

## 1.0 Objections from Beneficiaries to Covenant No Longer Enough

Decisions at VCAT and at the Supreme Court are constantly changing the landscape of the planning discipline. The VCAT decision (*Hutchins v Mornington Peninsula Shire Council* [2001] VCAT 2007) issued in October 2011 broke new ground in how beneficiaries of covenants were regarded in a context where a lot of unit development has occurred. The decision permitted the removal of a 'single dwelling' restrictive covenant and overturned a long established perception that Council cannot approve the removal (or variation) of a restrictive covenant if a beneficiary to that covenant objects.

The Tribunal relied upon the provisions of Section 60 of the Planning and Environment Act to overturn Council's refusal to grant a permit. Section 60 (5) of the Planning and Environment Act states;

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

*(a) the owner of any land benefited by the restriction (other than an owner who ... 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. (emphasis added).*

Councils have historically interpreted the broad provisions of S60 5(a) as affectively prohibiting them from approving any application to vary or remove a restrictive covenant, if a beneficiary to that covenants objects due to there being a 'perceived detriment'. In the *Hutchins* case a number of beneficiaries lodged

objections with Council. Based on the commonly held interpretation of Section 60, Council refused the application.

On appeal, the Tribunal found these objections to be vexatious. In coming to that conclusion, Member Martin noted that the dominant character of the street and surrounding area was 'unit dominated', as in there were a great number of multi-unit developments nearby. The Tribunal also found that the nearby beneficiaries either themselves lived in unit developments or in a street dominated by unit developments. Because of the site's context the Tribunal considered a person choosing to live in the street must expect a level of amenity strongly flavoured by unit development. Further, the Tribunal noted objections to the removal of a covenant that would prevent a similar application being considered by Council were vexatious. Therefore Council need not refuse such applications based on Section 60 (5) of the Act (outlined above).

This decision adds weight to *Thuy Tran v Brimbank CC* (VCAT Ref. P404/2011) and *Nguyen v Brimbank CC* (VCAT Ref P1551/2010), where objectors were found to be either so remote as to be unaffected by the variation, (in the *Thuy Tran* case, approximately 300 m away and on a different street) and where restrictive covenants had been removed on sites closer to the objectors, resulting in an erosion of the strength of the covenant, to the extent where its removal from the subject site would not result in detriment to the objectors.

Interestingly, the Tribunal also noted that objections relating to traffic, overlooking, visual bulk, and overshadowing would be addressed in the consideration of any future development permit application, ensuring beneficiaries and neighbours the opportunity to participate in the public notification process when a development proposal for the site was prepared and lodged at some future date.

The decision in *Hutchins* clearly articulates that Council has the power to approve covenant variations even when beneficiaries object. Objections from beneficiaries need not be the death knell for covenant variation or removal applications. Councils can now more confidently dismiss attempts by objectors to stymie proposals in areas where infill development has been found to be commonplace, or where objectors are substantially removed from the subject site.

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