

## **2 VARIATION OF RESTRICTIVE COVENANT AT 33 HIGHLAND DRIVE, PAKENHAM**

FILE REFERENCE INT1929191

RESPONSIBLE GENERAL MANAGER Andrew Paxton

AUTHOR Tara Hooper

### **RECOMMENDATION**

That a Refusal to Grant Planning Permit **T190026** be issued for **the variation of restrictive covenant at 33 Highland Drive, Pakenham VIC 3810** for reasons set out in this report.

### **Attachments**

- |   |  |         |
|---|--|---------|
| 1 | Locality Map                                       | 1 Page  |
| 2 | Copy of Objections, circulated to Councillors only | 5 Pages |
| 3 | Proposed Variation                                 | 1 Page  |

### **EXECUTIVE SUMMARY:**

APPLICATION NO.:	<b>T190026</b>
APPLICANT:	<b>Chandima Rathnayake</b>
LAND:	<b>33 Highland Drive, Pakenham VIC 3810</b>
PROPOSAL:	<b>Variation of restrictive covenant</b>
PLANNING CONTROLS:	<b>General Residential Zone Development Contributions Plan Overlay Schedule 1</b>
NOTIFICATION & OBJECTIONS:	<b>Notice of the application was given by way of sending notices to adjoining and near-by land owners/occupiers, by placing a sign on the road frontage, and by publishing a notice in a newspaper generally circulating in the area in which the subject land is situated.</b>  Council has received 3 objections to date.
KEY PLANNING CONSIDERATIONS:	<b>Variation of restrictive covenant, material detriment, interests of affected persons</b>
RECOMMENDATION:	<b>Refusal</b>

### **BACKGROUND:**

The subject site has no planning history.

### **SUBJECT SITE**

The site is located on the western side of Highland Drive.



The site is currently vacant. The parcel has a slope of approximately 21 percent (10 metre fall from front to rear).

It is within the Pakenham Heights estate, which is characterised by single dwellings on lots measuring approximately 800 to 1400 square metres. To the southeast near the intersection of Highland Drive and Aberdeen Heights, several parcels measure between 650 and 750 square metres.

It is noted that Council has not approved any variation or removal of restrictive covenants on any other lot within this estate.

## PROPOSAL

An application has been submitted to Council to vary the restrictive covenant in instrument S917443H (created on 3 March 1994) set out below by the addition of the words in bold:

AND THE SAID Transferee with the intention that the benefit of this Covenant shall be attached to and run at law and in equity with every Lot on Plan of Subdivision No.31 8023R other than the Lot hereby transferred and that the burden of this Covenant shall be annexed to and run at law and in equity with the said Lot hereby transferred does hereby for himself his heirs executors administrators and transferees and as separate covenants covenant with the said EDDIE BARRON CONSTRUCTIONS PTY LTD and the registered proprietor or proprietors for the time being of every lot on the said Plan of Subdivision and every part or parts thereof other than the Lot hereby transferred or any part thereof SHALL NOT:

- a) Erect or cause to be erected not than one private dwelling house (together with the usual outbuildings)

- b) Erect or cause to be erected any dwelling with a floor area of less than 120 square metres excluding garage carports and Verandahs.
- c) Erect or cause to be erected any dwelling and attached garage other than a dwelling and attached garage with external walls constructed substantially of brick veneer or stone.
- d) Erect or cause to be erected any detached outbuilding other than a detached outbuilding with external walls of brick, stone, timber or metal.

AND it is intended that the above Covenant shall appear as an encumbrance on the aforesaid Certificate of Title.

**PROVIDED HOWEVER that this covenant shall expire and no longer affect the land hereby transferred upon the Responsible Authority granting a permit to subdivide the land under the relevant Planning Scheme.**

The practical effect of this proposal is to allow the issuance of a subdivision permit to render the covenant null and void.

## PLANNING SCHEME PROVISIONS

### Planning Policy Framework (PPF)

The relevant clauses of the PPF are:

- Clause 15.01-5S          Neighbourhood character

### Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF are:

- 21.06-1                  Design and built form

### Relevant Particular/ General Provisions and relevant incorporated or reference documents

The relevant provisions/ documents are:

- Clause 52.02              Easements restrictions and reserves
- Clause 65                  Decision guidelines – approval of an application or plan
- *Planning and Environment Act 1987* section 60(2)

### Zone

The land is subject to the **General Residential Zone**

### Overlays

The land is subject to the **Development Contributions Plan Overlay Schedule 1.**

## PLANNING PERMIT TRIGGERS

The proposal for variation of restrictive covenant requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 52.02 of the Cardinia Planning Scheme, a planning permit is required before a person proceeds under Section 23 of the Subdivision Act 1988 to vary a restriction.

## PUBLIC NOTIFICATION

The application has been advertised pursuant to Section 52 of the Planning and Environment Act 1987, by:

- Sending notices to the owners and occupiers of adjoining land.
- Placing a sign on site
- Placing a notice in the Pakenham Gazette newspaper

Council has received three (3) objections to date.

The key issues that were raised in the objections are:

- Change to single-dwelling neighbourhood character
- Decrease in property values
- Creating an 'easy and precedented path . . . for owners of other vacant and non-vacant properties in the street to change their . . . restrictions'

## REFERRALS

The application was not referred to any external authorities.

## DISCUSSION

Restrictive covenants occupy a unique position in both common law and planning legislation. The benefit of a covenant has the status of a proprietary interest, which gives the beneficiary an interest over land. As such, the *Planning and Environment Act 1987* (the 'Act') requires the responsible authority to consider the matters under Section 60(2) of the Act in an application to vary or remove a restriction created after 1991. These are threshold issues considered before an assessment of the prescribed matters under the planning scheme. Importantly, as a recognition of the proprietary interest afforded to beneficiaries of a covenant, this section provides broader protection to beneficiaries than the planning scheme itself.

Under section 60(2) of the Act:

*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 . . . will be unlikely to suffer—*

- (a) *financial loss; or*
- (b) *loss of amenity; or*
- (c) *loss arising from change to the character of the neighbourhood; or*
- (d) *any other material detriment—*

*as a consequence of the removal or variation of the restriction.*

The Tribunal has provided guidance in interpreting section 60(2) when considering the removal or variation of a covenant. In *Waterfront Place Pty Ltd v Port Phillip CC* (Red Dot) [2014] VCAT 1558 ('*Waterfront Place*'), Senior Member H. McM Wright QC and Member Benz summarised several principles relating to how the tests in section 60(2) should be applied. These were further cited by Member Blackburn in *Singh & Kaur v Brimbank CC* [2017] VCAT 1730 (23 October 2017). Whilst not an exhaustive list, they provide guidance in decision making:

- *the provision is designed to protect proprietary interests and therefore should be interpreted as beneficial legislation and given as wide a meaning as the words of the sub-section reasonably allow.*

- *the Tribunal must be persuaded to a 'comfortable level of satisfaction' that the threshold requirements are met, rather than 'only just satisfied'.*
- *the loss referred to in section 60(2) must be 'material' but in this context the term does not have as wide a meaning as it does in section 52 of the P&E Act. In past cases, the Tribunal has explained 'material' in this context as meaning:*
  - *'important detriment, detriment of such consequence viewed on an objective basis. It does not include trivial or inconsequential detriment'; or*
  - *'real and not fanciful detriment'.*
- *it is essential to look at the purpose and effect of the restriction as one of the factors relevant in determining the likelihood of any loss or detriment in the event of removal or variation.*
- *in applying the tests set out in section 60(2), it is not a question of balancing the loss suffered by a benefiting owner in each of the categories set out in paragraphs (a) to (d) against the planning benefits of removal or variation of the covenant. The tests must be applied in absolute terms. Consideration of the planning merits can occur only if the tests are satisfied and the discretion to grant a permit thereby enlivened.*
- *the Tribunal must take into account the circumstances of all owners who enjoy the benefit of the covenant, not just those benefitting owners who have objected to the application.*

The restriction at issue, created in 1994, is in essence a 'single dwelling covenant', i.e. a restriction that does not allow more than one dwelling per lot. Whilst the language of the covenant does not explicitly exclude subdivisions, the purpose and effect of the restrictions are clear: to maintain the single dwelling character of the neighbourhood. Indeed, as a result of the restrictions in the covenant, a genuine neighbourhood character has been established.

The variation proposes to unwind the covenant upon the issuance of a permit to subdivide the land. For the reasons below, the proposed variation does not meet the threshold requirements of section 60(2) of the Act.

**The Applicant cannot establish that the variation is unlikely to result in the beneficiaries suffering financial loss, loss of amenity, loss arising from change of character of the neighbourhood, or any other material detriment.**

The proposed variation fails to satisfy the test of section 60(2) of the Act. It cannot be said that as a result of the variation, any beneficiary will be unlikely to suffer financial loss, loss of amenity, loss arising from change to the character of the neighbourhood, or any other material detriment.

The variation proposes to unwind the covenant upon the issuance of a permit to subdivide the land. Subdivision *per se* would not be a breach of the covenant; however the existence of the restriction renders any attempt to subdivide the land inconsistent with orderly planning as it would create a vacant lot incapable of development.

The variation removes that substantial impediment to subdivision, which, if successful,<sup>1</sup> would enable two (or more) dwellings on the subject site. This eventual result would be inconsistent with the single dwelling character of the neighbourhood and potentially create amenity impacts to the other beneficiaries of the covenant.

As the proposal does not include an accompanying subdivision and development application, the nature of the tests under section 60(2) are more difficult to satisfy. As Member Blackburn stated in *Singh & Kaur v Brimbank CC*, '[t]he nature of the tests set out in section 60(2) has. . . made it difficult for applications to vary or remove a restriction to succeed where they are not accompanied by an application for approval of a specific development. This is because in these circumstances the Tribunal often needs to consider a large

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<sup>1</sup> It is emphasised that no indication is given as to whether a planning permit for subdivision would be approved in this instance.

number of possible development scenarios and be satisfied that all of those scenarios do not cause material detriment to benefited land owners.'

Like the situation in *Singh & Kaur*, a large range of scenarios would need to be contemplated here. We do not know how many lots the owner wishes to create via subdivision, nor how many dwellings would be constructed on those lots. In one hypothetical scenario, because the land measures 1237 square metres, a subdivision of four equally sized lots would result in lots measuring 309.25 square metres each. Under the General Residential Zone Schedule 1, no planning permit is required to construct a single dwelling on a lot measuring over 300 square metres. So that subdivision would allow for the construction of four dwellings whilst concurrently extinguishing all of the protections of the restrictive covenant in one fell swoop. There would be no planning consideration of those dwellings (other than the mandatory garden area) if constructed after subdivision.

Concerns raised by the objectors addressed disapproval with the variation's effect on a change of character to the area, loss of amenity, and material detriment.

Two objections primarily focussed on the single-dwelling character of the neighbourhood, and a desire to maintain that character. One objection specifically noted, '*At present there are no dual dwellings and we live here because that is the style of living we enjoy. Pakenham has plenty of areas which support dual dwellings and areas that are not in that category should stay that way.*'

One objection noted a particular concern with a decrease in property values.

As stated in *Waterfront Place*, the responsible authority must be persuaded to a 'comfortable level of satisfaction' that the threshold requirements in section 60(2) of the Act are met. Based on the objections submitted and the potential development scenarios, it cannot be determined that that the threshold of section 60(2) can be met.

**The variation will result in material detriment to the beneficiaries of the covenant by removing the heightened considerations provided by 60(2) in removal of a covenant.**

Nonetheless, it could be argued that the actual change in character, loss of amenity, and other detriment would not occur in this situation by the variation itself, but only upon the 'triggering event' of the issuance of a planning permit for subdivision. However, if this is considered to be the case, that argument fails to recognise that the proposed variation of the restrictive covenant will cause material detriment to beneficiaries by removing the heightened consideration that Section 60(2) of the Act affords proprietary interests.

It is unclear why the applicant did not apply for the outright removal of the covenant, or a variation by means of removing subsection (a) of the covenant—perhaps it was an attempt to allow the removal of the covenant to bypass the broad protections afforded by section 60(2) of the Act. In any event, it is clear that this proposal is a thinly-veiled attempt to unwind the existing restrictive covenant.

Restrictive covenants are private property controls by nature; they allow beneficiaries to enforce a restriction by granting standing to challenge a violation of the covenant. The existence of the covenant also provides the beneficiaries a degree of control and certainty over preferred neighbourhood character that extends beyond the planning scheme. They enjoy elevated protection under the Act in recognition of the unique rights in property they create in beneficiaries.

If the proposed variation is approved, a successful application for a subdivision permit would unwind the covenant. In the consideration of that subdivision application, Council could only consider the matters under the planning scheme relating to the potential subdivision. Matters in section 60(2) of the Act like 'financial loss', specific examples of 'loss of amenity' (other than the considerations required in Clauses 56 and 65 of the planning scheme), and a broad consideration of 'any other material detriment' would not be contemplated. Thus, allowing such a variation to occur would cause material detriment to beneficiaries of the covenant by removing the protection section 60(2) of the Act affords their proprietary interests.

**The variation will detrimentally affect the interests of affected persons**

For the reasons stated above, the proposed variation will detrimentally affect the interests of affected persons under Clause 52.02 of the planning scheme. The variation would enable an application to subdivide the land, which would consequentially result in two or more dwellings. This would be inconsistent with the predominant single-dwelling neighbourhood character.

**CONCLUSION**

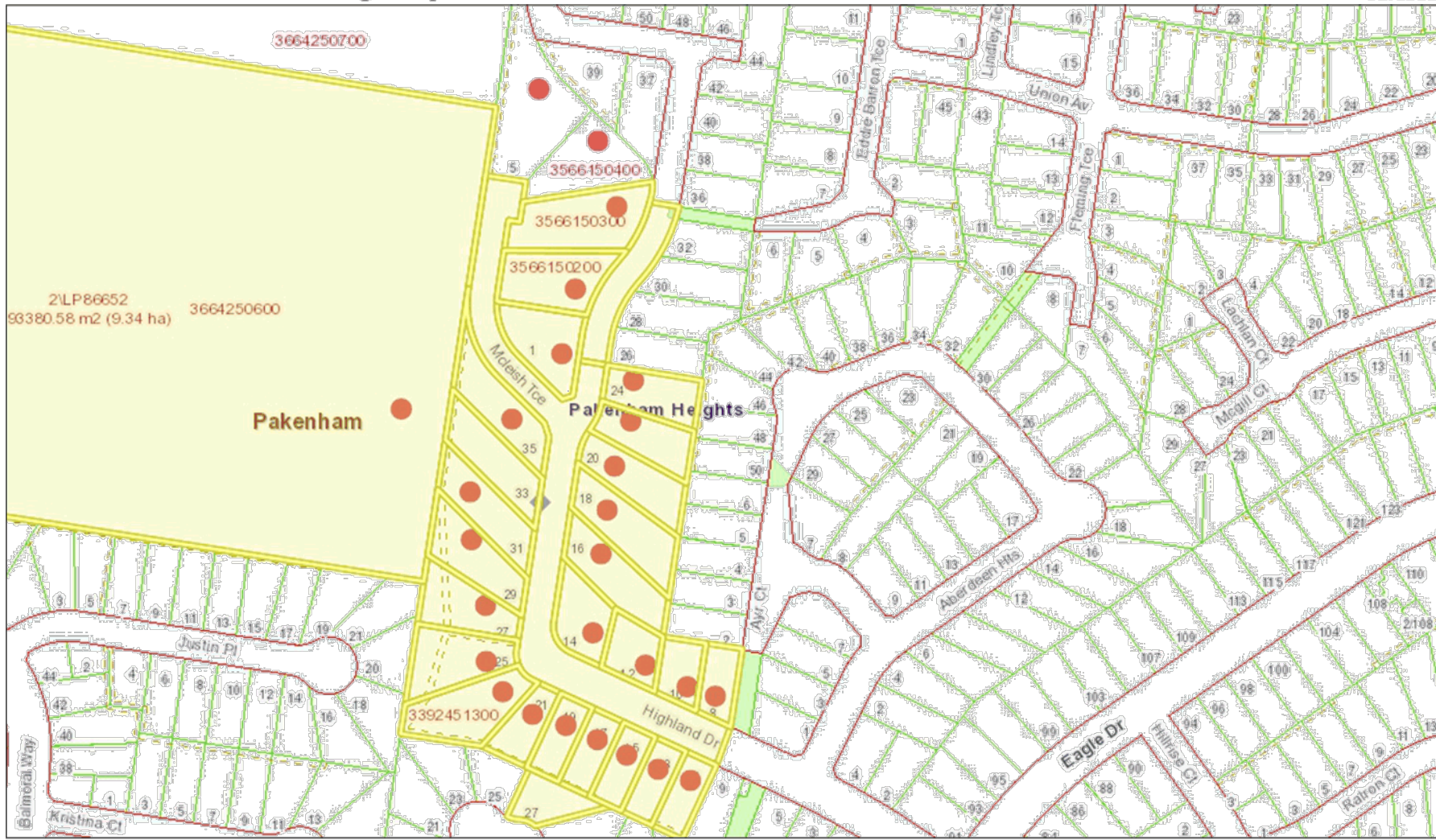
The Application has been assessed against the decision guidelines of all relevant clauses of the Cardinia Planning Scheme and the Planning and Environment Act 1987 and the proposed variation of restrictive covenant is determined to be inconsistent with these requirements. As such, it is recommended that a Refusal to Grant Planning Permit **T190026** be issued for **the variation of restrictive covenant at 33 Highland Drive, Pakenham VIC 3810** for the following reasons:

**GROUND OF REFUSAL**

1. Council cannot be satisfied that the variation of the covenant will be unlikely to cause any beneficiary of the covenant or any other person any detriment relating to:
  - a) Financial loss; or
  - b) Loss of amenity; or
  - c) Loss arising from change to the character of the neighbourhood; or
  - d) Any other material detriment.
2. The variation of the covenant will detrimentally affect the interests of surrounding landowners under Clause 52.02 of the Cardinia Planning Scheme.
3. The variation of the covenant is inconsistent with the orderly planning of the area.



# T190026 PA - Advertising map



1: 2,500

Data Source: State & Local Government. © CARDINIA SHIRE COUNCIL

4-Mar-2019

Notes





Attachment to Application by [REDACTED]

That the restrictive covenant in instrument S917443H set out hereunder by varied by the addition of the words in bold type set out below:

**AND THE SAID** Transferee with the intention that the benefit of this Covenant shall be attached to and run at law and in equity with every Lot on Plan of Subdivision No.318023R other than the Lot hereby transferred and that the burden of this Covenant shall be annexed to and run at law and in equity with the said Lot hereby transferred does hereby for himself his heirs executors administrators and transferees and as separate covenants covenant with the said **EDDIE BARRON CONSTRUCTIONS PTY LTD** and the registered proprietor or proprietors for the time being of every lot on the said Plan of Subdivision and every part or parts thereof other than the Lot hereby transferred or any part thereof **SHALL NOT:**

- (a) Erect or cause to be erected not than one private dwelling house (together with the usual outbuildings)
- (b) Erect or cause to be erected any dwelling with a floor area of less than 120 square metres excluding garage carports and Verandahs.
- (c) Erect or cause to be erected any dwelling and attached garage other than a dwelling and attached garage with external walls constructed substantially of brick veneer or stone.
- (d) Erect or cause to be erected any detached outbuilding other than a detached outbuilding with external walls of brick, stone, timber or metal.

**AND** it is intended that the above Covenant shall appears as an encumbrance on the aforesaid Certificate of Title.

**PROVIDED HOWEVER** that this covenant shall expire and no longer affect the land hereby transferred upon the Responsible Authority granting a permit to subdivide the land under the relevant Planning Scheme.