VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2050/2007
PERMIT APPLICATION NO. YR-2006/1791

CATCHWORDS

Application under section 77 *Planning and Environment Act* 1987 against refusal of a permit; variation of restrictive covenant to allow subdivision for the reduction of frontage and area (for existing second dwelling) on a lot, subdivision of land into 2 lots, Yarra Ranges Planning Scheme, Residential 1 zone, objector to permit application not a party to review or appearing at the hearing, assessment of perceived detriment and whether objection vexatious, without ground or merit, speculation by responsible authority or tribunal of perceived detriment in absence of objector submission.

APPLICANT	M E Hawley
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
SUBJECT LAND	10 Glendale Court , Kilsyth, VIC, 3137
WHERE HELD	Melbourne
BEFORE	Richard Horsfall, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	19 November 2007
DATE OF ORDER	6 December 2007
CITATION	Hawley v Yarra Ranges SC [2007] VCAT 2318

ORDER

1 The decision of the responsible authority in relation to planning permit application no. YR-2006/1791 is set aside. Pursuant to section 85(1) *Planning and Environment Act* 1987 the Tribunal grants the permit and directs the responsible authority to issue a permit for the land at 10 Glendale Court, Kilsyth allowing:

   i two (2) lot subdivision of the land in accordance with the endorsed plans; and

   ii variation of the restrictive covenant contained in instrument of transfer no. A461389 affecting the site, being the land in lot 79 on Plan of Subdivision no. 23698 comprised in Certificate of Title Volume 08177 Folio 688 to replace the words *'reduce either the frontage or the area of the said land'* with the words *'create more than two allotments'* pursuant to the decision of the Victorian Civil and Administrative Tribunal in application for review reference no. P2050/2007.

2 The permit shall be subject to the following conditions:

1 Before the use and development commences three (3) copies of the plan of subdivision be submitted to and approved by the responsible authority. These plans must be substantially in accordance with the original plans submitted

2 The layout and site dimensions of the proposed subdivision as shown on the endorsed plan(s) must not be altered unless agreed by the responsible authority.

3 This permit will expire if one of the following circumstances applies

i the plan of subdivision is not started within two (2) years of the date of this permit, as evidenced by the plan of subdivision being certified by the responsible authority within that period; or

ii the registration of the subdivision is not completed within five (5) years of the date of certification.

The responsible authority may extend the two year period if a request is made in writing before the permit expires, or within three (3) months afterwards.

4 4 The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity, gas and telecommunication services to each lot shown on the endorsed plan in accordance with the authority's requirements and relevant legislation at the time.

5 All existing and proposed easements and sites for existing or required utility roads or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.

6 The plan of subdivision submitted for certification under the *Subdivision Act* 1988 must be referred to the relevant authority in accordance with section 8 of that Act.

Richard Horsfall
Senior Member

APPEARANCES:

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

REASONS

INTRODUCTION AND BACKGROUND

1 The applicant seeks a review[1] of Yarra Ranges Shire Council's (*council*) decision to refuse to grant a permit[2] to subdivide the land at 10 Glendale Court, Kilsyth into 2 lots to accommodate an existing second dwelling on the land constructed without the need for a permit in 1997 and to vary a restrictive covenant to delete the restriction against the reduction of either the frontage or area of the said land, but introducing a prohibition of subdivision into more than 2 lots.

2 The permit application was lodged with council on 13 December 2007. Following the giving of notice of the application, 1 objection was received from Mrs C Grant, the owner of 4 Glendale Court (one of 3 lots already subdivided from a lot of the original subdivision) that *'I believe it will change the feeling and structure of the area if lots are subdivided. The intention of the covenant is to maintain sizeable blocks and limit the number of dwellings'*. The objector was notified of the application for review but did not lodge a statement of grounds, did not appear or be represented and made no submission to the Tribunal.

3 No referrals were made under section 55(1) *PE Act*.

4 On 10 July 2007 council's delegate, consistent with its planning officer's recommendation, determined to refuse to grant a permit on the following grounds:

> 1. The proposed subdivision fails to respect the surrounding pattern that would result in smaller lot sizes and reduce frontages which would be inconsistent with the typically larger allotments and open generous frontages in this immediate locality.
>
> 2. Council is not satisfied that the variation of the covenant would not cause material detriment of any kind to the owners of the properties benefiting from the covenant, pursuant to section 60(5) of the Planning and Environment Act 1987.

5 The application for review was lodged with the Tribunal on 15 August 2007. The stated grounds for review rebutted the grounds for refusal.

THE HEARING

6 Council and the applicant's representatives tabled and spoke to written submissions. These, together with the plans, photographs and other material tabled in the course of the hearing, are attached to the Tribunal's file. No expert evidence was called.

---

[1] Application under section 77 *Planning and Environment Act* 1987(PE Act) for review of a refusal of a permit

[2] Permit application no. YR-2006/1791

7 The objector was notified of the application for review but did not lodge a statement of grounds, did not appear or be represented and made no submission to the tribunal.

8 The hearing of this proceeding occupied 3 hours. Following the hearing, I inspected the land and the neighbourhood at large.

THE LAND AND ITS CONTEXT

9 The land is located on the west side of Glendale Court, on a crest between Kilsyth Avenue and Mount Dandenong Road, about 90m south of Mount Dandenong Road. It is regular in shape with the following dimensions:

- frontage of 40.23m;
- a depths of 52.73m; and
- an area of 2130m²;
- a fall of about 1-2m from the street to the rear.

10 The site is currently occupied by

(a) a large 'L' shaped single storey concrete block house brick dwelling sited at an angle set back about 17.5m from the frontage with a carport in front and a brick garage at the rear with generous clearances from the boundaries in an open garden and lawn setting, and

(b) the second smaller rectangular single storey weatherboard house located in the south-west rear corner 4.5m from the western rear boundary and 1.8m from the southern side boundary, formerly occupied by a member of the applicant's family. Its construction in 1997 did not need for a planning permit in accordance with the then applicable planning scheme.

11. Both houses are served by a single crossing which provides access to separate established gravel driveways to each house.

12. Surrounding land uses are predominantly single larger dwellings. Many are on larger allotments. The area is generally urban in appearance serviced by fully constructed roads and reticulated water and sewerage. The subdivision pattern is generally uniform with lots ranging from 1100m² to 2300m², but there are smaller lots, medium density housing and 2 battle-axe subdivisions at 18 and 23 Glendale Court with narrow entrances.

13. The original plan of subdivision LP23968 created 21 lots now further subdivided to 33 lots) in a site along and south of Mount Dandenong Road and on each side of Glendale Court and Palm Grove parallel to the west south to Kilsyth Avenue. The lots vary greatly in size from 1100m² to 2300m² with 1500m² being the average area. The original Lots 1 to 5 facing Mount Dandenong Road and lot 78 on the southern boundary of the site are benefited by the covenant. The original lot 1 has been subdivided into 10

units and lot 5 on the corner of the court into 3 lots, one of which is owned by the objector.

PROPOSAL

14. It is proposed to subdivide the land into 2 lots. Lot 1 will be 1,481m² containing the original dwelling and lot 2 will be 560m² to contain the 1997 second existing dwelling.

15. A common property area for the subdivision with a 10m frontage at the south end of the property and a depth of 8m will accommodate the common driveway entrance. Lot 2 will have a 10m frontage on the western rear boundary of this area.

16. The dividing boundary between the lots will run 10m inside and parallel to the southern boundary from the frontage for 25.14m , then angling 8.45m north widening lot 2, and then running parallel to and 14.70m inside the southern boundary to the rear for 20.57m . There is currently no fence between the houses.

17. The application also seeks variation of the covenant. It currently contains a restriction:

> (a) Not at any time hereafter by any subdivision of Act with the same intention to reduce either the frontage or area of the said land.

18. The applicant seeks a variation of the covenant to replace the words *'either the frontage or the area of the said land'* with the words *'create more than two allotments'* so that it reads:

> (a) Not at any time hereafter by any subdivision of Act with the same intention to create more than two allotments.

19. No works are proposed.

PRIOR DECISION

20. The covenant originally contained a single dwelling restriction. On 23 February 2007 the tribunal determined to amend that provision to enable the construction of 2 dwelling houses and a permit has issued to implement that decision. The Tribunal took the view that section 47(2) *PE Act* exempted the applicant from giving public notice of the application to vary the covenant as the land had been used or developed for more than 2 years in a manner that would have been lawful under the Act but for the existence of the restriction. Section 47(2) only referred to applications to *remove* covenants but the Tribunal applied the *slip* rule to conclude this was a prima facie error and that the intention of the draftsperson was to include a *variation* as well as a removal.[3]

[3] Hawley v Yarra Ranges SC [2007] VCAT 268 (23 February 2007) @ [14-18]

ZONING AND PLANNING CONTROLS

21. The land is zoned Residential 1 under the Yarra Ranges Planning Scheme. Clause 32.01 of the zone sets out its relevant purposes as follows:

    - Provide for residential development at a range of densities with a variety of dwellings to meet the housing need of all households.
    - Encourage residential development that respects the neighbourhood character.

22. Under clause 32.01-2 a permit is required to subdivide the land. A 2 lot subdivision must meet the objectives and standards of clause 56 listed in the table to the clause. The subdivision application is exempt from notice and review.

23. The parties referred to other provisions of the planning scheme including:

    (c) **State Planning Policy Framework** (SPPF) - clauses 14.01, 16.02, and 19.01;

    (d) **Local Planning Policy Framework** (LPPF) and the **Municipal Strategic Statement** (MSS) - clauses 21.03 (the State and Regional Planning Context) and 21.05 (Townships Large and Small) and objective 3 of clause 21.05-3 *'to recognise and protect the distinctive characteristics and environmental features of the residential areas throughout the Shire'*;

    (e) clauses 56 and 65 (decision guidelines);

    (f) the provisions of the *Planning and Environment Act* 1987 relating to the removal and variation of restrictive covenants.

TRIBUNAL CONSIDERATION

24. I have considered the submissions of the parties, the provisions of the planning scheme, the material produced at the hearing and on VCAT's file and my inspection of the site.

PLANNING MERITS

25. The local planning policies for the residential zone (clause 22.01) indicate that the character of the various areas is determined by the combination of key factors including road size, waste treatment, topography and vegetation cover.

26. Clause 22.01 places the site in a Metropolitan Residential Area (*MRA*) as approach to the Foothills Residential Areas and Rural Townships.

27. The objectives for an MRA reflect the purposes of the residential zone, and include ensuring that land remains committed to single dwelling housing as the primary function and predominant land use, and to ensure that the design of any new subdivision recognises and responds to existing physical,

environmental and visual characteristics of the site and surrounding area and to:

> … have regard to physical and environmental features, including viewlines, to help reflect the surrounding topographic and visual characteristics, and to give the subdivision a sense of place and character.[4]

28. Other objectives refer to the removal of vegetation which is not relevant in this case.

29. Mr Song in his submissions opposed the subdivision principally on the grounds relating to restrictive covenants and did not point to any aspect of the proposal which did not meet the policy apart from its unusual shape and the 10m frontage.

30. However the approval of this subdivision will have no physical impact on the land or its area, the streetscape or neighbourhood character. The second dwelling is in existence. No permit is required for the construction of a fence between the two houses on the site, which is likely to occur in any case now that the second dwelling is no longer occupied by a family member. Letting the house out will make a fence necessary or desirable.

31. I find the relevant objectives in clause 21.01-4, are met and the subdivision is consistent with the local policy.

32. I note several of the large lots in the original covenant subdivision have been further subdivided, there is some medium density and battle-axe blocks and smaller lots in the area. This additional lot of over 500m^2 with its existing house generously set back from the street in a garden setting is consistent with the neighbourhood character.

33. I have considered the conditions and deleted the council's draft condition requiring sealing and construction of the driveways of both lots. On inspection, I observed well constructed permeable gravel driveways to both houses in place which are consistent with the character of the area. Naturally the applicant will have to provide separate stormwater drainage from the house to the rear drainage easement, but no separate sealing or drainage of the driveways is necessary or desirable.

34. For these reasons the planning merits support the application.

RESTRICTIVE COVENANT

35. Under section 60(5) of the *Planning and Environment Act* 1987 the responsible authority (and the Tribunal) must not grant a permit allowing

---

[4] Clause 22.01-4

the removal or variation of a restrictive covenant unless satisfied on two matters:

- 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 removal or variation of the restrictive covenant; and
- if that owner has objected to the grant of the permit the objection is vexatious or not made in good faith.

36. It was agreed that the decision in McFarlane v Greater Dandenong City Council & Others[5] sets out guiding propositions on matters to be considered by the Tribunal in this context.

    1. It is for the Tribunal to determine whether it is satisfied on the balance of probabilities that any covenant beneficiary "will be unlikely to suffer detriment of any kind if the variation is permitted" in other words it is not a question of whether the Tribunal is satisfied there will be detriment: the Tribunal must be affirmatively satisfied that there will be none.
    2. Compliance with planning controls does not, of itself, and without, more, establish that a covenant beneficiary will be unlikely to suffer detriment of any kind. Consideration of a proposal from a planning perspective often requires a balancing of competing interests. There is no such balancing exercise involved in the consideration of the issue which arises under paragraph (a). The nature of the enquiry is fundamentally different.
    3. The mere assertion of the existence of a detriment is not sufficient to demonstrate its existence. On the other hand, loss of amenity will constitute a detriment, and in this regard amenity includes "an appeal to aesthetic judgement, which is difficult to measure, however the notion of "perceived detriment" specifically contemplates that this consideration is relevant to the enquiry.
    4. The determination must be made on the evidence before the Tribunal "including the appeal site and its environs".
    5. It is not necessary for an affected person to assert detriment. This is so for two reasons: first because the Tribunal must be affirmatively satisfied of a negative, namely that there will probably be no detriment of any kind; secondly the Tribunal is entitled to form its own views from the evidence.

37. The question therefore is whether the tribunal can be satisfied that any beneficiary of the covenant will be unlikely to suffer any detriment of any kind as a consequence of the permit to be granted for the variation of the covenant. I agree with council's submission that the tribunal must be

[5] [2002] VCAT 469 (26 June 2002)

satisfied affirmatively that there will be no detriment. Council came to the position that it is unable to conclude that any beneficiary of the covenant would be unlikely to suffer any detriment.

38. Mr Song referred to the decision of Hurley v Greater Geelong CC[6], where the Tribunal at paragraph [11] affirmed the propositions referred to above in McFarlane and commented in paragraphs [17] and [18] that section 60(5)(a) *'sets the bar extraordinarily high'*, and at [23] that *the current construction of section 80(5) PEA Act is such that it is almost impossible to vary a covenant.*

39. Council's submission was that the applicant has failed to demonstrate there will be a complete lack of detriment resulting from the variation of the covenant, that the subdivision would enable each dwelling to be sold individually, new boundary fences would most likely be erected and the frontage would be reduced. Additions to built form may occur (without the need for a planning permit) or alternatively existing dwellings may be replaced. In this way council submitted the variation would impact on the character of the area which the covenant is designed to maintain.

40. Mr Song referred to the Tribunal decision in Herrmann v Yarra Ranges SC[7] where the senior member made some comments as to the possibility of a subdivision. He said:

> 14. There was some mention of an existing application to subdivide the land. That is not before me, and I make no attempt to assess it. However, such a subdivision might create two lots (or possibly more) whereby there will then be an ability to erect detached houses on any lots not already containing a house without need to obtain planning permission. This would then mean that there would still be no indication of the proposed development, beyond the bare subdivision of the land.
>
> 15. It strikes me that the possibility of a simple subdivision, carrying with it such rights, is unlikely to persuade a responsible authority or a Tribunal to lift a covenant, or even to modify to the extent of allowing such subdivision. The rights that this might set loose for development without the need for further planning permission could be quite likely to occasion detriment to an owner of land nearby, or even relatively nearby, having the benefit of the restrictive covenant. It is, I think, unlikely that such responsible authority or Tribunal would be in a position to say that such a detriment was "unlikely".

41. In Herrmann the Senior Member commented at [18] on the failure of other beneficiaries to object:

> 18. … … The fact that the others have not objected might give some support to the notion that they do not think that they would suffer detriment by the removal of the covenant in relation to

[6] [2002] VCAT 1244 (10 October 2002)
[7] [2006] VCAT 1262 (27 June 2006)

> this land, although I do not think that such failure on their part is necessarily decisive. The paragraph requires the Tribunal to be satisfied that they are unlikely to suffer any detriment of any kind, whether they are so satisfied or not. They may not understand at all clearly what is involved. I think the absence of objection is relevant, but even so I still have to be satisfied.

42. Mr Merrigan for the applicant argued that this form of subdivision is specifically exempt from third party advertising and review of rights and from the normally applicable clause 56 provisions. He submitted there can be little doubt that the scheme intended that the subdivision of existing dwellings would be a relatively simple exercise.

43. He submitted it was difficult to envisage that this subdivision would cause any material detriment to owners benefiting. The existing residential use has caused no known problem for nearly 10 years, and the subdivision process or outcome will not adversely alter the existing or potential residential use.

44. He submitted that the objector is unlikely to suffer any detriment as the 2 dwellings exist. The frontage and area of the lots to be created have no relevance in relation to the grounds of objection. The existing covenant has been amended to provide for the 2 dwellings which have existed for 10 years. The proposed subdivision will not result in any changes to the *'feeling and structure of the area or alter the existing limitation on the number of dwellings'*.

45. Despite the comments in Hurley, the tribunal (including the member who decided Hurley has in fact varied and removed a number of covenants since section 60(5) was introduced in its present form. The tribunal will make an objective assessment of whether any objector is likely to suffer any detriment and has done so on many occasions, analysed what the objector has said and made a determination as to whether there are any grounds in the objector's position. In the years that have passed since Hurley was decided the tribunal has carried out its obligation to make an objective assessment of detriment and found on a number of occasions that the removal or variation of a covenant is appropriate.[8] Given the later decisions the comments in Hurley cannot be accepted as good law.

46. Generally the position is that owners of land who have not objected to the variation or removal after being given notice of the permit application or the VCAT proceedings are treated as not suffering any detriment as a result of the variation or removal, although VCAT must still be satisfied that no detriment is likely[9].

---

[8] See Paper by Horsfall and Doyle – Law Institute of Victoria – Restrictive Covenant Cases in VCAT (The Last Two Years) 2 March 2005.

[9] Schock v Yarra Ranges SC [2003] VCAT 1733 (24 November 2003), Ventura v Darebin CC [2004] VCAT 860 (16 May 2004), Pupillo v Moreland CC [2004] VCAT 529 (22 March 2004) and other decisions

47. Also in the case of Kontogioris v Darebin CC[10], there were objectors to the permit application who were beneficiaries but none lodged statements of grounds with VCAT or appeared at the hearing, and the member on an objective analysis applying the principles in McFarlane allowed the variation.

48. Despite the comments in Hurley and Herrmann, a number of variations have since been allowed by the tribunal on a finding by the tribunal that no detriment was likely to be suffered by any beneficiary and that the objection was groundless and therefore vexatious.

49. One difficulty in this case is that the objector has not filed a statement of grounds with VCAT or appeared at this hearing. All the tribunal has before it is her written objection to the council. Her objection given the facts is vague and imprecise and it is difficult to ascertain what detriment she perceives. No other beneficiary has objected including the owners of the adjoining land, being one of the original lots.

50. My finding is that I cannot find there is likely to be any detriment to any beneficiary arising from the subdivision of the land. The second dwelling already exists and a fence can be erected between the two houses without a permit. The construction of a fence is not a detriment that would flow from the variation of the covenant[11].

51. The physical characteristics of the land will remain the same. I have detailed above how the subdivision pattern of the area has already been substantially disturbed

52. Council raised the point made in Herrmann that the opportunities for development on a subdivided lot may be easier than that if the land was not subdivided. I do not necessarily agree with expression of this point in Herrmann that rights are *'set loose'*. Development still remains controlled in one way or another whether under the planning scheme or the building regulations, and it is quite possible that there will be a development on an unsubdivided lot which will be more dominant and obtrusive than a development on a smaller lot. Also planning permission can be sought and obtained for medium density housing on any lot. Thus I find that this ground cannot be accepted as it was not an issue raised by any objector and amounts to speculation by the council's representative. A line must be drawn between speculation as to possible detriments and an assessment of whether a beneficiary may or may not suffer a detriment.

53. Also the tribunal must assess detriment likely to be suffered by a beneficiary of the covenant.. The objector made no mention of this ground apart from preserving the present housing pattern which is not affected by the variation. It is a ground raised by the council which is not a party to the covenant. Council has made no detailed case this is a likely detriment in the

[10] [2004] VCAT 2391 (29 November 2004)
[11] Dukovski v Banyule CC [2003] VCAT 190 (13 February 2003)

present case, especially given the large houses being constructed on single lots without the need for permits in the shire.

54. Accordingly in this case I find that the beneficiaries of the covenant who have not objected to the variation will not suffer any detriment and also find that the objector is not likely to suffer any detriment as a consequence of the variation of the covenant as the physical state of the land will remain essentially the same.

55. The next issue is whether the objector's objection is vexatious or not made in good faith. Whilst an objection would be regarded as vexatious and not made in good faith if the proceedings were instituted to annoy or embarrass the person against whom they were brought, or brought for collateral purposes, they may also be properly regarded as vexatious if, irrespective of the motive of the litigant, they are groundless or having no merit[12].

56. In the circumstances of this case, as Mrs Grant has not lodged a statement of grounds or appeared before the tribunal and on the analysis of detriment above, I find that the claim of detriment expressed by her is so groundless as to lack merit and should be regarded as vexatious. In doing so I make no comment on her intentions or motives. Her objection was no doubt made honestly but I do not find it satisfies the test required in that it is groundless and has no merit.

Richard Horsfall
Senior Member

RH:HG/AM

[12] Ingberg v Bayside CC [2000] VCAT 2407 (30 November 2000) @ [104] and Castles & Maney v Bayside CC [2004] VCAT 864 (11 May 2004) @ [53]