loss arising from change to the character of the neighbourhood; or
>
> (d) any other material detriment –
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> as a consequence of the removal or variation of the restriction.

19 Much has been written about s 60(2) in many decisions of this Tribunal, although the decision in *Pletes v City of Knox*[3] in 1992 still serves as a useful summary of many of the principles as to how the sub-section should be interpreted and applied. These include the following:

- The expression "the owner of land benefited by the restriction" is used in its technical legal sense. An owner who may in fact benefit, but is not entitled in law to the benefit, is not protected under s 60(2). [This means that only Mr & Mrs Copelj, and not Mr & Mrs Giezynski, have the benefit of s 60(2) in the present case].
- The loss or a detriment referred to in s 60(2) is loss or detriment suffered "as a consequence of the removal or variation of the covenant". It is not simply any loss or detriment.
- In performing the exercise required by s 60(2), it may be that planning schemes, policies, provisions, requirements, principles and considerations are relevant, but only insofar as they bear on the unlikelihood (or otherwise) of loss or detriment. It is not a matter of weighing or balancing planning considerations in favour of variation against loss or detriment. If the Tribunal is not satisfied of the

[3] (1993) 10 AATR 155 at pages 161-163

unlikelihood of loss within the meaning of s 60(2), it must not exercise the power to vary or remove the covenant. [This means that Stockland cannot simply demonstrate that there is planning merit in varying the covenant. It must positively establish that loss or detriment is unlikely].

- To discharge the burden of the tests imposed by s 60(2), the applicant must satisfy the responsible authority (or the Tribunal on review) that the loss or detriment under consideration is unlikely to be suffered, on the balance of probabilities, by any relevant owner. The failure by an applicant to show the unlikelihood of a relevant loss or detriment being suffered by any owner of land benefited will be fatal to the application.
- The benefit of the covenant is to be ascertained by consideration of the purpose of the covenant derived primarily from its words. It is necessary to ascertain this benefit to assess the consequence of the variation or removal of the covenant.

20 The last of the principles summarised above again raises the potential impediment of the parol evidence rule to a consideration of the purpose of the covenant beyond its express wording. However, as Mr Finanzio argued before me, whilst the parol evidence rule serves to exclude extrinsic evidence as to the "intention" of the parties, it does not preclude a consideration of surrounding circumstances in aid of the proper construction of the covenant[4]. Based on a review of the authority Mr Finanzio cited, I agree. This means that much of the background material outlined above is relevant to the overall consideration of the application under review, although not the material solely relating to Stockland's "intention" when it entered into the covenant.

21 Given the availability of an exception to the application of the parol evidence rule in this way, it is unnecessary to finally determine whether that rule could be otherwise avoided by reason of s 98(1)(b) of the *Victorian Civil And Administrative Tribunal Act* 1998 – i.e. that the Tribunal is not bound by the rules of evidence. The Tribunal has however previously observed that whilst there does not have to be strict or undeviating application of the rules of evidence, those rules should not be lightly discarded.[5]

22 In any event, the purpose and effect of the covenant is only one of factors relevant to determine the likelihood of any loss or detriment arising in the event of variation or removal of the covenant[6]. This means that, provided I am satisfied that the tests in s 60(2) are met, the clear and ascertained purpose of the covenant is not an absolute bar to its variation via a planning

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4 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, per Mason J. at pages 347-8.

5 *Re Golem and Transport Accident Commission (No.1)* [2002] VCAT 319 per Bowman J.

6 *Pletes v City of Knox* at page 162.

permit process. That would make a nonsense of the process. What would constitute a bar is any objective likelihood of loss or detriment arising because of the variation of the covenant.

What is the likelihood of loss or detriment arising in the present case?

23 Mr Finanzio called planning evidence from Mr Marco Negri of Contour Consultants in consideration of the matters in s 60(2), and also made general submissions. These are discussed further, below.

24 Although I have noted the Council resolution not to express a formal view on the matter, I have nonetheless been assisted by the officer report to the Council meeting of 26 March 2007 which supports a view that the benefiting land owner who has objected to the application will be unlikely to suffer financial loss, loss of amenity, loss arising from the change to the character of the area, or any other material loss as a consequence of the variation of the restriction[7].

25 The benefiting land owner, Mr Copelj, made oral submissions to the effect that:

- His children decided on the purchase of Lot 410 and he was "not sure" of the extent to which they considered the overall plan. He thought they "had an idea" about the further development of the two super lots, but thought maybe only three extra lots would be created from each super lot.
- He thought a subdivision of each super lot into six was "too many".
- He had thought Greenview Terrace at the front of the super lots was going to be constructed, but it has only been landscaped with a pedestrian path. This means that there is additional traffic using the laneway between his property and the super lot. He believed that this traffic would otherwise have used Greenview Terrace if it had been constructed. The traffic includes garbage trucks, which are in Mr Copelj's view causing considerable disturbance, and he did not know the lane would be used in this way.
- The laneway is too narrow – maybe 6m rather than the 6.3m claimed by the applicant and shown on the plan. This means that the traffic in the laneway is very close to his bedroom sited near the lane.
- He will lose views from his house across the super lot to the golf course if six terrace houses are constructed rather than one dwelling.

26 There is some justification for Mr Copelj to be upset, although he raises a number of issues that the Tribunal is powerless to resolve in the context of this application. Whilst the 3D model and some marketing material suggests Greenview Terrace may not be constructed in this area, this is not at all clear from all plans, including the plan of subdivision and Mr & Mrs

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[7] Officer report to Council meeting of 26 March 2007, at pages 5394-5.

Copelj's title plan. It seems that the concerns of Mr Copelj primarily arise from the decision of Stockland not to construct Greenview Terrace in this area, which has led to some additional traffic flow along the laneway adjacent to his property. However, this disturbance already exists and Mr & Mrs Copelj are not protected from it by the existence of the covenant. The covenant does not seek in any way to regulate traffic in the lane, nor create any expectation that Greenview Terrace will be constructed. More importantly, for the purpose of s 60(2) of the *Planning and Environment Act* 1987, Mr & Mrs Copelj will not suffer any loss or detriment on this issue "as a consequence of the variation of the restriction".

27 Given the nature of Fairview Close as a cul-de-sac, and the absence of any common "rat-run" between collector roads in this area, I am not persuaded that the additional traffic flow in the laneway will be significant, although there will be a few who will no doubt use the laneway to get from Fairview Close to Longview Road. The variation of the covenant will not change this.

28 The variation of the covenant will also not change the fact that the super lots (whether subdivided or not) also have a lawful access to the laneway.

29 Insofar as Mr Copelj alleges that six terrace houses is "too many" for each of the super lots, I am satisfied on the evidence that Mr Copelj and his family were reasonably aware of the potential further subdivision of the super lots when Mr & Mrs Copelj purchased and developed their lot. I do not believe he will suffer any financial loss if the covenant is varied as proposed. Moreover, as Mr Finanzio pointed out in his submissions, whilst the super lots currently have a notional impediment through the "single dwelling" covenant, the lots are of a size where (even if the covenant was upheld) a substantial building could still be erected on the super lot in conformity with the planning scheme, including a lawful use other than a single dwelling house.

30 Insofar as Mr Copelj alleged he would sustain a loss of views across the super lot to the golf course, I do not accept he will suffer any loss of amenity in this regard. It has been stated by this Tribunal on many occasions that there is no legal right to a view, although it is clearly a matter potentially relevant to a consideration of amenity. However, I accept the evidence of Mr Negri that the only windows in Mr Copelj's house which could notionally have views across the super lot are a robe, an ensuite bathroom, and a bedroom (at the upper level) and a robe and kitchen (at the lower level). Even the windows for each of these rooms are very small. On any objective assessment, having regard to the design of Mr & Mrs Copelj's house and its siting on his lot, there can be no expectation on Mr Copelj's part that the living areas or balconies have been designed to take advantage of any view over the super lots. This is also self-evident from the photographs provided both by Mr Copelj and Stockland.

31 In addition to my comments on the stated concerns of Mr Copelj above, the following matters are also relevant from the evidence of Mr Negri and the submissions of Mr Finanzio:

- The application before me is not a review of the initial determination in favour of the general layout of the Hidden Grove housing estate, nor the proposal for six terrace houses on each of the two super lots already "approved" as part of that determination and the planning permit. The endorsed plan under the planning permit provides for the six terrace houses on each of the two super lots.
- Given the extensive planning for the Hidden Grove Estate, the marketing material and plans, and the stated objective of the Residential 1 Zone to provide a variety of housing types, I am satisfied on the evidence of Mr Negri that the variation of the covenant will not change the character of the neighbourhood in any material way. Mr & Mrs Copelj will therefore suffer no loss for the purpose of s 60(2)(c). I am satisfied that terrace houses have always been proposed in this location.
- Importantly, the restriction only has a life of seven years (ie until January 2013). To the extent there could conceivably be any loss or detriment, it would only arise for a short time, bearing in mind the additional time which will elapse before any terrace houses are able to be built on the subdivided super lots. This adds weight to the view that there is no material loss or detriment of a longer-term ongoing nature.
- I am satisfied there will be no "other material detriment"[8] suffered by Mr & Mrs Copelj as a consequence of the variation of the covenant. Put simply, Mr Copelj will be in no worse position if the covenant is varied having regard to the objection and submissions he has made.

32 Although the formal position of the Responsible Authority is that it has expressly resolved not to take a formal position on the application, I note that my findings are also generally consistent with those in the Council officer report.

33 I am also satisfied that there is no other benefiting land owner who would suffer loss or detriment. As indicated, Mr & Mrs Giezynski are not a legal beneficiary under the covenant. Mr & Mrs Copelj are the closest benefiting land owner, and other benefiting land owners more remote from the super lots are less likely to suffer any loss or detriment. In any event, no other benefiting land owner has maintained an objection before the Tribunal.

34 Mr Finanzio suggested to me in his conclusion that, if the covenant was not varied, Mr Copelj would in fact receive a windfall benefit, and the proposed

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[8] In *Pletes v City of Knox*, at page 162, the Tribunal noted that the expression "any other material detriment" in s 60(2)(d) means "important detriment, detriment at much consequence viewed on an objective basis. It does not include a trivial or inconsequential detriment.

variation would simply return the parties to their original position. Whilst this argument suggests a "no net loss" to Mr Copelj, I do not believe Mr Finanzio's argument reflects the proper consideration of potential loss and detriment in s 60(2), and his argument on this issue has not been material to my decision.

Final observation

35 As a final observation, I have noted above that there is some justification for Mr Copelj being upset that his expectation of Greenview Terrace being fully constructed will not be met, leading to some additional traffic flow in the laneway adjacent to his property. This was perhaps not fully anticipated when he purchased and developed his lot, and may also have been exacerbated by his difficulty with the English language, and his understandable lack of knowledge of Victorian property and planning laws.

36 In the course of the hearing, Mr Copelj handed the Tribunal some correspondence passing between he and Stockland. It appears that Stockland initially offered some opportunity to resolve the broader issues of concern to Mr Copelj in relation to the use of the laneway (particularly in relation to rubbish collection and visitor parking), but then indicated that this may not occur if Mr Copelj persisted with his objection to the variation of the covenant.

37 Whilst the Tribunal understands Stockland's frustration at its predicament, Mr Copelj was not the cause of Stockland's error in the registration of its covenant and the resultant delay to its development, and he should not be the subject of veiled threats to other aspects of his residential amenity. Although I have found that Mr Copelj's objection to the variation of the covenant is not ultimately substantiated, the matter came before the Tribunal as an application by Stockland against the Council's failure to determine the matter (rather than arising solely from Mr Copelj's objection) and Mr Copelj should not be penalised for having exercised the rights given to him under the planning legislation to participate as an objector in the hearing of the application for review. The Tribunal thus trusts that Stockland will re-engage with Mr Copelj in trying to resolve the broader issues of concern to him. A resolution of those issues would lessen the likelihood of other applications and hearings (such as the present hearing for variation of the covenant) being used as a forum to air broader based grievances which the Tribunal has no jurisdiction to determine.

Mark Dwyer
Deputy President