

3 SUBDIVISION OF LAND INTO TWO (2) LOTS AND VARIATION OF A COVENANT AT 2 CUMBERLAND DRIVE, PAKENHAM

FILE REFERENCE INT1712178

RESPONSIBLE GENERAL MANAGER Andrew Paxton

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RECOMMENDATION

That a Refusal to Grant Planning Permit T160561 be issued for two (2) lot subdivision & variation of restrictive covenant at 2 Cumberland Drive, Pakenham VIC 3810 for the reasons outline in this report

Attachments

- | | | |
|---|--|---------|
| 1 | Locality plan | 1 Page |
| 2 | Plan of subdivision | 2 Pages |
| 3 | Copy of objection circulated to councillors only | 1 Page |

EXECUTIVE SUMMARY:

APPLICATION NO.:	T160561
APPLICANT:	Kristina Basic and Vincent Opiekan C/- Nobelius Land Surveyors
LAND: PROPOSAL:	Lot 1240 PS63888, 32 Cumberland Drive, Pakenham Variation of a restrictive covenant and subdivision of the land into two lots
PLANNING CONTROLS:	General Residential Zone (R1Z) Development Contributions Plan Overlay (DCPO1)
NOTIFICATION & OBJECTIONS:	The application has been advertised pursuant to Section 52 of the Planning and Environment Act 1987 sending notices to the owners and occupiers of adjoining land. Placing a sign on site and placing a notice in the Pakenham Gazette newspaper. One (1) objection has been received to date.
KEY PLANNING CONSIDERATIONS:	Impact on beneficiaries of covenant as per Section 60 (2) of the Planning and Environment Act 1987
RECOMMENDATION:	Refusal

BACKGROUND:

A Planning permit was issued in 2015 to subdivide the land into residential lots. No other proposal is relevant to this application.

SUBJECT SITE:

The site is located on the north west corner of Mauve Street and Cumberland Drive.

A crossover is located southern side of the allotment off Cumberland Drive and a 3 metre easement transverse the along the northern boundary.

The site currently is vacant and the topography of the land is flat.

The main characteristics of the surrounding area are:

- A developing residential area of Pakenham dominated by single storey detached dwellings

PROPOSAL:

The application involves both the subdivision of land into two lots and the variation of a restrictive covenant which would allow dwellings to be built on each of the lots proposed. Whilst Council can approve a two lot subdivision without the covenant being varied, only one lot will be allowed to have a dwelling built on it, therefore the applicant also seeks to vary the covenant.

Lot 1240 is 608m² in size and shaped rectangle with Cumberland Drive located along the southern property boundary and Mauve Street located along the eastern side boundary.

Both proposed lots are to be 304m² each, with both lots able to establish separate street addresses.

The proposal includes the removal of part (f) of the existing restrictive covenant in instrument AM211818T created on 26 September, 2015, which states:

*“AND the said Transferees for themselves, their heirs, executor administrators
And Transferees the registered proprietor or proprietors for the time being of the land hereby
transferred and every part thereof (hereinafter referred to as "The Transferees") DO HEREBY and as
separate Covenant COVENANT with the said transferor its successors, assigns and transferees and
others the registered proprietor or proprietors for the time being of the land comprised in the
said Plan of Subdivision No. PS638882D, and every part or parts thereof (other than the lot hereby
transferred) that the Transferees will not, and the Transferees hereby Covenant that they will not:*

””

***(e) Erect or cause to be erected more than one dwelling house or allow the lot hereby transferred to
be used as a road, access way, carriageway, easement, crossover or for any other purposes
whatsoever;***

The application proposes to vary the covenant by removing Clause ‘(e)’ to allow the two dwellings to be developed on the land after the subdivision is finalised.

PLANNING SCHEME PROVISIONS:

State Planning Policy Framework (SPPF)

The relevant clauses of the SPPF are:

- Clause 11.02-1 Supply of urban land
- Clause 15.01-3 Neighbourhood and subdivision design
- Clause 15.01-5 Cultural identity and neighbourhood character

Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF are:

- Clause 21.03-1 Housing

Relevant Particular/ General Provisions and relevant incorporated or reference documents

The relevant provisions/ documents are:

- Clause 52.02 Easements, restrictions and covenants
- Clause 65 Decision Guidelines

Zone

The land is subject to the General Residential Zone

Overlays

The land is subject to the following overlays:

- Development Contribution Plan Overlay – Schedule 1

PLANNING PERMIT TRIGGERS

The proposal for the subdivision of land into two lots and the variation of a covenant requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 32.08-2 General Residential Zone 1 a permit is required to subdivide land.
- Pursuant to Clause 52.02 of Easements, Restrictions and Covenants a planning permit is required for variation of restriction

In addition to above Section 60 (2) of the Planning and Environment Act 1987 provides that:

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 in the character of the neighbourhood; or*
- (d) Any other material detriment –*

as a consequence of the removal or variation of the 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
- Sending notices to the beneficiaries of the covenant
- Placing signs on site
- Placing a notice in the Pakenham Gazette newspaper

Council has received one (1) objection to date.

The key issues that were raised in the objection is:

- Lack of privacy
- Noise increase
- Potential parking issues

These will be discussed further in the report

REFERRALS

The application was not required to be referred externally

DISCUSSION

Variation of Covenant

The decision guidelines of Clause 52.02 of the Cardinia Planning Scheme states that before deciding on an application to remove or vary a covenant that the Responsible Authority must consider the interests of the affected people. The affected people in this instance are the beneficiaries of the subject covenant and Council must assess the impact of the proposed variation to the covenant on those beneficiaries. Section 60 (2) of the Planning and Environment Act 1987 provides criteria to assess the impact of such covenant variation on the benefitted parties of the covenant. They are:

- (a) *Financial loss; or*
- (b) *Loss of amenity; or*
- (c) *Loss arising from change in the character of the neighbourhood; or*
- (d) *Any other material detriment –*

As a consequence of the removal or variation of the restriction.

Often with the variation or the removal of covenants the Responsible Authority is obliged to refuse the application where the removal or variation of a covenant is opposed by a beneficiary of the covenant. Although as established in a VCAT decision *Derring Lane Pty Ltd v Glen Eira CC (2 August 2006)* the Responsible Authority is not obliged to refuse the application solely based on objections by beneficiaries, provided it is satisfied that the requirements of Section 60(2) of the Planning and Environment (Amendment) Act 1987 have been met.

The following is an assessment against those criteria provided on Section 60(2) of the Planning and Environment Act:

- **Financial Loss:** The objector has not identified financial loss as a ground of objection and Council cannot consider the balance of probabilities that the proposed variation of the covenant is likely or unlikely to cause financial loss to any benefitting owners. It is considered that there is no impact to the beneficiaries under this criteria.
- **Loss of Amenity:** The objector has noted traffic congestion and lack of privacy as amenity impacts associated with the proposal to remove the restrictive covenant. The distance between the subject land and the objectors land (adjacent) could provide some direct impact in relation to traffic (it would be difficult to see how a second dwelling would create privacy issues). It is considered that Council cannot discount that the proposal may cause a loss of amenity to the objector through traffic therefore can consider that the objector may be inconvenience by this criteria.
- **Loss Arising from Change to the Character of the Neighbourhood:** The objector has noted that the land around the site is single dwelling, with no other units. The redevelopment of the subject land in a manner allowed by the proposed variation would change the character of the neighbourhood. Although there could be debate on if this is a loss to the area or an opportunity, the beneficiary has highlighted their concerns and therefore it is considered that the objector may be inconvenience by this criteria.
- **Any other Material Detriment:** It is acknowledged that this property and other surrounding allotments were purchased with the covenant in place, with the understanding that only single dwellings would be supported on the land. The objection from a beneficiary to the removal of the restriction to allow the subdivision on the land has identified that the covenant was put there for a reason and should not be removed. Detriment is noted in VCAT case *McBride v Stonnington CC 26 October 2005* as 'loss, damage

or injury'. Whilst the objector has not specifically identified how the subdivision and variation will result in material detriment, Council cannot determine that there will be no loss for the objector as a result of the removal of the restriction and must therefore refuse the application.

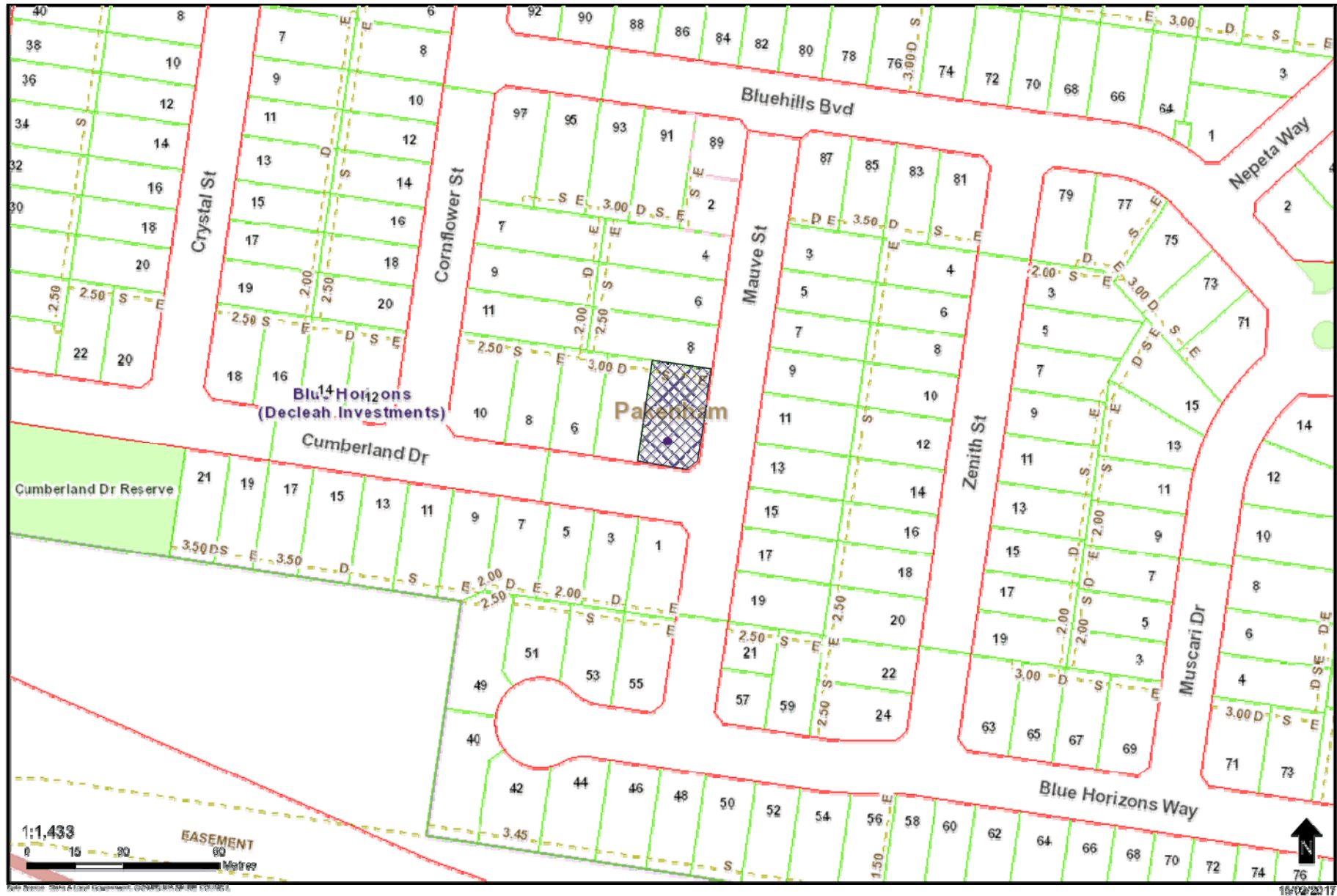
Given the above, Council officers are not satisfied that the proposed variation of the covenant is unlikely to result in loss of amenity, loss arising from change to the character of the neighbourhood or any other material detriment.


CONCLUSION

As a result of receiving an objection to the proposal from a beneficiary, Council cannot determine that the beneficiary is unlikely to suffer under the criteria's set out in Section 60 (2) of the Planning and Environment Act 1987 as a consequence of the variation of the restriction.

It is recommended that a Refusal to Grant Planning Permit T160561 be issued for two (2) lot subdivision & variation of restrictive covenant at 2 Cumberland Drive, Pakenham VIC on the following grounds:

1. The proposal fails to meet the requirements of Section 60(2) 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 loss of amenity, loss arising from the change in neighbourhood character or any other material detriment as a consequence of variation to the restriction.



PLAN OF SUBDIVISION		EDITION 1	PS 744002 W		
LOCATION OF LAND PARISH: Nar Nar Goon TOWNSHIP: --- SECTION: --- CROWN ALLOTMENT: 51G (pt) CROWN PORTION: --- TITLE REFERENCE: Vol. 11548 Fol. 391 LAST PLAN REFERENCE: Lot 1240 PS638883 B POSTAL ADDRESS: 2 Cumberland Drive, Pakenham 3810 (at time of subdivision) MGA CO-ORDINATES: E: 364 910 ZONE: 55 (of approx centre of land N: 5 783 430 GDA 94 in plan)		Council Name: Cardinia Shire Council EXPLANATORY NOTE: WARNING: This plan is unregistered. Alterations may be required by Council and the Registrar of Titles prior to Registration. Nobelius Land Surveyors accepts no responsibility whatsoever for any loss or damage suffered.			
VESTING OF ROADS AND/OR RESERVES		NOTATIONS			
IDENTIFIER	COUNCIL/BODY/PERSON	This is a Spear Plan			
Nil	Nil				
NOTATIONS					
DEPTH LIMITATION: DOES NOT APPLY					
SURVEY: This plan is not based on survey. STAGING: This is not a staged subdivision. Planning Permit No. --- This survey has been connected to permanent marks No(s). In Proclaimed Survey Area No. ---					
EASEMENT INFORMATION					
LEGEND: A - Appurtenant Easement E - Encumbering Easement R - Encumbering Easement (Road)					
Easements and rights implied by Section 12(2) of the Subdivision Act 1988 apply to all of the land in this plan.					
Easement Reference	Purpose	Width (Metres)	Origin	Land Benefited/In Favour Of	
E-1	Sewerage	3	PS 626356 T	South East Water Limited	
E-1	Drainage	3	PS 638883 B	Cardinia Shire Council	
NOBELIUS LAND SURVEYORS  P.O. BOX 461 PAKENHAM 3810 Ph 03 5941 4112 mail@nobelius.com.au		SURVEYORS FILE REF: 13,965 LICENSED SURVEYOR: B. S. NOBELIUS VERSION		ORIGINAL SHEET SIZE: A3	SHEET 1 OF 2

