Responding to a notice of application to modify or discharge a restrictive covenant

If you own land with the benefit of a restrictive covenant, you may receive a letter by mail or see a sign on land giving notice of an application to modify or discharge it.

If you wish to contest the application to modify or discharge the covenant you may wish to:

- write an objection; and/or
- appear in court to support that objection.

The first step is to ascertain whether you have the benefit of the covenant. Because covenants are essentially contracts that run with the land, the law generally says that if you are not party to a contract you have no standing to enforce it.

If you have received written notice of the application, the chances are that your land has been identified as having the benefit of the covenant. If you have simply seen the sign on the land and live nearby, someone may have formed the view that your land either does not have the benefit of the covenant or that the modification or removal will not affect you. Or it may mean that the address for correspondence on your land title is out of date. This is surprisingly common.

If you are unsure whether your land has the benefit of a covenant, the cheapest and quickest option is to contact an experienced title searcher such as Dinah Newell from Feigl & Newell on (03) 9629-3011 or info@feiglnewell.com.au This is a specialised task and it is risky to leave it to someone who hasn't done it before.

Once you have established a benefit, the question might then be what to write in your objection. Two decisions of the Victorian Supreme Court provide some guidance. The first is *Prowse v Johnston* in which Justice Cavanough listed the concerns of residents that he accepted were reasons a single dwelling covenant was not obsolete:

> *108 The objections of the defendants are set out in the various affidavits sworn by them. They are summarised in their written outline of submissions as follows:*
>
> *(a) Loss of character of the residential estate being an estate with large single dwelling family homes and substantial gardens;*
>
> *(b) Loss of privacy and overlooking into neighbouring private outdoor living areas and gardens;*
>
> *(c) Bulk and dominance of proposed building particularly when viewed from adjoining residences and property;*
>
> *(d) Loss of large, spacious Edwardian family home on the burdened land and surrounding mature trees and established garden;*
>
> *(e) Loss of family neighbourhood with front and rear garden;*

(f) Loss of spaciousness, beauty and privacy;

(g) Construction of a three-storey building with basement car parking over virtually the entire site in conflict with the prevalent single dwelling residential character of the area;

(h) Additional noise, traffic, parking and access issues associated with 18 units and 33 [actually 36] basement car spaces;

(i) This is the "thin end of the wedge" and the precedent effect of the removal of a covenant for the construction of a large unit development would be very significant;

(j) The character of the Coonil Estate has been maintained for over 90 years and should be preserved;

(k) Much of the Coonil Estate is a recognised heritage overlay area which should be preserved;

(l) The proposed development will be an isolated "eye sore" in stark contrast to the many period and heritage homes surrounding the burdened land; and

(m) The plaintiff's land was purchased as part of the Coonil Estate, and has benefited from the reciprocal covenants given by others.

109 I accept that these are all admissible objections, though some are stronger than others. They are relevant to show that the covenant is not obsolete. They are also relevant for other purposes, to which I will come. The covenant is not obsolete. The purposes of the covenant are still being achieved throughout the Estate and on the burdened land, with a contribution in that respect from the covenant on the burdened land.

In the more recent decision of *Oostemeyer v Powell* Justice Riordan set out in paragraphs [36] to [45] the evidence he relied upon to reject an application to modify a covenant made pursuant to s84(1)(c) of the *Property Law Act* 1958 the so-called "substantial injury" test.

Once you have registered your opposition to the application to modify or remove the covenant you may be required to appear in the Supreme Court to support your objection. That is not to say the court will not consider your objection if you don't appear. The Court generally reads every objection closely. However, in the standard form notice in the Court's *Guide for practitioners*, the court makes it clear that "Written objections without an attendance may not be considered."

Once at court, the Judge in charge of the list will set the matter down for a contested hearing.

It's a matter of judgement at what point you wish to be legally represented, if at all. *Oostemeyer v Powell* (above) demonstrates that unrepresented residents can succeed in fending off an attack on a covenant. However, it is relatively rare that objectors represent themselves in a contested hearing, partly because of the complexity of the proceedings and

the time involved; and partly because objectors are typically reimbursed most of their costs, even if they are unsuccessful, in accordance with the principle in *Re Withers* [1970] VR 319.

Matthew Townsend
Owen Dixon Chambers
http://www.vicbar.com.au/profile?3183
townsend@vicbar.com.au (04) 1122 0277
Liability limited by a scheme approved under Professional Standards Legislation.