VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2935/2006
PERMIT APPLICATION NO. YR-2006/951

CATCHWORDS

Planning and Environment; *Planning and Environment Act* 1987, s.47(2); exemption from public notice if application for removal of restrictive covenant is in respect of a development in existence for more than two years; whether exemption for 'removal of restrictive covenant' includes exemption for the lesser act of varying restrictive covenant in respect of a development in existence for more than two years; application of legal maxim *the greater includes the lesser*.

APPLICANT	Marie Elizabeth Hawley
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
SUBJECT LAND	10 Glendale Court, Kilsyth
WHERE HELD	Melbourne
BEFORE	Tonia Komesaroff, Member
HEARING TYPE	Hearing
DATE OF HEARING	21 February 2007
DATE OF ORDER	23 February 2007
CITATION	Hawley v Yarra Ranges SC [2007] VCAT 268

ORDER

The decision of the responsible authority is set aside. A permit is granted and directed to be issued by the responsible authority under the provisions of section 85(1)(b) of the *Planning and Environment Act* 1987 for the land at 10 Glendale Court, Kilsyth which allows:

> **Variation of Covenant A461389 dated 30 December 1957 pertaining to Lot 79 PS 23968 at 10 Glendale Court, Kilsyth by replacement of the words *'one dwelling house'* with the words *'two dwelling houses'* in paragraph (d) thereof.**

The Tribunal directs that the permit must contain the following conditions

1 This permit will lapse if the covenant is not varied within two years of the date of the permit.

Tonia Komesaroff
Member

APPEARANCES:

For Applicant	Mr Peter Merrigan of Millar Merrigan, Land Development Consultants.
For Responsible Authority	Mr David Song of Aspect Town Planners Pty Ltd, Consultant Town Planners.

REASONS

BACKGROUND

1 Although the subject land has enjoyed a restrictive covenant since 1957, *not to erect or construct on the said land any buildings other than one dwelling house and any usual and proper outbuildings*, the subject land holds two detached dwellings.

2 Its first dwelling is in the vicinity of fifty years old and its second dwelling is over nine years old, pursuant to a building permit dated 24 September 1997 and a certificate of Occupancy dated 5 December 1997, both issued by the Responsible Authority's predecessor, the Shire of Lillydale.

3 The second dwelling was lawfully built in accordance with the planning controls in existence at the time of construction. This occurred because, pursuant to the Lillydale Planning Scheme, development of a second dwelling was an as-of-right 'dual occupancy' under its planning scheme, provided both dwellings met the maximum density of one dwelling per 864 square metres. As the subject land enjoys an area of 2,130 square metres, planning permission for the second dwelling was not required.

4 This application for variation of the restrictive covenant to replace the words *'one dwelling house'* with *'two dwelling houses'* is made pursuant to clause 52.02 of the Yarra Ranges Planning Scheme which reads:

> A permit is required before a person proceeds under section 23 of the *Subdivision Act* 1988 to create, vary or remove an easement or restriction … … …

5 *'Restriction'* is defined in the *Subdivision Act* 1988, section 3(1) to mean:

> A restrictive covenant or a restriction which can be registered, or recorded in the register under the *Transfer of Land Act* 1958.

PRELIMINARY MATTERS

6 By consent the name of the permit applicant and the applicant for review has been varied from Max Hawley to Marie Elizabeth Hawley, following the demise of Max Hawley.

THE SITE AND ITS LOCALITY

7 The subject site is located on the western side of Glendale Court, approximately 90 metres south of Mount Dandenong Road, in Kilsyth. The site is rectangular in shape and has a frontage to Glendale Court of 42 metres, a depth of 52.7 metres and overall site area of 2,130m^2.

8 The site is occupied by a single storey brick detached house which is set back 17.5 metres from the site's frontage and 5 metres from the northern side property boundary. A second, single storey detached weatherboard dwelling is located in the south west corner of the site and is set back 1.8

metres from the southern side boundary and 4.5 metres from the western (rear) property boundary.

9 An existing vehicle crossover is located in the southern end of the site's frontage and provides access to a gravel driveway which extends in front of the existing brick dwelling and connects to an existing carport. The crossover also provides vehicle access to the weatherboard dwelling located at the rear of the site. There is an existing brick garage located in the north western corner of the site.

THE PROPOSAL

10 There is to be no physical change on the subject land, merely the variation of words in the covenant.

RELEVANT PLANNING HISTORY

11 The land is presently zoned Residential 1 under the Yarra Ranges VPP format planning scheme.

12 Council records indicate that the weatherboard dwelling (second house) has existed on the land for over nine years. At the time the second dwelling was constructed, no planning permit was required as it complied with the subdivision density provisions under Clause 403.1 of the former Lillydale Planning Scheme.

13 Under the former planning scheme the site was within a General Residential zone. Under this previous zone, a house could be constructed on the land provided that it did not exceed the maximum density for subdivision which was 1 lot per 864 square metres. Given the subject site has an area of 2,130m^2, the construction of a second dwelling did not require planning control.

PRELIMINARY QUESTION OF LAW

14 The responsible authority did not advertise this restrictive covenant variation application on the basis that it was exempt from such public notification by virtue of the *Planning and Environment Act* 1987 section 47(2) which reads:

> Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the *Subdivision Act* 1988) over land if the land has been used or developed for more than two years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.

15 When VCAT performed an administrative review of council's actions under its Practice Note 2 information[1], it was also of the opinion that public

[1] Practice Note Planning and Environment List No.2 - Information to be provided by a Responsible Authority 1.7 – 1.9 inc.

notification was exempt under the same section 47(2) of the *Planning and Environment Act* 1987.

16 Both council and the permit applicant agree that there is no doubt that the development of the second dwelling has been in existence for more than two years before the date of the application (in fact for more than nine years) and was lawful under the *Planning and Environment Act* 1987 and under its delegated legislation, the Lillydale Planning Scheme, at the time of its construction, but for the existence of the restrictive covenant.

17 A preliminary question has now been raised by council as to whether section 47(2) does indeed exempt this application for variation because the strict technical words of 47(2) say *'application for a permit to remove a restriction'* whereas this is an application for a permit to *'vary'* a restriction.

18 All related sections in the *Planning and Environment Act* 1987, section 47(1)(e), section 52(1)(cb), section 52(1AA) and section 60, refer to *removal or variation.* It appears to me to be *prima facie* an error or slip by the parliamentary draftsperson of the legislation that section 47(2) uses the word *'remove'* without its accompanying partner *'or vary'*.

ISSUES FOR CONSIDERATION

19 The first issue for consideration is whether this application is exempt from the s.52 public notification provisions.

20 If it is exempt, the second question for me to decide is whether I am satisfied that a permit can be issued for the variation of clause (d) of the restrictive covenant, under the *Planning and Environment Act* 1987, s. 60(5).

DOES REMOVE INCLUDE VARY?

21 There is a general legal maxim that *the greater includes the lesser*, first expressed in the Latin *Major continet in se minus*[2]. This principle is enunciated in the High Court of Australia decision ***The Shire President, Councillors and Ratepayers of the Shire of Swan Hill v Bradbury***[3].

22 It is my opinion that this principle applies in this case. This also accords with logic for, if the legislature regards it as unnecessary to give public notice of complete removal of covenant for an otherwise lawful development in excess of two years, then it follows that a variation of same ought to be treated similarly.

23 The High Court decision of ***The Shire President, Councillors and Ratepayers of the Shire of Swan Hill v Bradbury*** concerned the Local Government Act 1915 which gave councils power to make by-laws

[2] See Black's Law Dictionary, Seventh edition, Bryan A Garner Ed, West Group. St Paul Minn, 1999 @ page 1656.
[3] (1937) 56 CLR 746 @ 762 per Dixon, J

'regulating and restraining the erection and construction of buildings'.

24 Council, passed a by-law, prohibiting the erection of buildings unless with the approval of the council. The High Court held such by-law was invalid as exceeding its source of power. Dixon J applied this Latin maxim:

> Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or course of conduct to be regulated … … …
>
> The word "restraint" has not been the subject of the same judicial examination. But to restrain an activity or course of conduct usually means something less than its entire prohibition. To restrain a man from a course of conduct is to stop his pursuit of it. But to restrain the course of conduct is to moderate, check or restrict it. The expression "restrain" suggests the exercise of control during the progress of the activity to which it is applied, but not prevention… … …
>
> Every prevention or suppression necessarily includes restraint because **the greater includes the less**[4]. But, if a course of conduct were forbidden unless it were approved by an unfettered discretion vested in some authority, I should think to describe the result as a "restraint" would be a very considerable understatement. When the nature of the subject matter is considered, in my opinion, a power to regulate and restrain the erection of buildings cannot be regarded authorizing the legal result produced by a general prohibition of building unless with the approval of the council.
>
> Once the legal effect is grasped of such an entire but conditional prohibition, it becomes difficult to resist the conclusion that to support it some wider power is necessary than one of regulation and restraint. Under an authority to regulate and restrain, restrictive conditions may be imposed upon the erection of buildings, the incidents may be provided for, the actual operations of building controlled, but it cannot be made prima facie unlawful to construct a building.

25 The ***Shire of Swan Hill v Bradbury*** case concerns the opposite of this case, because that case illustrates that the lesser does not include the greater. My case illustrates the opposite, nevertheless the principle remains the same and it is that principle that I apply in coming to the conclusion that council and the Tribunal were exempt from public notification of this application to vary the covenant because the development has existed on the subject land for a period in excess of two years, indeed over nine years.

26 To put it another way, it seems to me to be patently absurd for section 47(2) to forgo public notification of an application for a permit to completely remove a restriction yet require public notification of an application for a

[4] Tribunal emphasis

permit to vary a restriction, because removal is total, whereas variation would, by definition, not be so all-encompassing. Nothing could be greater than total removal of a restrictive covenant, so:

> a court when interpreting ordinary or subordinate legislation should eschew creating absurdities ….. technicalities and angels dancing on pinheads are to be avoided. See ***Leibler v City of Moorabbin***[5]**.**

MERITS ANALYSIS

27 The section 60(5) *Planning and Environment Act* 1987 test prevents me from ordering the grant of a permit unless I am satisfied that:

> … … … the owner of any land benefited by the restriction will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the variation of the restriction.

28 It is accepted that the second dwelling is in existence, its associated driveway is already in existence, the ability to erect fencing between both dwellings can presently occur without planning permission, and the only impact of my decision is a wording variation in the covenant.

29 If, for example, there was a desire by one of the dwelling's residents to extend that dwelling, planning permission is required pursuant to clause 32.01-4 which requires a permit to *'extend a dwelling if there are two or more dwellings on the lot'*. So building extensions cannot now occur without separate planning permission.

30 Upon any future two-lot subdivision, because each lot will be greater than 500m2, planning permission will not be required if each dwelling's owner then wishes to extend the dwelling.

31 However a plan of subdivision still requires both:

i fresh planning permission;

ii a variation to clause (b) of the same covenant;

and therefore is a matter for a future date and application. It is not before me to day. In other words, subdivision cannot occur automatically and will require separate planning approval.

32 I was referred to ***Hurley and Odgers v Greater Bendigo City Council and Another***[6] and ***Herrmann v Yarra Ranges Shire Council*** [7] but I find that each of those cases is distinguishable from the present one. That is because in both those cases, it was clear that a decision to either vary or remove the relevant covenant could be a precedent for future variation of other covenants in the vicinity, and therefore an erosion of the neighbourhood.

33 In this case, however, there has been a dramatic change not just in the planning controls since the second dwelling was erected but also in the

[5] (1992) 8 AATR 188, Victorian Supreme Court, per Nathan J.
[6] [2002] VCAT 1244
[7] [2006] VCAT 1262

legislation, such that it is no longer possible for a second dwelling to be built on other lots burdened by this covenant.

34 The planning scheme change has been that the General Residential zone under the Lillydale Planning Scheme has given way to clause 32.01-4 under the Yarra Ranges Planning Scheme, so that a planning permit[8] is now required to construct a dwelling if there is already at least one dwelling on the lot.

35 The legislative change is that section 60(5) has been inserted into the *Planning and Environment Act* 1987 in 2000, with the effect that a permit now cannot[9] be granted by either the responsible authority or VCAT unless beneficial owners are notified and will be unlikely to suffer any detriment of any kind (including any perceived detriment).

36 Having considered the particular and peculiar facts surrounding this case, I have come to the conclusion that a permit can be granted to vary the restrictive covenant pursuant to clause 52.02 of the Yarra Ranges Planning Scheme because section 60(5) of the *Planning and Environment Act* 1987 (Vic) is not offended.

37 I have come to the conclusion that because:

i this second dwelling has been in existence for over nine years without any covenant beneficiary objecting to same;

ii there will be no physical change whatsoever on the land as a result of this application;

iii this application merely regularises something which has been in existence for over nine years

I am positively satisfied that owners of land benefited by the restrictive covenant will be unlikely to suffer any detriment of any kind including any perceived detriment as a consequence of this wording variation.

38 In being so positively satisfied, I am conscious of the very high bar imposed by the *Planning and Environment Act* 1987 section 60(5) and the very heavy burden that this permit applicant needs to overcome, as expressed in ***McFarlane v City of Greater Dandenong***[10], which I do not need to repeat. Nevertheless, I have been so satisfied before in ***Schock v Yarra Ranges Shire Council***[11], and I am so satisfied in this case, applying ***McFarlane***.

Tonia Komesaroff
Member
TK:AM

[8] not just a building permit
[9] Tribunal emphasis
[10] [2002] VCAT 696
[11] [2003] VCAT 1733