

2 VARIATION OF A RESTRICTIVE COVENANT AT 3 MIKEY BOULEVARD, BEACONSFIELD

FILE REFERENCE INT1813574

RESPONSIBLE GENERAL MANAGER Andrew Paxton

AUTHOR Mary Rush

RECOMMENDATION

That a Refusal to Grant Planning Permit T170262 be issued for a variation of a restrictive covenant at 3 Mikey Boulevard, Beaconsfield VIC 3807 for reasons set out in this report.

Attachments

- | | | |
|---|---|---------|
| 1 | Copy of covenant | 2 Pages |
| 2 | Site plan | 1 Page |
| 3 | Objections circulated to councillors only | 9 Pages |

EXECUTIVE SUMMARY:

APPLICATION NO.:	T170262
APPLICANT:	Matthew Milosevic
LAND:	3 Mikey Boulevard, Beaconsfield VIC 3807
PROPOSAL:	Variation of a restrictive covenant
PLANNING CONTROLS:	General Residential Zone Bushfire Management Overlay
NOTIFICATION & OBJECTIONS:	The application was advertised and received seven (7) objections and one (1) letter of support.
KEY PLANNING CONSIDERATIONS:	Compliance with Section 60 (2) of the Planning and Environment Act 1987 Impact on beneficiaries of covenant
RECOMMENDATION:	Refusal

BACKGROUND:

There is no previous planning history for the site.

SUBJECT SITE



The site is located on the northern corner of Mikey **Boulevard** and Liam Court, near the peak of the ridgeline that Berwick Views Estate is located on.

The site currently contains an existing 2 storey dwelling which is constructed on the northern section of the lot. One crossover is located on the northern boundary of the site abutting Liam Circuit.

The topography of the land slopes steeply down to the south west from the north east.

The main characteristics of the surrounding area are:

- North: North-east of the site is a vacant lot known as 4 Liam Crt (1400sqm).
- East: South-east of the site is 5 Mikey Blvd which contains a two storey dwelling (1000sqm)
- South: Directly south of the site is the intersection of Liam Crt and Mikey Blvd. Opposite this are residential lots each with dwellings. 12 Mikey Blvd (1000sqm), 14 Mikey Blvd (1554sqm) and 16 Mikey Blvd (1580sqm). South of these is the Ridge Top Reserve and more residential developments within the Berwick Views Estate, each lot before reaching O'Neil Road and Janet Bowman Drive is over 1000sqm.
- West: Directly west of the site is 15 Mikey Blvd (1000sqm) which contains a dwelling.

PROPOSAL

The proposal is to vary a restrictive covenant to allow the site to be used for a second dwelling, by removing part (a) of the existing covenant in instrument AC126927Y, which states:

“Creation and/or Reservation and/or Covenant:
Covenant

“The Transferee with the intent of binding itself and each subsequent owner for the time being of the land in this transfer (“the Land”) COVENANTS with the Transferor and each of the owners from time to time of the land in plan of subdivision PSS07847N (apart from the Land) that the Transferee will not:

(a) build or allow to be built more than one dwelling house together with the usual outbuildings (unless the land is designated a dual occupancy site);

.....”

PLANNING SCHEME PROVISIONS

State Planning Policy Framework (SPPF)

The relevant clauses of the SPPF are:

- Clause 11.02-1 Supply of urban land

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 reserves
- Clause 65 Decision Guidelines

Zone

The land is subject to the **General Residential Zone Schedule 1 (GRZ1)**

Overlays

The land is subject to the Bushfire Management Overlay

PLANNING PERMIT TRIGGERS

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

- Pursuant to Clause 52.02 Easements, Restrictions and Reserves a planning permit is required before a person proceeds under Section 23 of the Subdivision Act 1988 to create, vary or remove an easement or restriction.

Section 60 (2) of the Planning and Environment Act 1987 provides that:

The responsible authority must not grant a permit 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 was advertised in accordance with Section 52 of the Planning and Environment Act 1987 by way of a public notice displayed on the site and by mail to adjoining owners and occupiers. Council also required the applicant to place a newspaper advertisement on the Pakenham Gazette.

The application has received seven (7) objections from beneficiaries of the restrictive covenant. . The objections are summarised as follows:

- Breach of covenant
- Loss of amenity
- Loss of property value
- Detrimental to the character of the area

REFERRALS

No internal or external referrals were required

DISCUSSION

Variation of Covenant

The purpose of the planning application to vary the restrictive covenant by deleting part (a) of the covenant, to allow the use of the land for a second dwelling and so that there is no barrier to the future subdivision of the land.

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:* Several objectors have identified financial loss as a ground of objection. Council cannot confirm that the beneficiaries will not suffer financial detriment because of the variation to the covenant particularly to those lots immediately abutting the site as they will have an additional dwelling opposite the location of the private open space of the existing dwelling. Therefore, it is considered that the proposal could lead to financial loss.
- *Loss of Amenity:* Several objectors have identified specific concerns of the impact of the proposal on their amenity, such as increase in on street parking and traffic congestion. Council officers cannot provide any certainty that the proposal will not result in the loss of amenity. It is therefore considered that the proposal could result in loss of amenity.
- *Loss Arising from Change to the Character of the Neighbourhood:* Several objectors have identified that the area is characterised by larger lots and that allowing the variation of the covenant will allow the construction of a dwelling on a small lot which will be out of character with the surrounding neighbourhood. It is therefore considered that the proposal will change the character of the immediate area and that Council officers cannot provide any certainty that the proposal will not result in the loss arising from a change to the character of the neighbourhood.
- *Any other Material Detriment:* Two of the objections specifically identified that the covenant protects the character of the area by ensuring additional dwellings/lots would not be created. Approving the requested variation is in direct conflict with covenant and will result in material detriment to the beneficiaries of the covenant whether it be perceived or otherwise.

CONCLUSION

After consideration of the affected parties as required by Clause 52.02 and Section 60 (2) of the Planning and Environment Act 1987, Council considers that the proposed variation of the restrictive covenant is likely to result in financial loss, loss of amenity, loss arising from a change to the character of the area, and other material detriment. It is therefore recommended that the variation of a restrictive covenant at 3 Mikey Boulevard, Beaconsfield VIC 3807 be refused 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 financial loss, loss of amenity, loss arising from the change in neighbourhood character or any other material detriment as a consequence of variation to the restriction.

Lot 1637

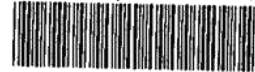
TRANSFER OF LAND

Section 45 Transfer of Land Act 1958



AC126927Y

12/06/2003 \$366 45



Lodged by:

Name:

Phone:

Address:

Ref.:

Customer Code:

Scott Ashwood P/L
Code 1557Q

1 X PA.

MADE AVAILABLE / CHANGE CONTROL

Land Titles Office Use Only

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 easements 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 easements reserved by this transfer or restrictive covenant contained or covenant created pursuant to statute and included in this transfer.

Land: (volume and folio reference)

Lot 1637 on Plan of Subdivision No. 507 847N

Certificate of Title Volume 10724 Folio 475

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

ALL ITS ESTATE IN FEE SIMPLE

Consideration:

\$112,000.00

Transferor: (full name)

BERWICK VIEWS PTY LTD ACN 082 359 662



DAC126927Y-1-6

Transferee: (full name and address including postcode)

MATHEW IAN BARKER of 80 CRAIG ROAD, DEVON MEADOWS VIC 3977

Directing Party: (full name)

Creation and/or Reservation and/or Covenant:

Covenant

The Transferee with the intent of binding itself and each subsequent owner for the time being of the land in this transfer ("the Land") COVENANTS with the Transferor and each of the owners from time to time of the land in plan of subdivision PS507847N (apart from the Land) that the Transferee will not:

- (a) build or allow to be built more than one dwelling house together with the usual outbuildings (unless the land is designated a dual occupancy site);
- (b) build or allow to be built a dwelling house which does not incorporate at least one lock-up garage attached to the dwelling house;

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Approval No. 571007L

ORDER TO REGISTER

Please register and issue title to

T2



Signed

Cust. Code:

STAMP DUTY USE ONLY	
This stamp is	ACN 002 869 409 AP 414
SRO	Victorian Duty \$ 2188.00
Property	Consideration/Advance \$ 112,000
	Victorian Assets % Section
NOT TO BE COPIED	Original / Counterpart / Collateral / Unstamp
	Transaction No.: 153612003
	Endorsing Date: 6/6/03
	Signature: [Signature] No 4

THE BACK OF THIS FORM MUST NOT BE USED

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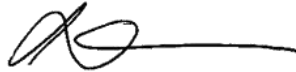
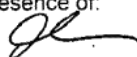
- (c) build or allow to be built on the Land a dwelling house which is not constructed:
 - (i) with at least 75% of all external walls (excluding windows) of brick, stone, brick or masonry veneer or other approved texture coated materials.
 - (ii) with a roof of any materials other than masonry or terracotta tiles or other non-reflective material with not less than 2 falls at a minimum pitch of 12 degrees.
- (d) build or allow to be built on Lots 1601 to 1604 (inclusive) and Lots 1634 to 1636 (inclusive) a dwelling house which has a floor area (excluding the area of any garage or other outbuilding) of less than 160 square metres.
- (e) build or allow to be built on Lots 1605 to 1633 (inclusive) and Lots 1637 to 1647 (inclusive) a dwelling house which has a floor area (excluding the area of any garage or other outbuilding) of less than 186 square metres;
- (f) build or allow to be built a dwelling house within 5 metres of the front boundary of the Land or if a corner lot, within 5 metres of the front boundary and within 2 metres of the side boundary abutting a street;
- (g) erect or permit to be erected:
 - (i) a side or front boundary fence within 5 metres of the front boundary of the Land where the Land is greater than 450 square metres;
 - (ii) any front or side boundary fence or internal fence abutting or facing any street which is not constructed of timber pickets or any other design as approved by the Transferor;
- (h) park or permit to be parked any commercial vehicle with a carrying capacity of 1 tonne or more, or any boat caravan or trailer on the Land so as to be visible from any street;
- (i) within 5 years of registration of plan of subdivision PS507847N erect any dwelling or outbuilding unless prior to making an application for a building permit for its erection the Transferee obtains the prior approval of the Transferor of its building design plans and specifications including a site works plan and a schedule of colours and materials.
- (j) erect, permit or allow to be erected or to remain erected on the Land any advertisement, hoarding, sign or similar structure used for the display of any advertising without the prior written approval of the Transferor.

AND IT IS AGREED that the benefit each of these covenants runs with the land the subject matter of Plan of Subdivision no. PS507847N (apart from the Land) and that the burden runs with the Land provided however, restriction (g) and (j) end on 31 December, 2010.

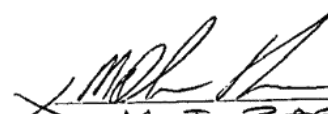
Dated: 29 May 2003

Execution and attestation:

EXECUTED by BERWICK VIEWS PTY. LTD.)
 ACN 082 359 662 by its Attorney LYDIA ARRICO)
 under Power of Attorney dated 3rd July, 2001)
 which has not been revoked in the presence of:)

SIGNED by the Transferee in the presence of:)


 M I BARKER

Witness: 



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Approval No. 571027L

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