

1 REMOVAL OF RESTRICTIVE COVENANT AT 110 BAYVIEW ROAD, OFFICER

FILE REFERENCE INT1978074

RESPONSIBLE GENERAL MANAGER Tracey Parker

AUTHOR Meghan Ablett

RECOMMENDATION

That a Refusal to Grant Planning Permit T190295 be issued for the removal of a covenant U215270U relating to development of single storey dwellings and height restrictions at 110 Bayview Road, Officer VIC 3809 on the following grounds:

- The proposal fails to meet the requirements of Section 60(2) and 60(5) of the Planning and Environment Act 1987, as the Responsible Authority is not satisfied that the owner of any land benefitted by the restriction will be unlikely to suffer financial loss, loss of amenity, loss arising from the change in neighbourhood character or any other material detriment (including perceived detriment) as a consequence of variation to the restriction.

Attachments

1	Locality Map	1 Page
2	Copy of the Restrictive Covenant	4 Pages
3	Copy of Objections - Circulated to Councillors only	1 Page

EXECUTIVE SUMMARY

APPLICATION NO.:	T190295
APPLICANT:	Nathan Miratana
LAND:	110 Bayview Road, Officer VIC 3809
PROPOSAL:	Removal of covenant U215270U relating to development of single storey dwellings and height restrictions
PLANNING CONTROLS:	Urban Growth Zone Schedule 3 Development Contributions Overlay Schedule 4 Clause 52.02 Easements Restrictions and Reserves Officer Precinct Structure Plan September 2011 Officer Development Contributions Plan September 2011.
NOTIFICATION & OBJECTIONS:	The application has been advertised pursuant to Section 52 of the <i>Planning and Environment Act 1987</i> . Council received one objection.
KEY PLANNING CONSIDERATIONS:	Is the removal of the restrictive covenant an appropriate planning outcome

RECOMMENDATION: Refusal

BACKGROUND

The history of the site includes:

Planning permit T180820 was issued on 18 April 2019 for subdivision of the land, the creation of reserves and associated works (including roadworks in land subject to inundation overlay generally in accordance with the endorsed plans).

SUBJECT SITE

The site is located on the eastern side of Bayview Road.

There is a pipeline easement through the centre of the site.

The site currently contains a dwelling and a line of trees running along the north boundary and running north to south in the centre of the site.

The topography of the land is gently sloping north to south.

The main characteristics of the surrounding area are:

NORTH: Undeveloped residential land and Brown Road

EAST: Undeveloped residential land and Tivendale Road

SOUTH: Undeveloped and developing residential land and Princes Hwy

WEST: Bayview Road, developing residential land forming part of Winning Post and Timbertop Estate

PROPOSAL

The proposal seeks to remove restrictive covenant U215270U registered on the title of the subject site.

The covenant states:

“Transferees shall not:-

Build, construct or erect or cause to be built, constructed or erected or to remain on the land hereby transferred, or any part thereof, any dwelling or house unless such dwelling or house is of a single storey or level with the floor of the said dwelling or house not higher than 1.5 metres above the natural surface of the land when measured over the entire floor area,

AND this covenant shall appear on the Certificate of Title to issue for the said land and run with the land.”

PLANNING SCHEME PROVISIONS

Planning Policy Framework (PPF)

The relevant clauses of the PPF are:

- Clause 11.02 Managing Growth

- Clause 11.02-2S Structure Planning
 - Clause 11.02-3S Sequencing of development
- Clause 11.03 Planning for Places
 - Clause 11.03-2S Growth Areas
- Clause 13.07 Amenity
 - Clause 13.07-1S Land Use compatibility
- Clause 14.02 Water
 - Clause 14.02-1S Catchment planning and management
- Clause 15.01 Built Environment
 - Clause 15.01-1S Urban Design
 - Clause 15.01-1R Urban Design Metropolitan Melbourne
 - Clause 15.01-2S Building Design
 - Clause 15.01-3S Subdivision Design
 - Clause 15.01-5S Neighbourhood Character
- Clause 16 Housing
 - Clause 16.01-1S Integrated housing
 - Clause 16.01-2S Location of residential development
 - Clause 16.01-3S Housing Diversity
 - Clause 16.01-4S Housing affordability
- Clause 18.02 Movement Networks.
- Clause 19.03 Development infrastructure.

Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF are:

- Clause 21.03 Settlement and Housing
 - Clause 21.03-1 Housing
 - Clause 21.03-2 Urban growth area
- Clause 21.05 Infrastructure provision
 - Clause 21.05-3 Local roads
- Clause 21.06 Particular Uses and Development
 - Clause 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
- Officer Precinct Structure Plan September 2011
- Officer Native Vegetation Precinct Plan September 2011
- Officer Development Contributions Plan

Zone

The land is subject to the Urban Growth Zone Schedule 3. The applied zone is General Residential (Clause 32.08).

Overlays

The land is subject to the Development Contributions Plan Overlay Schedule 4 (DCPO4).

PLANNING PERMIT TRIGGERS

The proposal for **removal of covenant U215270U** requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 52.02 Easements, restrictions and reserves a permit is required to create and remove a restriction.

PUBLIC NOTIFICATION

Section 52 of the *Planning and Environment Act 1987* requires that the Responsible Authority must give notice of an application in the prescribed form to:

- Owners and occupiers of land benefited by a registered restriction covenant if the application is to remove or vary the covenant;
- Any other persons, if the responsible authority considers the grant of the permit may cause material detriment to them.

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

- Sending notices to the beneficiaries of covenant U215270U
- Placing signs on site frontage
- Placing a notice in the Pakenham Gazette newspaper

Council has received one objection to date. The key issue that was raised in the objections are:

- Approval will be contrary to the restrictive covenant under which the lot was purchased.

REFERRALS

The application was not required to be referred.

DISCUSSION

Section 60(2) and 60(5) of the *Planning and Environment Act 1987* states that Council **must not** issue a permit where it has not been satisfied that the owner of any land benefitted by the restriction will be unlikely to suffer financial loss, loss of amenity, loss arising from the change in neighbourhood character or any other material detriment (including perceived detriment) as a consequence of the variation to the restriction.

The relevant section of the *Planning and Environment Act 1987* is provided below.

*The responsible authority **must not grant** a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—*

- (a) 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 any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and*
- (b) *if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.*

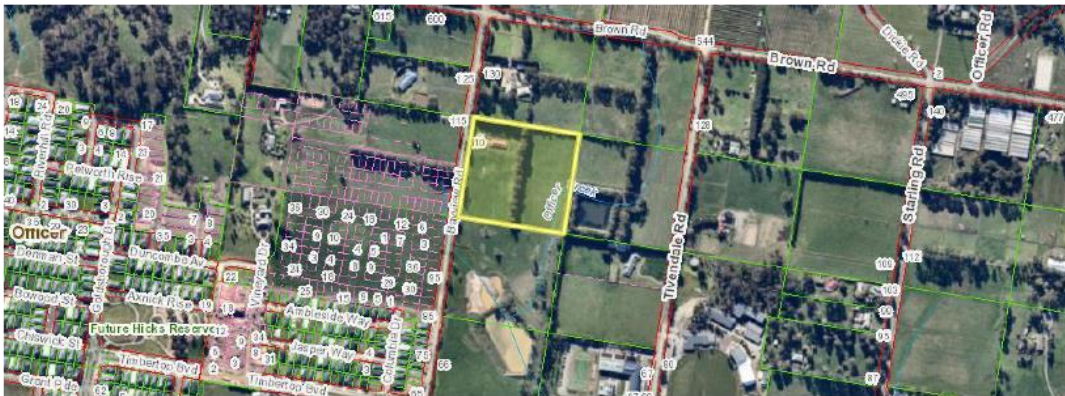
The objector has expressed concerns that they purchased their respective lot with the expectation the single story and height restriction covenant will remain on the affected lots and that the purchaser of the subject site was aware of the restrictive covenant when they purchased the subject site. As the objection has been received from a legal beneficiary of the covenant and relates to perceived material detriment that will arise from the removal of the covenant, the effect of Section 60(5) of the *Planning and Environment Act 1987* is that a permit **must not** be granted and the application must be refused.

Therefore the Officer's Recommendation is to refuse the application as required by Section 60(2) and 60(5) of the *Planning and Environment Act 1987*, in accordance with its statutory obligation.

CONCLUSION

It is concluded that the application to remove covenant **U215270UC** does not satisfy the requirement of the owner of any land benefitted by the restriction will be unlikely to suffer financial loss, loss of amenity, loss arising from the change in neighbourhood character or any other material detriment (including perceived detriment) as a consequence of the variation to the restriction.

Attachment 1 (Locality Plan)



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VICTORIAN LAND TITLES OFFICE

Transfer of Land <sup>Containing a
Covenant and/or Easement</sup>
 Section 45 Transfer of Land Act 1958

Lodged at the Land Titles Office by:

Name: _____

Phone: _____ *CBA*Ref: _____ Customer Code *205*

The Transferor at the direction of the directing party (if any) transfers to the transferee the estate and interest specified in the land described for the consideration expressed -
 - together with any easement created by this transfer;
 - subject to the encumbrances affecting the land including any created by dealings lodged for registration before the lodging of this transfer; and
 - subject to any easement reserved by this transfer or restrictive covenant contained or covenant created pursuant to statute and included in this transfer.

Land (Title) Lot 2 on Plan of Subdivision No. 433 and being ~~the~~ the land contained in X
 Certificate of Title Volume ~~6840~~ Folio ~~915~~
10274

Estate and Interest (e.g. "all my estate in fee simple")

All our estate in fee simple

Consideration
 \$162,500.00

Transferor (Full name)

NOEL AUDREY RIDGWAY and PETER ANTHONY RIDGWAY

Transferee (Full name and address for future notices including postcode)

PETER ALAN WOOKEY and SUSAN MARGARET CAMPTON both of 115 Windella Crescent
 Glen Waverley, 3150, as joint tenants

Directing Party (Full name)

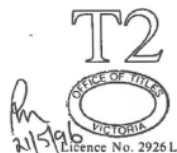
Creation and/or Reservation of Easement and/or Covenant

(See over)



(see reverse)

Land Titles Office Use Only



Victorian Stamp Duty - AP184
 PRIME/COUNTERPART/COLL
 Consideration \$ 162,500
 Duty Payable \$ 5950
 Ref: 304 724 905
 Date 21/5/76
 Initials *Q 57643*

ORDER TO REGISTER**To the Registrar of Titles**

Please register this dealing and upon completion issue the documents as follows :-

To the Lodging Party

Signed.....

Firm's Name..... National Australia Bank Limited

Customer code..... NAB 200Q

Creation and/or Reservation of Easement and/or Covenant (continuation if necessary)

AND THE TRANSFEREES for themselves, their heirs, executors, administrators and transferees and the registered proprietors for the time being of the land hereby transferred COVENANT with the said NOEL AUDREY RIDGWAY and PETER ANTHONY RIDGWAY and the registered proprietors, administrators and transferees that the Transferees shall not :-

AMENDED

23 JUL 1996

Attachment of
Covenant to
Transfer

build, construct or erect or cause to be built, constructed or erected or to remain on the land hereby transferred, or any part thereof, any dwelling or house unless such dwelling or house is of a single storey or level with the floor of the said dwelling or house not higher than 1.5 metres above the natural surface of the land when measured over the entire floor area;

AND this Covenant shall appear on the Certificate of Title to issue for the said land and run with the land.

Dated: 21/3/1996

Execution and Attestation

SIGNED by the Transferors)
in the presence of :)

Witness

SIGNED by the Transferees)
in the presence of :)

Witness

See Annexure Sheet marked.....

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PLAN OF SUBDIVISION OF ALLOTMENTS
NOS 38 39A 39B 40A 40B 41A 41B

PAKENHAM

Measurements are in Links

Conversion Factor

LINKS X 0.201168 = METRES

VOL 1367 FOL 386



STREET NAME ADDED
FROM
TO M^{RS} MULLEN
VIDE 78 / 1746

Stamp
4 JUL 82
LP 433
EDITION 8

ENCUMBRANCES

AS TO THE LAND MARKED E-1
EASEMENT TO VICTORIAN PIPELINES
COMMISSION CREATED BY INST.E15118

AS TO THE LAND MARKED E-2
WATER SUPPLY & TELEPHONE LINE
EASEMENT RESERVED BY TR.C835364

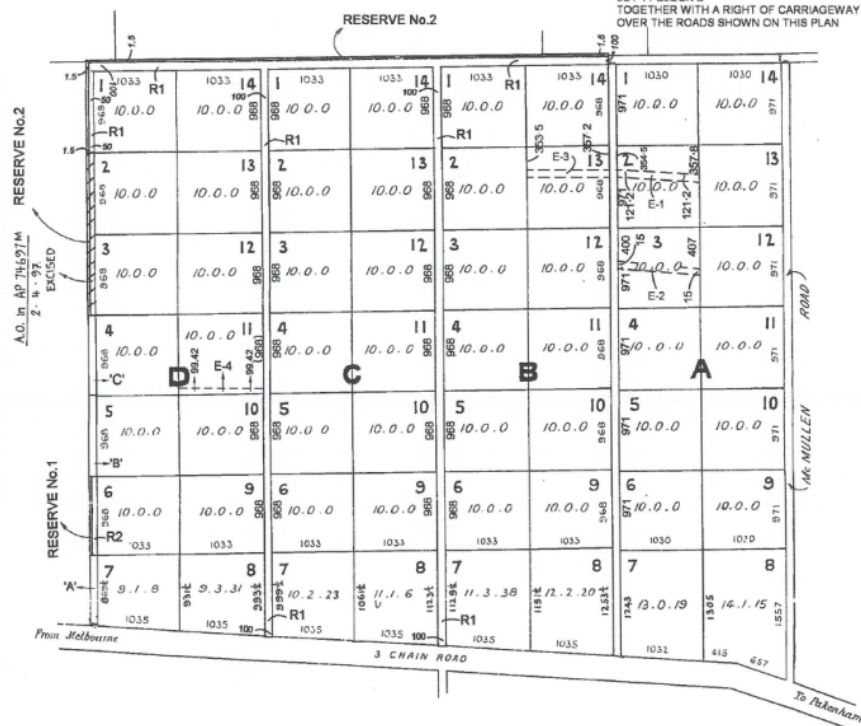
AS TO THE LAND MARKED E-3
THE EASEMENT TO THE GAS AND FUEL
CORP. CREATED IN E873303

AS TO ROADS R1 & R2
ANY EASEMENTS AFFECTING
THE SAME

AS TO THE LAND MARKED E-4
CARRIAGEWAY EASEMENT
CREATED IN V4227967 IN
FAVOUR OF 10142/873

APPURTENANCES

AS TO LOTS 1 TO 5 11 & 14 BLOCK A.
LOT 13 BLOCK B
LOTS 3 & 4 BLOCK C &
LOT 11 BLOCK D
TOGETHER WITH A RIGHT OF CARRIAGEWAY
OVER THE ROADS SHOWN ON THIS PLAN



MODIFICATION TABLE			PLAN NUMBER LP 433				
RECORD OF ALL ADDITIONS OR CHANGES TO THE PLAN							
WARNING: THE IMAGE OF THIS PLAN/DOCUMENT HAS BEEN DIGITALLY AMENDED. NO FURTHER AMENDMENTS ARE TO BE MADE TO THE ORIGINAL PLAN/DOCUMENT.							
AFFECTED LAND/PARCEL	LAND/PARCEL IDENTIFIER CREATED	MODIFICATION	DEALING NUMBER	DATE	TIME	EDITION NUMBER	ASSISTANT REGISTRAR OF TITLES
LOT 2 BLOCK A	E-1	CREATION OF EASEMENT	E15118			2	AD
LOT 3 BLOCK A	E-2	RESERVATION OF EASEMENT	C835364			2	AD
THIS PLAN		APPURTENACY NOTATION ADDED				2	AD
LOT 13 BLOCK B	E-3	CREATION OF EASEMENT	C 673303			3	AD
ROADS	R1 & R2	EASEMENTS ENHANCED				4	AD
'A'		ADVERSE POSSESSION APPLICATION	AP130958A	19/2/15		5	D.R.
Lot 11 Block D	E-4	Rectification	A.O. in BP3160A	21/7/16		6	RGM
'B'		Adverse Possession	AP 135435H	14/06/16		7	JBHB
'C'		Adverse Possession	AP 137236D	17/01/18		8	JBHB