



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 91**

**Restrictive Covenants**

**DISCUSSION PAPER**

**JUNE 1995**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

## **Commissioners**

### *Chairman*

Mr P G Creighton BJuris (Hons) LLB (Hons) (Western Australia) BCL (Oxford)

### *Members*

Dr P R Handford LLB (Birmingham) LLM PhD (Cambridge)

Ms C J McLure BJuris (Hons) LLB (Hons) (Western Australia) BCL (Oxford)

## **Officers**

### *Executive Officer and Director of Research*

Dr P R Handford LLB (Birmingham) LLM PhD (Cambridge)

### *Research Officers*

Mr M G Boylson LLB (Western Australia)

Mr A A Head LLB (Western Australia)

### *Staff*

Mrs S Blakey

Ms K L Chamberlain

Mr L McNamara BA (Murdoch)

Ms M A Ryan

---

The Commission's office is at:  
11th Floor, London House  
216 St George's Terrace  
PERTH Western Australia 6000

Telephone: (09) 481 3711

Facsimile: (09) 481 4197.

## Preface

The Commission has been asked to review the circumstances, if any, in which restrictive covenants should be used to restrict or regulate the subdivision, development or use of land or to preserve the amenity and aspect of land.

It has also been asked to consider whether local authorities have adequate power to regulate land in their area for the purpose of restricting or regulating the development or use of the land or preserving the amenity and aspect of the land, either permanently or for a specified period of time.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 29 September 1995.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them in its final report. Since the process of law reform is essentially public, copies of submissions made to the Commission will usually be made available on request to any person or organisation. However, if you would like all or any part of your submission or comment to be treated as confidential, please indicate this in your submission or comments. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1992*.

The research material on which this discussion paper is based can be studied at the Commission's office by anyone wishing to do so.

Comments should be sent to -

Peter Handford  
Executive Officer and Director of Research  
Law Reform Commission of Western Australia  
11th Floor, London House  
216 St George's Terrace  
PERTH WA 6000

Telephone: (09) 481 3711  
Facsimile: (09) 481 4197

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The pronouns and adjectives “he”, “him” and “his”, as used in this discussion paper, are not intended to convey the masculine gender alone, but include also the female equivalents “she”, “her” and “hers”.

# **Chapter 1**

## **INTRODUCTION**

### **1. TERMS OF REFERENCE**

1.1 The Commission has been asked:

"To review the circumstances, if any, in which restrictive covenants should be used to restrict or regulate the subdivision, development or use of land or to preserve the amenity and aspect of land and, in particular, to consider -

- (a) who can, or should, be a party to a restrictive covenant;
- (b) whether local authorities should have power beyond that of a private landowner to enter into restrictive covenants with owners of land in their area to regulate or restrict the development or use of the land or to preserve the amenity and aspect of land;
- (c) whether there should be any time limit on when a restrictive covenant should be valid;
- (d) the means of enforcing restrictive covenants; and
- (e) who should have standing to, or be empowered to, enforce a restrictive covenant to which they are not a party.

To consider whether local authorities have adequate power to regulate land in their area for the purpose of restricting or regulating the development or use of the land or preserving the amenity and aspect of the land, either permanently or for a specified period of time."

### **2. THE ORIGIN AND ROLE OF RESTRICTIVE COVENANTS**

1.2 A restrictive covenant is an obligation attached to a block of land which restricts the use or enjoyment of that block of land for the benefit of owners of other blocks and their

successors in title. A covenant is an agreement between two or more parties. Usually an agreement only binds the parties to it. A restrictive covenant, however, has a more enduring effect than other agreements since the restriction will be binding on subsequent purchasers of the land. The use of land may, therefore, be controlled long after the original parties to the agreement have disposed of their interest in the land concerned. For example, one block owner may agree with another block owner that he will not construct a house on his block other than in a prescribed building envelope. If the agreement satisfies the rules for creating a restrictive covenant,<sup>1</sup> the covenant is said to run with the burdened land. As a result, those who subsequently acquire the burdened block are under an obligation to the owners for the time being of the benefited block to refrain from constructing a house other than in the prescribed building envelope.

1.3 The use of restrictive covenants as a form of private land-use planning developed in the last century at a time when governments did not control land use as is done today:

"Land developers, in an effort to protect against diminution in value of land caused by inappropriate development of neighbouring property and to promote appreciation of the value of their land, sought to restrict the use of land by restrictive covenants at law. Although the common law provided the tortious remedy of nuisance to proscribe activity on land that injured the neighbour, this remedy was limited by the requirement that a positive action was necessary to support any relief and evidentiary requirements might be difficult to satisfy. In addition the type of development which a party wished to protect against, for example, neighbouring low standard development, might not provide the type of injury that was contemplated by the remedy of nuisance."<sup>2</sup>

Today the State Government and local authorities regulate and control town planning,<sup>3</sup> subdivisions and building, but there is still a demand for private land-use control. One writer, M J Weir, has suggested that this is due to the greater rigidity of restrictive covenants as compared to town planning schemes.<sup>4</sup> Because of the changing nature of the urban and semi-urban environment, moves have been made to make town planning more flexible. For example, town planning schemes must be reviewed at least every fifth year.<sup>5</sup> This relative flexibility is said to encourage ". . . the development of the use of the restrictive covenant, as a

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<sup>1</sup> Para 2.3 below.

<sup>2</sup> M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 Environmental and Planning Law Journal 137, 138.

<sup>3</sup> Town planning legislation was first enacted in Western Australia in 1928: *Town Planning and Development Act 1928*.

<sup>4</sup> M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 Environmental and Planning Law Journal 137, 140.

<sup>5</sup> *Town Planning and Development Act 1928* s 7AA.

primary goal of a covenantee is to preserve the economic value of land which can be affected by incompatible use of neighbouring property.<sup>6</sup>

1.4 Another reason for the continued demand for restrictive covenants is that town planning schemes, which deal with the use of land, by-laws and building codes may not deal with all the matters that may be necessary to protect the economic interests of a property owner. A developer may wish to preserve the amenity and aspect of the neighbourhood by various restrictions such as those which prohibit the use of materials in walls other than clay brick, concrete or stone or prohibit the use of reflective roofing on houses.

1.5 While restrictive covenants provide a private means of controlling the use of land or the amenity of an area, their existence can result in a conflict between a restrictive covenant and the public interests promoted by town planning schemes and local authority by-laws, including building codes. For example, a restrictive covenant made decades ago may limit the use of a block to a single residence but the town planning scheme for the area may permit the erection of a duplex on the block. In this case, a duplex cannot be built unless the Supreme Court or a town planning scheme wholly or partially extinguishes the covenant or those who own land benefited by the covenant agree to it being extinguished.

### **3. ISSUES FOR CONSIDERATION**

1.6 The main issues discussed in this paper are -

- \* Should all uses of restrictive covenants be abolished?
- \* Should particular uses of restrictive covenants be abolished and, if so, which ones?
- \* Should limitations be placed on the use of restrictive covenants by developers or others involved in creating new blocks of land?
- \* How should inconsistencies between restrictive covenants and a town planning scheme or by-laws be resolved?

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<sup>6</sup> M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 *Environmental and Planning Law Journal* 137, 140.

- \* How should restrictive covenants be enforced and should local authorities have standing to enforce them?
  
- \* Do local authorities require any additional powers to control the development or use of land?

#### **4. CONSULTATIONS**

1.7 The Commission wrote to all local authorities in Western Australia and a number of other organisations or associations seeking preliminary submissions. The Commission, by means of a press release, also invited preliminary submissions from persons interested. 22 preliminary submissions have been received.<sup>7</sup> A Commission officer has also held discussions on the project with a member of Parliament, officers of the Ministry for Planning, the Department of Land Administration, local authorities and members of the public. The Commission gratefully acknowledges the help of those who have made preliminary submissions or have otherwise assisted the Commission.

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<sup>7</sup> Except for one person who made a confidential submission, the names of those who made a preliminary submission are listed in Appendix I.

## Chapter 2

### RESTRICTIVE COVENANTS: PRIVATE REGULATION OF THE DEVELOPMENT OR USE OF LAND

#### 1. INTRODUCTION

2.1 The term restrictive covenant is used to describe a special obligation which imposes restrictions on the use or enjoyment of land for the benefit of other land. It differs from ordinary contractual obligations in that it is enforceable by and against persons between whom there may be no privity of contract<sup>1</sup> and between whom there is no privity of estate.<sup>2</sup> For this reason restrictive covenants are said to "run with the land". One circumstance in which they are valuable is where an owner of a block wishes to subdivide the block into two blocks, blocks 1 and 2, but wishes to preserve the view from block 1. A restrictive covenant can be created when one block is sold which limits the height of the building that can be constructed on block 2. The owner of block 2 and all subsequent owners are prohibited by the covenant from constructing a building on the block exceeding the height limit. Another example is where a developer of an area of land subdivides it and transfers a block to B taking a restrictive covenant for the protection of the other blocks in the subdivision. C, the purchaser of another block in the subdivision, may be able to enforce the covenant against B and successors in title to B's block. B and B's successors in title may also be able to enforce the covenant against C and the purchasers of other blocks in the subdivision and their successors in title.

2.2 Restrictive covenants fall into two broad categories: those that affect the use or development of land and those that are designed to preserve the amenity or aspect of an area of land. There is some overlap between these categories. Examples of restrictive covenants that affect the use or development of land are those that limit -

\* the number of buildings that may be constructed on a block; or

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<sup>1</sup> That is, the notion that only the parties to a contract may sue on it or be the subject of obligations created by it.

<sup>2</sup> That is, an immediate relationship such as that between a landlord and tenant.

- \* the use to which a block may be put. A covenant may provide that a block can be used only for residential purposes.

Examples of restrictive covenants that preserve the amenity or aspect of an area are those that-

- \* prohibit the use of materials in walls which are not clay brick, concrete or stone;
- \* prohibit the use of reflective roofing on buildings on the block;
- \* prohibit the erection of asbestos or similar fibre fencing;
- \* prohibit the erection of rain water tanks or clothes lines or hoists which are visible from the street;
- \* prohibit the placement of solar water heaters or air conditioners on roofs;
- \* limit the height of buildings that can be constructed on a block; or
- \* prohibit the erection of buildings on a block other than in a prescribed building envelope. There may be various reasons for such a limitation: it may protect an environmentally sensitive area such as a sand dune area on the coast or maintain separation between buildings in a semi-rural or bush setting.

## **2. CREATION OF RESTRICTIVE COVENANTS**

### **(a) Ensuring that the burden of a restrictive covenant runs with the land**

2.3 At common law the burden of a covenant does not run with freehold land so as to bind it in the hands of a person other than the original owner, that is, it does not run to a successor in title of the original owner. However, in equity a restrictive covenant is enforceable against all successors in title to the land whether or not they have notice of the covenant, except in the case of a purchaser for value of the legal estate without notice of the covenant. The burden of

the covenant runs with the land and is enforceable against successors in title if the following conditions exist -

- \* there is land for the benefit of which the covenant is given, that is, there must be both burdened and benefited land and the covenant must touch and concern the benefited land;<sup>3</sup>
- \* the burden of the covenant is intended to run with the land;<sup>4</sup>
- \* the covenant is negative in form, in that it requires the owner of the burdened land to refrain from doing certain acts or exercising certain rights, for example, to restrain a person from erecting buildings on the land,<sup>5</sup> to limit the height of a building or to use a dwelling as a private residence.<sup>6</sup> It must be a burden on the land, affecting it in the hands of successors in title.

2.4 A restrictive covenant cannot be enforced against a successor in title to the covenantor if the covenantee does not have land for the benefit of which the covenant is given.<sup>7</sup> Where the covenantee has no land, a successor in title to the original covenantor is bound neither in contract nor in equity. This limitation effectively means that a public authority, including a local authority, cannot enforce a restrictive covenant against a successor in title to the covenantor, whether or not it is for a public purpose, unless it has land capable of benefiting from the covenant. Except in the case of estate schemes,<sup>8</sup> a covenant cannot be annexed to land which the covenantee does not own at the time the covenant is made.<sup>9</sup>

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<sup>3</sup> If the covenant is annexed only to the whole of the land it is not enforceable unless it "touches and concerns" the whole as a whole: *In re Ballard's Conveyance* [1937] 1 Ch 473. If the covenant is annexed to each and every part it may be enforced by any person who has a part which is "touched and concerned" even though some parts may not be "touched and concerned": *Marquess of Zetland v Driver* [1939] 1 Ch 1. In Western Australia, unless it is expressly provided to the contrary, a restriction is deemed to be and always to have been annexed to the whole and to each part of that other land capable of benefiting from the restriction: *Property Law Act 1969* s 49.

<sup>4</sup> S 48 of the *Property Law Act 1969* provides that covenants affecting land are deemed to be made on behalf of the covenantor and his successors in title unless a contrary intention is expressed.

<sup>5</sup> Positive covenants, such as a covenant to carry out repairs, do not run with freehold land.

<sup>6</sup> *German v Chapman* (1877) 7 Ch D 271.

<sup>7</sup> *London County Council v Allen* [1914] 3 KB 642.

<sup>8</sup> Paras 2.5-2.8 below.

<sup>9</sup> *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293.

**(b) Building or estate schemes**

2.5 At the beginning of the century it was recognised that the above rules relating to the passing of the benefit and burden of restrictive covenants were not satisfactory to cope with the enforcement of restrictive covenants in estate schemes.<sup>10</sup> Under these schemes, developers of large-scale subdivisions include restrictions as to the future use or development of each of the blocks in the scheme. They are usually designed to enhance the value and amenity of the neighbourhood. The covenants are imposed on the understanding that each successor in title to the original owner is to have the benefit of the covenants entered into by every other person, whether such person took before or after him from a common vendor.<sup>11</sup> Unless there is a waiver or variation of the stipulations, the original vendor is also bound as against his purchasers in respect of any property still owned by him.<sup>12</sup>

2.6 In order to overcome limitations of the rules relating to the passing of the benefit and burden of restrictive covenants, special rules were developed relating to the enforcement of covenants contained in estate schemes. In the leading case, *Elliston v Reacher*, it was held that four requirements had to be established before an owner of a block is entitled in equity to enforce covenants entered into by the owner of another block or his predecessors with the common vendor, the developer, irrespective of the dates they purchased their block -

1. The title to a block must be derived from a common vendor. This rule has been relaxed in at least two circumstances -
  - (a) where a vendor dies after selling some of the blocks in a subdivision and the remaining blocks are sold by his successor in title;<sup>13</sup> and
  - (b) where blocks in a development are held by a number of developers but they intended to create a common scheme and have made arrangements to carry out this intention.<sup>14</sup>

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<sup>10</sup> See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) 691-692.

<sup>11</sup> *Elliston v Reacher* [1908] 2 Ch 374.

<sup>12</sup> *MacKenzie v Childers* (1889) 43 Ch D 265.

<sup>13</sup> *In re Dolphin's Conveyance* [1970] 1 Ch 654.

<sup>14</sup> *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623.

2. The blocks in the scheme should be subject to common restrictions, though there may be varying details as to particular blocks. This requirement has also been relaxed. For example, it has been held that the fact that nine of 115 blocks in a scheme were sold without restrictions did not vitiate the scheme.<sup>15</sup>

3. The restrictions were intended by the common vendor to be and were for the benefit of all the blocks intended to be sold. They need not be for the benefit of other land retained by the vendor.

4. The plaintiffs and defendants, or their predecessors in title, purchased their blocks from the common vendor on the basis that the restrictions were to enure for the benefit of the other blocks included in the scheme.

2.7 Some estate schemes contain a restrictive covenant to the effect that no building or structure is to be erected on a block without prior written approval of the developer. The developer might also prepare guidelines which are to be taken into account in granting approval and deal with matters such as the type of dwelling permitted and the building materials that can be used. Such restrictions may bind the land notwithstanding that it is necessary to go beyond the encumbrance on the title to know the precise restriction.<sup>16</sup>

**(c) Estate sub-schemes**

2.8 The owners of certain blocks in a valid estate scheme may agree amongst themselves that different or additional covenants will bind their blocks thus creating an estate sub-scheme. These covenants are enforceable against other owners of blocks in the sub-scheme, but do not affect the other owners of blocks in the head scheme.

**(d) Creating a restrictive covenant for the benefit of the Crown or a local authority**

2.9 Even if the Crown or a local authority does not own land capable of being benefited (that is, there is no dominant tenement), a restrictive covenant for the benefit of the Crown or a local authority can be created pursuant to section 33A of the *Public Works Act 1902*. Section 33A permits the creation of an easement in gross (that is, an easement without a

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<sup>15</sup> Ibid.

<sup>16</sup> *West Lakes Ltd v Makris* [1993] ANZ Conv R 193, 196-197.

dominant tenement) and further permits the benefit of a restriction as to use to be made appurtenant to such an easement.

2.10 Restrictive covenants benefiting a local authority may also be made by first creating some sort of easement (for example, a small right of carriageway or perhaps an easement for light and air) or transferring a small area of land, such as a drainage sump, to the authority and then making the relevant restrictive covenant appurtenant to that easement. However, one requirement which must be established before an owner of a block is entitled to enforce a covenant in an estate scheme is that the restriction must be intended by the developer to be and was for the benefit of all blocks in the scheme.<sup>17</sup> It may not be possible to establish this in relation to the land transferred to the council because it would not be intended that the authority would be an owner in the same manner as the other owners of blocks in the scheme with reciprocal rights, enforceable between all block owners and their successors in title.<sup>18</sup> If this were the case, the covenant would be enforceable only between the original parties to it, that is, the developer and the local authority.

2.11 Another device used to involve a local authority in a restrictive covenant is a deed<sup>19</sup> between a developer and a local authority. The deed between the developer and the local authority embodies the restrictive covenants. It contains a number of other clauses to ensure that the restrictive covenants are registered on the title of the blocks. In the deed the developer agrees not to sell a block to another person unless the purchaser has also entered into a deed with a similar effect. The developer also agrees to charge its interest in the subdivision in favour of the local authority and authorises the authority to lodge a caveat to prevent a transfer to a purchaser unless the restrictive covenants are created. However, it is debatable ". . . whether there is a chargeable interest between a subsequent purchaser and the Shire".<sup>20</sup> If not, the local authority could not ensure that transfers to a purchaser created a restrictive covenant. To enable the local authority to act in place of the developer in relation to some covenants, such as a covenant requiring a purchaser to obtain the developer's permission to make improvements on the land, the developer also gives the local authority an

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<sup>17</sup> Para 2.6 above.

<sup>18</sup> *City of Mitcham v Clothier* (1994) 62 SASR 394, 402.

<sup>19</sup> A deed is required by the Land Titles Office unless a restrictive covenant is created by a transfer of land: Department of Land Administration *Land Titles Registration Practice in Western Australia* (3rd ed 1994) para 7.150.

<sup>20</sup> *Marford Nominees Pty Ltd v State Planning Commission* (unreported) Town Planning Appeal Tribunal of Western Australia 23 February 1995, Appeal No 11 of 1994, 37.

irrevocable power of attorney to act for the developer. This device can only be used if the local authority is prepared to enter into the deed.<sup>21</sup>

**(e) Restrictive covenants created under legislation**

2.12 In Western Australia there are a number of situations in which restrictive covenants can be entered into in specific circumstances under legislation.<sup>22</sup> There are similar legislative examples in other jurisdictions. Under the *City of Perth Parking Facilities Act 1956*, for example, if the Council sells part of the land in a parking station or facility it may do so subject to such restrictions and conditions as the Council, with the approval of the Minister, imposes.<sup>23</sup> Where the Minister approves of any restrictions or conditions, he must lodge a memorial of the restrictions and conditions with the Registrar of Titles. The Registrar must enter a memorandum of the memorial in the register book. Every restriction or condition so entered binds the purchaser of the land and his successors in title (including the owners and occupiers for the time being of the land) other than the Council and may be enforced by the Council in any court of competent jurisdiction and the court may make such order as is necessary in that regard. Any restrictions or conditions then applicable to land may, with the approval of the Minister, be varied. Notice of the variation must be given to the Registrar.

**3. RESTRICTIVE COVENANTS AND THE *TRANSFER OF LAND ACT 1893***

2.13 The Registrar of Titles is required to show a restrictive covenant as an encumbrance on the title to the land affected by the covenant.<sup>24</sup> The Registrar is not required to make an entry relating to a restrictive covenant on the certificate of title of any person entitled to the benefit of it<sup>25</sup> and does not do so in practice. Where the covenant is shown as an encumbrance, it binds subsequent registered proprietors if it is a type of covenant the burden of which runs with the land, but it does not convert an equitable into a legal interest.<sup>26</sup> That is, the equitable rules regulating the running of the benefit and burden of restrictive covenants

<sup>21</sup> *Bunbury Industrial Park Pty Ltd v State Planning Commission* (unreported) Town Planning Appeal Tribunal of Western Australia 25 November 1994, Appeal No 12 of 1994, 9.

<sup>22</sup> *Aboriginal Heritage Act 1972* s 27; *City of Perth Parking Facilities Act 1956* s 11B; *Country Areas Water Supply Act 1947* s 12EB; *Heritage of Western Australia Act 1990* s 29; *National Trust of Australia (WA) Act 1964* s 21A.

<sup>23</sup> *City of Perth Parking Facilities Act 1956* s 11B(2).  
The restrictions or conditions may vary as between different purchasers and as between separate occupancies within the same land, building or structure.

<sup>24</sup> *Transfer of Land Act 1893* s 69.

<sup>25</sup> Id s 129A(2).

<sup>26</sup> A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) 680.

are still applicable despite notification on the title. In relation to the burden, registration of the covenant denies a person who acquires a block and becomes the registered proprietor of it the right to rely on the indefeasibility provisions of the *Transfer of Land Act 1893*.<sup>27</sup>

#### 4. RESTRICTIVE COVENANTS AND THE *PROPERTY LAW ACT 1969*

2.14 Under the *Property Law Act 1969*<sup>28</sup> a person may take an immediate or other interest in the benefit of any covenant over or respecting land, although he is not named as a party to the conveyance or other instrument that relates to the land. In these circumstances the covenant may also be enforced by third parties, such as a local authority, who are neither parties to the covenant nor assignees or other successors-in-title to the parties to the covenant. According to Bradbrook, MacCallum and Moore the provision merely repeals the common law rule that only a person who is expressly named as a party to a covenant may enforce it.<sup>29</sup> According to them "where X covenants with Y and the owners of adjoining land, the owners of the adjoining land may sue to enforce the covenant by virtue" of the provision.<sup>30</sup> A significant limitation, however, is that the provision only operates in favour of persons who are in existence and identifiable at the date of the covenant. It therefore does not allow a covenant to be enforced by a future owner.

#### 5. DISCHARGE OR MODIFICATION OF RESTRICTIVE COVENANTS

##### (a) Introduction

2.15 Restrictive covenants may be modified or discharged in five ways -<sup>31</sup>

- \* agreement;
- \* laches or acquiescence;
- \* unity of ownership;
- \* court order; and
- \* operation of planning consent.

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<sup>27</sup> *Whitfords Beach Pty Ltd v Gadsdon* (1992) 6 WAR 537, 552.

<sup>28</sup> S 11(1).

<sup>29</sup> A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) 673.

<sup>30</sup> *Ibid.*

<sup>31</sup> See generally A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) 697-704.

The first four ways are discussed briefly below. The fifth way is discussed in the following chapter.<sup>32</sup>

**(b) Agreement**

2.16 A restrictive covenant may be discharged or modified by agreement by all persons interested in the land affected by the covenant giving their consent to the discharge or modification.<sup>33</sup> In the case of Torrens system land, a memorandum of the discharge or modification must be entered in the register book.<sup>34</sup>

**(c) Laches or acquiescence**

2.17 Where a person is guilty of laches or acquiescence, the general equitable rules prevent the plaintiff obtaining relief in the discretion of the court. Laches is an ". . . equitable defence based on undue delay on the part of the plaintiff in bringing a case. It is most likely to succeed where the delay has been prejudicial to the defendant or a third party, and where an inference can be drawn from the delay that the plaintiff acquiesced in the infringement of the right for which he/she now claims relief".<sup>35</sup> Acquiescence involves assent, either expressed or implied from conduct, to an infringement of rights by which the right to equitable relief is lost.

**(d) Unity of ownership**

2.18 If one person acquires a fee simple estate in possession in both the benefited and burdened land, any restrictive covenant affecting it is discharged and does not revive if the burdened land is later sold. This rule does not apply to estate schemes.<sup>36</sup>

**(e) Court order**

2.19 Where Torrens system land is subject to a restrictive covenant, the Supreme Court may on the application<sup>37</sup> of any person interested in the burdened land order that the covenant

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<sup>32</sup> Paras 3.19-3.20 below.

<sup>33</sup> See *Transfer of Land Act 1893* s 129B(1).

<sup>34</sup> *Transfer of Land Act* s 129B(2).

<sup>35</sup> *The CCH Macquarie Dictionary of Law* (2nd ed 1993) 99.

<sup>36</sup> See paras 2.5-2.8 above.

be wholly or partially extinguished, discharged or modified.<sup>38</sup> That may be done if the Court is satisfied that -

1. by reason of any change in the use of any land to which the restriction is annexed, or changes in the character of the property or neighbourhood or other material circumstances, the restriction ought to be deemed to have been abandoned or to be obsolete or that the continued existence thereof would impede the reasonable use of the land without securing practical benefits to other persons or would, unless modified, so impede such use;
2. the persons entitled to the benefit of the restriction have agreed to it being wholly or partially extinguished, discharged or modified or may reasonably be considered to have waived the benefit of the restriction wholly or in part; or
3. the proposed extinguishment, discharge or modification will not substantially<sup>39</sup> injure the persons entitled to the benefit of the restriction.

When proceedings are instituted to enforce any rights arising out of the breach of a restrictive covenant affecting Torrens system land, any person against whom the proceedings are instituted may apply in those proceedings to the Court for an order in the above terms.<sup>40</sup> The register book must, on application, be amended to give effect to the order in respect of all

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<sup>37</sup> The Court may direct that notice of the application be given to the relevant local authority and to any other person as the Court may order: *Transfer of Land Act 1893* s 129C(4). The form of the notice is set out in the schedule to Form 12 of the Common Forms of the *Rules of the Supreme Court 1971*. In practice, it may also be necessary to publish the notice in the public notices column of "The West Australian" newspaper.

An application under s 129C is made by an originating summons to the Supreme Court, returnable before a Registrar. Once the notice has been given and any other directions complied with, where it appears that the application will not be opposed, a Registrar may proceed to deal with the application: *Rules of the Supreme Court 1971* O 58 r 30(2).

<sup>38</sup> *Transfer of Land Act 1893* s 129C(1).

<sup>39</sup> In Victoria it has been held that "substantially" involves a dichotomy between "cases involving some, genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other": *Greenwood v Burrows* [1993] ANZ Conv R 197, 204. In New South Wales it has been held that "substantially" "connotes injury which has substance in the sense of being real or appreciable": *Webster v Bradac* [1994] ANZ Conv R 260, 262. The injury may, for example, be economic (a reduction in the value of the land benefited), physical (subjection to noise or traffic) or intangible (impairment of views).

<sup>40</sup> *Transfer of Land Act 1893* s 129C(2).

certificates of title specified in the order.<sup>41</sup> The costs of and incidental to an application for a court order cannot be awarded against the defendant or respondent in any event.<sup>42</sup>

2.20 In *Kort Pty Ltd v Shaw*<sup>43</sup> an application was made to discharge or modify a restrictive covenant which provided that the burdened land should be used only for a single residence. At the time of the application the local town planning scheme permitted multiple residences to be built on the block and such a development had been approved by the local council. The discharge or modification of the restriction was refused because there were practical benefits to be gained by neighbouring owners by the continuation of the covenant and the covenant did not impede the reasonable user of the land. The applicant could not establish that discharge would not substantially injure persons entitled to the benefit of the restriction.<sup>44</sup> In such a case, therefore, a restrictive covenant may operate to frustrate the objects sought to be achieved by a town planning scheme.

## 6. ENFORCEMENT OF RESTRICTIVE COVENANTS

2.21 In most cases a restrictive covenant will be enforceable only in the Supreme Court and only in equity.<sup>45</sup> The remedies available are prohibitory,<sup>46</sup> mandatory,<sup>47</sup> *quia timet*,<sup>48</sup> and interlocutory injunctions<sup>49</sup> to restrain breaches of restrictive covenants, and declarations. Injunctions are discretionary remedies and do not issue as of right. In addition to or in substitution for an injunction, the court may award equitable damages for a breach of a restrictive covenant.<sup>50</sup>

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<sup>41</sup> Id s 129C(7).

<sup>42</sup> Id s 129C(8).

<sup>43</sup> [1983] WAR 113. See also *Perth Construction Pty Ltd v Mount Lawley Pty Ltd* (1955) 57 WALR 41, *Smith v Australian Real Estate & Investment Co Ltd* [1964] WAR 163 and *Re Robinson* [1972] VR 278 (discussed at (1972) 46 ALJ 533).

<sup>44</sup> For a case in which this ground was established see *Wall v Australian Real Estate Investment Co Ltd* [1978] WAR 187.

<sup>45</sup> That is, in cases other than those where damages may be recovered at law for breach of a covenant by the covenantee or his assignee or successor-in-title to whom the benefit of the covenant has run at law against the covenantor or his personal representative: A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 17.32.

<sup>46</sup> An injunction to restrain a defendant from performing a particular act.

<sup>47</sup> An injunction to order the defendant to perform a particular act, for example, to demolish a structure built in contravention of a restrictive covenant.

<sup>48</sup> An action "for the purpose of quieting a present apprehension of a probable future injury to property": *Jowitt's Dictionary of English Law* (2nd ed 1977) 1487 -

<sup>49</sup> An injunction to prevent the occurrence of specific acts until the rights of the parties are determined at the hearing of the main action.

<sup>50</sup> *Supreme Court Act 1935* s 25(10). See B Kercher and M Noone *Remedies* (2nd ed 1990) 213-217, A J Bradbrook and M A Neave *Easements and Restrictive Covenants in Australia* (1981) 348-353 and P M McDermott *Equitable Damages* (1994).

2.22 The following general rules apply to the question of whether damages should be granted in addition to or in substitution for an injunction -

1. A person who commits a wrongful act should not be entitled to ask the court to sanction his doing so by assessing damages to compensate his neighbour for the breach of his neighbour's rights. In such cases the rule is "not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction".<sup>51</sup>
2. However, damages in substitution for an injunction may be awarded if the "plaintiff by his acts or laches has disentitled himself to an injunction".<sup>52</sup>
3. A good working rule is that damages in substitution for an injunction may also be awarded:
  - "(1) If the injury to the plaintiff's legal rights is small,
  - (2) And is one which is capable of being estimated in money,
  - (3) And is one which can be adequately compensated by a small money payment,
  - (4) And the case is one in which it would be oppressive to the defendant to grant an injunction".<sup>53</sup>
4. Even if the requirements in item 3 exist, a defendant may disentitle himself from asking for damages by his conduct, for example, by "hurrying up his buildings so as if possible to avoid an injunction".<sup>54</sup>

2.23 One example of damages being given as a substitute for a mandatory injunction is the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*<sup>55</sup> where the damages ordered to be paid was such a sum of money as might reasonably have been demanded by the plaintiffs from the developer as a quid pro quo for relaxing the covenant. In that case, a developer built

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<sup>51</sup> *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id* 322-323.

<sup>54</sup> *Id* 323.

<sup>55</sup> [1974] 1 WLR 798.

a number of houses in breach of a covenant preventing it from building except in accordance with a layout plan submitted to and approved by the plaintiffs. The plaintiffs commenced proceedings for an injunction shortly after the building work began but did not seek interlocutory relief. All houses were completed by the date of the trial. The trial judge refused to issue the injunction because it would ". . . be an unpardonable waste of much needed houses to direct that they now be pulled down".<sup>56</sup>

2.24 In a recent case, *Jaggard v Sawyer*,<sup>57</sup> it was also decided that it would be oppressive to grant an injunction and the plaintiff was awarded damages based on the price the defendant might reasonably have been required to pay the plaintiff for release from the covenant. That case involved an estate development served by a private road. The defendant built a house on a block which was not part of the estate but was contiguous with a block in the estate and which was serviced by the private road through the block which was part of the estate. The defendant believed that the road was a public road. The plaintiff threatened to bring proceedings for an injunction before construction began but did not do so until two months after construction of the house began and when building was at an advanced stage. The judge found that the defendant had not acted in blatant and calculated disregard of the plaintiff's rights. Although the defendant had known of the covenant, he had failed to appreciate its effect. It would have weighed against a finding of oppression if the defendant had acted in blatant and calculated disregard of the plaintiff's rights, of which he was aware.<sup>58</sup>

2.25 If damages are given in addition to an injunction they are to compensate for the injury which has been done. The injunction will prevent its continuance or repetition. If damages are given in substitution for an injunction they cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the threatened act. If no injury has been sustained, the damages will be only for damage to be sustained in the future by injuries which the injunction, if granted, would have prevented.<sup>59</sup> "The doctrine of res judicata operates to prevent the plaintiff and his successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the plaintiff has been fully compensated."<sup>60</sup>

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<sup>56</sup> Id 811.

<sup>57</sup> [1995] 1 WLR 269.

<sup>58</sup> Id 283.

<sup>59</sup> *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851.

<sup>60</sup> *Jaggard v Sawyer* [1995] 1 WLR 269, 286.

2.26 Unlike the Supreme Court, the District Court of Western Australia does not have a general equitable jurisdiction. Apart from three instances,<sup>61</sup> claims for equitable relief as principal relief are beyond the jurisdiction of the District Court.<sup>62</sup> It may, however, grant equitable remedies as an ancillary power of the Court to be exercised in the determination of claims otherwise within the jurisdiction of the Court.<sup>63</sup> Except in cases where damages may be recovered at law for breach of a covenant by the covenantee or his assignee or successor in title to whom the benefit of the covenant has run at law against the covenantor, a claim in respect of a breach of a restrictive covenant will be merely an equitable claim and as a claim for principal relief it will be beyond the jurisdiction of the Court.<sup>64</sup>

2.27 Local Courts, like the District Court, do not have a general equitable jurisdiction. However, Local Courts do have jurisdiction to determine an equitable claim or demand in respect of which the only relief sought is the recovery of a sum of money or damages, whether liquidated or unliquidated, and the amount claimed is not more than \$25,000.<sup>65</sup> As damages in lieu of an injunction are, under section 25(10) of the *Supreme Court Act 1935*, a form of equitable claim for damages<sup>66</sup> section 32 of the *Local Courts Act 1904* confers on Local Courts jurisdiction in respect of such a claim for damages for a breach of a restrictive covenant. For this purpose, section 33 of the *Local Courts Act 1904* gives the Local Courts all the powers of the Supreme Court in its equitable jurisdiction including the power to award damages in lieu of the injunction that the Local Courts have no power to grant.<sup>67</sup>

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<sup>61</sup> *District Court of Western Australia Act 1969* ss 50(1)(b) (relating to partnerships), 50(1)(ba) (relating to deceased estates) and 50(1)(bb) (an action for specific performance).

<sup>62</sup> *Commercial Developments Pty Ltd (t/as Don Rogers Motors Pty Ltd) v Mercantile Mutual Insurance (Workers' Compensation) Limited* (1991) 5 WAR 208, 217.

<sup>63</sup> Ibid.

<sup>64</sup> It is, therefore, not necessary to consider whether an action for an injunction to prevent a breach of a restrictive covenant is within the category of "personal actions" for which the District Court does have jurisdiction: *Commercial Developments Pty Ltd (t/as Don Rogers Motors Pty Ltd) v Mercantile Mutual Insurance (Workers' Compensation) Limited* (1991) 5 WAR 208, 219.

<sup>65</sup> *Local Courts Act 1904* s 32. See *Dunlop Olympic Ltd v Ellis* [1986] WAR 8, 15 where one judge, Brinsden J, held that a claim for rent under a void lease of which equity would grant specific performance is an equitable claim within the meaning of s 32.

<sup>66</sup> See *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 256.

<sup>67</sup> Ibid.

## Chapter 3

### PUBLIC REGULATION OF THE DEVELOPMENT OR USE OF LAND

#### 1. INTRODUCTION

3.1 There is a series of mechanisms by which public authorities regulate the development or use of land in Western Australia. They apply when new blocks of land are created, when they are developed by building or other works or when they are used for various purposes. Those mechanisms relevant to a discussion of the use of restrictive covenants as a means of private land use control are discussed below.

#### 2. CONTROL OF THE CREATION OF BLOCKS OF LAND

3.2 Responsibility for approving plans for the creation of new blocks of land by the subdivision of a block of land lies with the Western Australian Planning Commission.<sup>1</sup> Local authorities are not directly responsible for this process. However, where a plan for the subdivision of a block may "affect the powers or functions" of a local authority,<sup>2</sup> the Commission is required to send a plan of subdivision to the authority for "objections or recommendations". The Commission may also refer the plan to other public bodies under this provision. Having considered any objections or recommendations, the Commission may approve the subdivision subject to such conditions as it thinks fit.<sup>3</sup> There is a right of appeal from the Commission's decision to the Minister or the Town Planning Appeal Tribunal.<sup>4</sup> Any conditions imposed should relate to the development and be in accordance with town planning principles.<sup>5</sup> They must also be capable of being "carried out before the approval becomes

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<sup>1</sup> *Town Planning and Development Act 1928* s 20(1)(a).

<sup>2</sup> *Id* s 24(1).

<sup>3</sup> *Id* s 24(3). The Town Planning Court of Western Australia in *Della-Vedova v Town Planning Board* 8 June 1978 (unreported but cited by C Wheeler *Role of Town Planning and Local Authority Policies in Relation to Development Applications* Paper No 3, 9 Law Society of Western Australia Seminar on Town Planning and Local Government (1986)) stated:

"There would seem . . . to be very little point in obliging the Board to refer the applications to these organisations unless it is able to exercise its discretion if it thought fit, based on any objection or recommendation any such organisation may furnish to it."

<sup>4</sup> *Town Planning and Development Act 1928* ss 26(1)(a) and 39(1).

<sup>5</sup> *Lloyd v Robinson* (1962) 107 CLR 142, 153.

effective."<sup>6</sup> A condition which survives the effective approval is not so capable.<sup>7</sup> The Registrar of Titles cannot issue a certificate of title for land the subject of a subdivision unless the subdivision has been approved by the Commission.<sup>8</sup>

3.3 The subdivision of land involves the preparation and submission to the Western Australian Planning Commission of a detailed plan of survey setting out details of streets, the blocks to be created, their sizes and frontages to roads, drainage, sewerage and water, underground power, and the provision of public open space. Conditions imposed on the approval of the plan will vary between subdivisions but might include construction of a dual use path network or the provision of a uniform style of fencing along the residential block boundaries abutting any public open space and drainage reserves to the satisfaction of the local authority. Generally the conditions imposed on the approval of a plan of subdivision do not relate to or conflict with matters dealt with by restrictive covenants.

### 3. TOWN PLANNING SCHEMES

#### (a) Creation or amendment

3.4 A town planning scheme is the principal means that a local authority has to regulate land in its area for the purpose of restricting or regulating its development or use or preserving its amenity and aspect.<sup>9</sup> These schemes are made under the *Town Planning and Development Act 1928*. A town planning scheme may be made with the general object of improving and developing land in a local authority's area and making suitable provision for the use of land for building or other purposes and for all or any of the purposes, provisions, powers or works set out in the First Schedule of the Act.<sup>10</sup>

3.5 In the Perth Metropolitan Region,<sup>11</sup> a town planning scheme must be in accordance with and consistent with the Metropolitan Region Scheme.<sup>12</sup> The Scheme is a structure plan

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<sup>6</sup> *Town Planning and Development Act 1928* s 20(1).

<sup>7</sup> *City Car Park Pty Ltd v Town Planning Board* (1985) 2 SR(WA) 301, 310.

<sup>8</sup> *Town Planning and Development Act 1928* s 20(2).

<sup>9</sup> In some circumstances, in the absence of a town planning scheme, the Minister may make an interim development order for regulating, restricting or prohibiting the development of land: *Town Planning and Development Act 1928* s 7B.

<sup>10</sup> S 6.

<sup>11</sup> That is, the region described in the Third Schedule of the *Metropolitan Region Town Planning Scheme Act 1959*.

<sup>12</sup> *Metropolitan Region Town Planning Scheme Act 1959* s 34.

with broad categories of zonings within which town planning schemes provide local planning detail. Its purpose is to ensure the orderly development of land within the metropolitan region and to set aside land for parks, regional roads and other public purposes.

3.6 A town planning scheme is prepared by a local authority often in consultation with occupiers and owners of land in the municipality.<sup>13</sup> Once it is prepared it must be advertised for public inspection.<sup>14</sup> Members of the public may make submissions to the local authority, which must consider all submissions.<sup>15</sup> After considering any submissions made to it, the local authority must adopt the scheme, with or without modification, or resolve not to proceed with it. Once adopted, the scheme must be sent to the Western Australian Planning Commission which must examine the scheme and submit its recommendations to the Minister. The Minister may approve the scheme, refuse to approve it or require the local authority to modify it in such manner as he specifies before it is resubmitted for his approval.<sup>16</sup> This process is obviously time consuming and complex.

3.7 Under the *Town Planning and Development Act 1928*, the Minister may by regulation prescribe a set of general provisions for carrying out the general objects of town planning schemes, and in particular for dealing with matters set out in the First Schedule.<sup>17</sup> Where a town planning scheme is made in respect of an area, the general provisions have effect as part of the scheme, except so far as the scheme provides for the variation or exclusion of a provision.<sup>18</sup> Special provisions may also be inserted in a town planning scheme providing for any matter which may be dealt with by general provisions.<sup>19</sup> Matters set out in the First Schedule include:

"6. The replanning or reconstruction of the scheme area, or any part thereof, including any provisions necessary for -

- (f) adjustment of rights between . . . owners or other persons interested in... lands, roads, streets, or rights of way.

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<sup>13</sup> Amendments to schemes are dealt with in a similar manner.

<sup>14</sup> *Town Planning and Development Act 1928* s 7(2).

<sup>15</sup> *Town Planning Regulations 1967* reg 17(1).

<sup>16</sup> *Town Planning and Development Act 1928* s 7(2a).

<sup>17</sup> Id s 8(1).

The regulations no longer set out these general provisions but the Ministry for Planning provides local authorities with a Model Scheme Text. Reg 11(1) of the *Town Planning Regulations 1967* provides that a scheme text ". . . shall be prepared in such manner and form as the Commission may require."

<sup>18</sup> *Town Planning and Development Act 1928* s 8(1a).

<sup>19</sup> Id s 8(2)(c).

15. The extinction or variation of any right-of-way or easement, public or private, or of any restrictive covenant or covenants affecting land."

3.8 In preparing or amending a town planning scheme a local authority must have due regard to any approved statement of planning policy prepared under the *Town Planning and Development Act 1928*<sup>20</sup> by the Western Australian Planning Commission with the approval of the Minister which affects its district.<sup>21</sup> If the scheme provides that a specified statement of planning policy shall be read as part of the scheme, the scheme has effect as if the statement of planning policy was set out in full in the scheme.<sup>22</sup> Statement of Planning Policy (No 1) deals with matters such as the area of land required for each kind of dwelling, plot ratios and setbacks from boundaries.

### (b) Zones

3.9 Town planning schemes set zones for land use in the area covered by the scheme. Land may, for example, be zoned residential, commercial, light industrial, rural or special rural. In relation to particular zones certain standards may be set including the minimum size of blocks and other matters such as the minimum setback of buildings from boundaries.

3.10 In the case of residential zones, unless a scheme otherwise provides, uniform conditions are imposed under a Statement of Planning Policy prepared by the Ministry for Planning called the Residential Planning Codes.<sup>23</sup> This Code deals with single houses, grouped dwellings,<sup>24</sup> multiple dwellings<sup>25</sup> and special purpose dwellings.<sup>26</sup> Residential land is given a code according to Table 1 of the Residential Planning Codes, for example, R10. This code determines the type of residence that can be constructed on a block. If a block is zoned R10, for example, it can be used for a single house or a grouped dwelling. The minimum area of lot per dwelling is 1000 square metres: that is, if the lot is only 1000 square metres only

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<sup>20</sup> S 5AA which provides for the preparation of statements of planning policy. Statement of Planning Policy No 1 Residential Planning Codes (as amended 1991) was published in the Government Gazette on 13 December 1991.

<sup>21</sup> *Town Planning and Development Act 1928* s 7(5)(a).

<sup>22</sup> Id s 7(5)(c).

<sup>23</sup> Government Gazette 13 December 1991, 6265.

<sup>24</sup> One of two or more dwellings on the same block such that no dwelling is placed wholly or partly vertically above another, except where special conditions of landscape or topography dictate otherwise.

<sup>25</sup> A dwelling in a group of more than one where any part of a dwelling is vertically above a part of any other.

<sup>26</sup> For example, a dwelling designed for the accommodation of aged or dependent persons.

one residence can be built on the block. At least 60% of the block must be open space and at least two car parking spaces must be provided for each block.

3.11 The Residential Planning Codes also authorise Councils to impose conditions on a development relating to the amenity of the development. Clause 1.7.1 of the Code provides that the Council may impose conditions relating to:

- "(a) the height or location of buildings;
- (b) the preservation of existing trees or areas or buildings of architectural or historical interest;
- (c) building materials and finishes where these relate to the preservation of local character and the amenity of the area generally;
- (d) the dispersal of building bulk in order to minimise its impact;
- (e) an increase in building setbacks where the adjoining land is controlled under a lower density residential code in order to ensure adequate protection for adjoining residents;
- (f) the location and orientation of a building or buildings on a lot in order to achieve higher standards of daylighting, sunshine or privacy or to avoid visual monotony in the street scene as a whole."

To this end, town planning schemes may provide, for example, that the Council must be satisfied that the appearance of a proposed building will not destroy local amenities and will be in harmony with the exterior designs of adjoining buildings. Town planning schemes may also require plans to be approved showing the landscape of a block including the quantity of shrubs to be planted. They may also control the use of solar heaters or air-conditioners by requiring, for example, that they are sympathetically integrated with the shape or form of the roof and are of a colour which complements the colour of the roof.

3.12 Another category of land zoning is special rural. Special conditions apply to such land depending on its location and physical condition. For example, those conditions might -

- \* limit block sizes to a minimum of two hectares;
- \* provide that the block can be used only for residential or equestrian purposes;
- \* prohibit the keeping of livestock and poultry for commercial purposes;

- \* require that the land be managed so as to avoid the land being laid bare of vegetation resulting in loose, wind erodible conditions; or
- \* limit the number of animals such as horses that can be kept on each block.

**(c) Breaches of town planning schemes**

3.13 A person who contravenes or fails to comply with the provisions of a town planning scheme is guilty of an offence carrying a penalty of \$50,000, and a daily penalty of \$5,000.<sup>27</sup> It is also an offence to commence or continue to carry out any development which is required to comply with a town planning scheme otherwise than in accordance with the scheme or with any condition imposed with respect to the development by the responsible authority.

3.14 The responsible authority also has power, after giving notice, to remove or alter any building or other work which has been commenced or continued which is in contravention of the scheme.<sup>28</sup> Any expenses incurred in so doing may be recovered from the person in default.<sup>29</sup> If any question arises whether any building or work contravenes a town planning scheme, the question can be referred to the Minister as arbitrator whose decision shall be final and conclusive.<sup>30</sup>

**(d) Conflicts between town planning schemes and restrictive covenants**

3.15 It is not unusual for there to be conflict between a town planning scheme and a restrictive covenant. This can occur where a restrictive covenant provides, for example, that not more than one residence can be built on a block but the town planning scheme allows for a duplex to be built on it or for the block to be used for commercial purposes.

**4. PLANNING POLICIES<sup>31</sup>**

3.16 Another means used by a local authority to regulate the development or use of land in its area is the adoption of planning policies under town planning schemes that set minimum

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<sup>27</sup> *Town Planning and Development Act 1928* s 10(4)(a)(i).

<sup>28</sup> *Id* s 10(1).

<sup>29</sup> *Id* s 10(2).

<sup>30</sup> *Id* s 10(3).

<sup>31</sup> Planning policies which are adopted by local authorities should be distinguished from statements of planning policy which are prepared by the Western Australian Planning Commission with the approval of the Minister.

standards for particular areas or districts in the town planning scheme area.<sup>32</sup> They may be prepared in conjunction with a developer as an alternative to the use of restrictive covenants. Standards similar to those set out in restrictive covenants can be incorporated in planning policies.<sup>33</sup> Before a policy can become operative the Council must publicise details of where it may be inspected. Policies which may be inconsistent with the town planning scheme must be submitted to the Western Australian Planning Commission for consideration and advice. The Council must review the policy in the light of any submissions made and advice received. It must then adopt the policy, with or without modifications, or decide not to proceed with it. Where it is adopted, notice of that adoption must be given in a newspaper circulating within the scheme area. A policy does not bind the Council in respect of any application for planning approval but the Council must have due regard to its provisions and objectives before making a decision. Developments in areas covered by planning policies can, therefore, be managed in the same way as other aspects of town planning. As with town planning schemes, planning policies can be amended, in the same way as a policy becomes operative, if it is warranted by a change in any circumstances in the area.

## 5. BUILDING CODE OF AUSTRALIA

3.17 Subject to various exemptions, buildings must comply with standards set out in the Building Code of Australia 1990 (or any variations made in Western Australia) published by the Australian Uniform Building Regulations Co-ordinating Council.<sup>34</sup> The Code provides generally that every building must be constructed in a proper and workmanlike manner, using materials that are not faulty or unsuitable for the purpose for which they are intended.<sup>35</sup> It also sets standards for particular matters including fire resistance of building elements, structure and loads, damp and weatherproofing, light and ventilation, noise transmission and insulation.

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<sup>32</sup> For example, the City of Wanneroo Town Planning Scheme No 1 (as amended) contains provisions for the making of Planning Policies. These provisions are set out in Appendix II. They are based on the Model Scheme Text prepared by the Ministry for Planning.

There is no specific power to make planning policies. They are authorised under a number of clauses of the first Schedule of the *Town Planning and Development Act 1928*: cls 5, 7, 8 and 9.

<sup>33</sup> In accordance with the provisions in the City of Wanneroo's Town Planning Scheme, design guidelines have been prepared for a number of subdivisions and have been adopted by the Council as policy for applications for building approval in the areas covered by the guidelines.

<sup>34</sup> The Code was adopted in Western Australia by the Building Regulations 1989 cl 5(1).

<sup>35</sup> Building Code of Australia A2.1.

## 6. USE OF RESTRICTIVE COVENANTS IN TOWN PLANNING

3.18 As part of its power to approve subdivisions of land,<sup>36</sup> the Western Australian Planning Commission has, in exceptional circumstances, required a developer to impose restrictive covenants on an estate development as a condition of the approval of a subdivision. The Town Planning Appeal Tribunal, on an appeal from a decision of the Western Australian Planning Commission, has also from time to time imposed a condition on the approval of a subdivision requiring the imposition of restrictive covenants. This is usually done to provide land management controls where this has not been done under the town planning scheme of the relevant local authority. Such a condition can be used, for example, where land is suitable for subdivision as if it were in a special rural zone, with the controls which that zoning involves, but is at the time zoned for general farming. In this case, restrictive covenants can be used to impose special rural zone controls either indefinitely or until the land is rezoned as special rural zone.<sup>37</sup> It is true that a condition of a continuing nature cannot be imposed on approval of a subdivision. However, a condition requiring the imposition of a restrictive covenant is not regarded as being of a continuing nature even though compliance with the covenant involves the assumption of a continuing obligation. As the local authority does not usually have land capable of benefiting from a restrictive covenant, it is necessary to rely on some device<sup>38</sup> to ensure that the local authority has the benefit of the covenant and is therefore in a position to enforce it.

## 7. EXTINGUISHMENT OR MODIFICATION OF RESTRICTIVE COVENANTS BY TOWN PLANNING SCHEMES

3.19 Where a town planning scheme provides for it, a local authority has power to extinguish or vary any restrictive covenant affecting land.<sup>39</sup> For example, the City of Melville Town Planning Scheme No 3 provides that a restrictive covenant, the effect of which is that the number of residential units that may be constructed on the land is limited to a number less than that permitted by the Scheme, is extinguished or varied to the extent that it is inconsistent with the provisions of the Scheme.<sup>40</sup> Where a restrictive covenant is extinguished or varied

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<sup>36</sup> Para 3.2 above.

<sup>37</sup> See *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522, 537 and 540.

<sup>38</sup> Such as those referred to in paras 2.9-2.11 above.

<sup>39</sup> Para 3.7 above.

<sup>40</sup> Cl 5.14.1. Cl 5.14 is set out in Appendix III. Cl 23A of the City of Gosnells Town Planning Scheme No 1 is in similar terms. In *Hicks v City of Melville and Richards* (unreported) Town Planning Appeal Tribunal of Western Australia Appeal No 10 of 1994 (28 September 1994) the Tribunal at 8 held that there was no

by a town planning scheme an application may be made to the Land Title Office for an amendment of the certificate of title to remove or modify the covenant.<sup>41</sup> Developers have attempted to avoid the effect of the provision in Melville by using restrictive covenants that prevent the registration of a strata plan in relation to a block. A strata plan is the usual means of creating titles to multiple units on a block. This, of course, does not prevent the construction of attached houses which are not strata titled but held as a "purple" title.

3.20 The Model Scheme Text prepared by the Department for Planning contains a section relating to restrictive covenants the effect of which is to limit the number of residential units that can be constructed on a block to a number less than that permitted by a town planning scheme. The section provides that such a restrictive covenant is extinguished or varied to the extent that it is inconsistent with the provisions of the Residential Planning Codes which apply to the scheme.<sup>42</sup> Where a restrictive covenant is so extinguished or varied the Council shall not grant planning approval to the development of the land unless the application has been dealt with as a "SA" use<sup>43</sup> and has complied with prescribed advertising requirements.<sup>44</sup>

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inconsistency between cl 5.14.1 and the *Transfer of Land Act 1893* s 129C (see para 2.19 above) and that they should be read together as alternative methods for the extinguishment or variation of a restrictive covenant. The Tribunal also stated that general provisions in town planning schemes which were inconsistent with a restrictive covenant would not have the effect of extinguishing the covenant and the scheme and the covenant would have to be read together.

<sup>41</sup> S 184 of the *Transfer of Land Act 1893* authorises the Commissioner of Titles to direct the removal of any "right or interest notified as an encumbrance" on the certificate of title if it has been "fully satisfied extinguished or otherwise determined and no longer affects" the relevant land.

<sup>42</sup> Model Scheme Text cl 4.4.1.

<sup>43</sup> In the case of a "SA" use, the Council shall not grant planning approval unless prescribed notice requirements are fulfilled.

<sup>44</sup> Model Scheme Text cl 4.4.2. Under cl 6.3.3 one or more of the following must be carried out:

(a) Notice of the proposed development to be served on the owners and occupiers as likely to be affected by the granting of planning approval stating that submissions may be made to the Council within twenty-one days of the service of such notice.

(b) Notice of the proposed development to be published in a newspaper circulating in the Scheme area stating that submissions may be made to the Council within twenty-one days from the publication thereof.

(c) A sign or signs displaying notice of the proposed development to be erected in a conspicuous position on the land for a period of twenty-one days from the date of publication of the notice referred to in paragraph (b) of this subclause."

As far as the Commission is aware, no Councils have adopted this section of the Model Scheme Text as yet.

## Chapter 4

### THE LAW ELSEWHERE

#### 1. INTRODUCTION

4.1 A number of the issues raised by the terms of reference have been addressed by legislation in other States and in England. In some jurisdictions local authorities are authorised to enter into covenants in gross or planning agreements with land owners to control the use or development of land. Some of these jurisdictions also attempt to deal with conflicts between restrictive covenants and town planning schemes or by-laws. These provisions are discussed below.

#### 2. COVENANTS IN GROSS

##### (a) Introduction

4.2 At present a local authority which does not have land benefited by a restrictive covenant cannot enforce it. This is a result of the rule in *London County Council v Allen*.<sup>1</sup> This limitation has been addressed in some jurisdictions by authorising local authorities to enter into restrictive covenants in gross, that is, to enter into a restrictive covenant even though the local authority has no land benefited by the covenant.

4.3 The *Final Report of the Commission of Inquiry into Land Tenures* examined the difficulties created by the rule in *London County Council v Allen*. It pointed out that attempts had been made to overcome the limitation imposed by the rule. For example, covenants have been attached to public roads but this will normally be ineffective because it is not easy to demonstrate that a limitation on the use of particular land will benefit a particular roadway.<sup>2</sup> The Report concluded that there was a need for covenants in gross, both positive and restrictive, in favour of a public authority.<sup>3</sup> It gave the following example of the situations in which a covenant in gross could be useful:

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<sup>1</sup> Para 2.4 above.

<sup>2</sup> *Final Report of the Commission of Inquiry into Land Tenures* (1976) paras 4.36-4.38.

<sup>3</sup> Id para 4.52.

"A council . . . purchases an old building and restores it. It is useful for private purposes and it is desirable that it be resold to permit such use and to recoup the capital outlay. It is also desirable to ensure that the building is not demolished or externally altered, at least without permission. The purchaser is willing to so covenant but the problem is how to make this binding on his successors in title. No other land of the covenantee is affected by the covenant."<sup>4</sup>

4.4 The Report suggested that a provision along the following lines be adopted in each jurisdiction in Australia:<sup>5</sup>

"(1) It shall be, and shall be deemed always to have been, possible to create by covenant, contained in a registered dealing in favour of a prescribed authority, an enforceable obligation or restriction relating to the land referred to in such dealing notwithstanding:

- (a) that there be no land benefited by the said obligation or restriction or that the prescribed authority has no interest in any land benefited thereby;
- (b) that the obligation or restriction requires the doing of some positive act or acts.

(2) Any such obligation or restriction shall be endorsed upon the Certificate of Title of the said land and shall be enforceable by the prescribed authority against the registered proprietor for the time being of the said land as if made between the prescribed authority and the registered proprietor.

(3) In this section the term 'prescribed authority' means the Crown, any statutory body representing the Crown, any public authority constituted by Act of Parliament and any local authority.

(4) This section applies and shall be deemed always to apply to the land under the provisions of the *Real Property Act*, etc. [as the case may be].<sup>6</sup>

Provision along the lines of that proposed above has been made in South Australia, Tasmania and Victoria. The provisions in South Australia and Tasmania allow for both positive and restrictive covenants in gross.

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<sup>4</sup> Id para 4.45(b).

<sup>5</sup> This is wider than the provision in Western Australia which applies to particular situations: see para 2.12 above.

<sup>6</sup> *Final Report of the Commission of Inquiry into Land Tenures* para 4.52.

**(b) South Australia**

4.5 In South Australia a council may enter into an agreement with any person relating to the management, preservation or conservation of land within the area of the council of which that person is the owner.<sup>7</sup> The owner cannot enter into the agreement unless all other persons with a legal interest in the land give their consent. Upon the application of a party to the agreement, the Registrar-General must note the agreement against the relevant instrument of title of the land.<sup>8</sup> Once entered, the agreement is binding on the current owner of the land whether or not the owner was the person with whom the agreement was made.<sup>9</sup> If an agreement has been rescinded or amended, the Registrar-General, upon the application of the council or the owner of the land the subject of the agreement, must enter a note of the rescission or amendment against the instrument of title.<sup>10</sup>

**(c) Tasmania**

4.6 In Tasmania, notwithstanding any law to the contrary, a covenant without a dominant tenement (a covenant in gross) may be created in favour of the Crown or any public authority or local authority.<sup>11</sup> A covenant in gross is enforceable between the parties to it, and any person deriving title under any such party, as if the covenant were entered into by a fee simple owner of land for the benefit of adjacent land, held by the relevant authority, that was capable of being benefited by the covenant and as if that adjacent land continued to be so held by the authority.<sup>12</sup>

**(d) Victoria**

4.7 In Victoria a planning scheme for an area may regulate or provide for the creation of restrictions<sup>13</sup> when land is subdivided.<sup>14</sup> If it does so, the owner of the land burdened or to be burdened by a restriction must, in accordance with the scheme, lodge a certified plan at the

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<sup>7</sup> *Development Act 1993* (SA) s 57(2).

<sup>8</sup> *Id* s 57(5).

<sup>9</sup> *Id* s 57(7).

<sup>10</sup> *Id* s 57(8).

<sup>11</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 90AB(1).

<sup>12</sup> *Id* s 90AB(2).

<sup>13</sup> This power also permits the variation or removal of restrictive covenants and in this respect is the same as a power in Western Australia: para 3.7 above.

<sup>14</sup> *Planning and Environment Act 1987* (Vic) s 6(2)(g).

Office of Titles for registration.<sup>15</sup> Upon registration, any restriction is created, varied or removed as specified in the plan.<sup>16</sup>

#### (e) New South Wales

4.8 In New South Wales, there is a general provision similar to a number of provisions in Western Australia which enable restrictive covenants to be created for specific purposes.<sup>17</sup> A local authority<sup>18</sup> may impose a restriction on the use of land not vested in the authority so that the restriction is enforceable by the authority whether or not the benefit of the restriction is annexed to other land.<sup>19</sup> No provision is made for payment of compensation to the owner of the land for any injurious effect of the restriction. In the case of Torrens system land<sup>20</sup> the restriction may be imposed by a memorandum of restriction that is executed by the authority, the registered proprietor of the land and by each other person who has a registered estate or interest in the land and is to be bound by the restriction.<sup>21</sup> Once the memorandum is lodged in the office of the Registrar-General the restriction takes effect when he has made in the Register such recordings with respect to the restriction as he considers appropriate. According to one author<sup>22</sup> the Land and Environment Court of New South Wales has generally not favoured the use of restrictive covenants as a means of protecting amenity in consents to development and has warned against the use of title registration to supplement planning legislation.

### 3. PLANNING AGREEMENTS OR OBLIGATIONS

#### (a) England

4.9 Another approach has been adopted in England where local planning authorities have power to enforce a "planning obligation". Any person interested in land in the area of a local planning authority may enter into a planning obligation restricting the development or use of

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<sup>15</sup> *Subdivision Act 1988* (Vic) s 23(1).

<sup>16</sup> Id s 24(2)(d).

<sup>17</sup> Para 2.12 above.

<sup>18</sup> Also the Crown, a public authority constituted by an Act or a prescribed corporation: *Conveyancing Act 1919* (NSW) s 88E(1).

<sup>19</sup> Id s 88E(2). The benefit of a covenant may also be annexed to an easement created in favour of the Crown or a local authority: id s 88A(1)(b).

<sup>20</sup> There is a similar provision relating to "old system" land: id s 88E(4).

<sup>21</sup> *Conveyancing Act 1919* (NSW) s 88E(3)(a) and (b).

<sup>22</sup> P Ryan *Urban Development: Law and Policy* (1987) 72 and footnote 70.

the land in any specified way.<sup>23</sup> A planning obligation may be unconditional or subject to conditions and impose any restriction either indefinitely or for a specified period.<sup>24</sup> It is enforceable by means of an injunction by the local planning authority against the person entering into the obligation and any person deriving title from him.<sup>25</sup> The most common use of planning obligations is in agricultural occupancy where occupation of a dwelling is restricted to those employed in agriculture. They are also used to provide the maximum size of any unit in commercial premises.<sup>26</sup>

4.10 In one case a planning application was made for a house for a farm worker. A planning obligation was entered into which restricted the occupation of the house to a person employed in agriculture and tied the house to the farm. The farm was sold and the purchasers argued that the Council had exceeded its powers in entering into the agreement and that the agreement was unlawful. These arguments were rejected by the Court. It was held that the Council merely had to have regard to all relevant considerations and must not act unreasonably. A planning obligation need not be fairly and reasonably related to the permitted development.<sup>27</sup>

4.11 A planning obligation may be modified or discharged in the following ways -

1. The local planning authority and any person against whom the obligation is enforceable may agree to modify or discharge it.<sup>28</sup>
2. After the expiry of the relevant period,<sup>29</sup> on the application of a person against whom a planning obligation is enforceable, the authority may modify or discharge the obligation.<sup>30</sup>
3. On appeal to the Secretary of State from a decision of the authority the Secretary may modify or discharge the obligation.<sup>31</sup>

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<sup>23</sup> *Town and Country Planning Act 1990* (UK) s 106(1)(a).

<sup>24</sup> Id s 106(2).

<sup>25</sup> Id s 106(3) and (5).

<sup>26</sup> S Payne *Planning Conditions - Enforcement and Variation* [1993] Conv & Prop Law 119, 120.

<sup>27</sup> *Good v Epping Forest District Council* (unreported) referred to in J Rowan-Robinson *Planning Decisions and Planning Agreements* [1994] Conv & Prop Law 31, 35.

<sup>28</sup> *Town and Country Planning Act 1990* (UK) s 106A(1).

<sup>29</sup> A minimum of five years unless some other period is prescribed: id s 106A(4).

<sup>30</sup> *Town and Country Planning Act 1990* (UK) s 106A(3) and (6).

<sup>31</sup> Id s 106B.

**(b) Victoria**

4.12 In Victoria a local authority may also enter into an agreement with an owner of land, or with a person in anticipation of that person becoming the owner of land, in the area covered by a planning scheme for which it is a responsible authority.<sup>32</sup> The agreement must be under seal and bind the owner to the covenants specified in the agreement.<sup>33</sup> The agreement may restrict or regulate the use or development of the land or provide conditions subject to which the land may be used or developed for specified purposes.<sup>34</sup> Agreements have been used in circumstances well beyond those normally associated with restrictive covenants. They have been used to -

- \* provide public open space;
- \* provide infrastructure such as roads and underground power lines;
- \* require properties to be rehabilitated;
- \* obtain a commitment to maintaining a facility; and
- \* as part of a plot ratio bonus system to ensure that a historic building is restored.<sup>35</sup>

4.13 The local authority may apply to the Registrar of Titles to register the agreement under the *Transfer of Land Act 1958*.<sup>36</sup> The Registrar must make a recording of the agreement on any relevant folio of the Register.<sup>37</sup> Once registered, the burden of any covenant in the agreement runs with the land affected and the local authority may enforce the covenant against any person deriving title from any person who entered into the covenant as if it were a restrictive covenant despite the fact that it is not for the benefit of any land of the local authority.<sup>38</sup>

**(c) Tasmania**

4.14 A similar approach has also been adopted in Tasmania. In that State a planning authority may enter into an agreement with an owner of land in the area covered by a planning

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<sup>32</sup> *Planning and Environment Act 1987* (Vic) s 173.

<sup>33</sup> Id s 174(1).

<sup>34</sup> Id s 174(2).

<sup>35</sup> G Morris, M Barker and T L Bryant *Planning and Environment Service (Victoria)* para 23,521.

<sup>36</sup> *Planning and Environment Act 1987* (Vic) s 181(1).

<sup>37</sup> Id s 181(3).

<sup>38</sup> Id s 182.

scheme.<sup>39</sup> An agreement may provide for "the prohibition, restriction or regulation of use or development" of the land.<sup>40</sup> An agreement must be registered by the Recorder of Titles.<sup>41</sup> After the registration of an agreement the burden of any covenant in the agreement runs with the land to which it relates.<sup>42</sup> It is enforceable between the parties to it and any person deriving title under such party.<sup>43</sup>

#### 4. DISCHARGE OR MODIFICATION OF RESTRICTIVE COVENANTS

##### (a) Introduction

4.15 All States in Australia, except South Australia, provide powers to discharge or modify restrictive covenants. Powers in New South Wales and Victoria are similar to those in Western Australia.<sup>44</sup> An additional power in Victoria, and powers in Queensland, Tasmania and England which differ from that in Western Australia, are discussed below.

##### (b) Victoria

4.16 Victoria has made an attempt to balance private property rights embodied in restrictive covenants and the wider community interest reflected in town planning schemes. In 1988 town planning authorities were given ultimate responsibility for land use development by removing the need to apply to a court for the removal or variation of a restrictive covenant. Instead provision was made for the removal or variation of a covenant by either -

1. provision in a planning scheme with a specific direction for the creation, removal or variation of a restrictive covenant;<sup>45</sup> or
2. in the absence of a specific direction, in the case of a proposal for development requiring planning permission, the town planning authority giving permission

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<sup>39</sup> *Land Use and Planning Approvals Act 1993* (Tas) s 71(1).

<sup>40</sup> Id s 72(2)(a).

<sup>41</sup> Id s 78(3).

<sup>42</sup> Id s 79(a).

<sup>43</sup> Id s 79(b).

<sup>44</sup> *Conveyancing Act 1919* (NSW) s 89(1); *Property Law Act 1958* (Vic) s 84(1).

<sup>45</sup> *Subdivision Act 1988* (Vic) s 23(1) (since amended).

upon conditions which required the creation, modification or removal of a restrictive covenant.<sup>46</sup>

4.17 As a result of doubts cast on whether the legislation empowered a local authority to remove a restrictive covenant when granting a permit,<sup>47</sup> the legislation was amended in 1991. It now provides that a responsible authority must not grant a permit which would allow the removal or variation of a restriction unless the authority is satisfied that the owner of any land benefited would be unlikely to suffer:

- "(a) financial loss; or
  - (b) loss of amenity; or
  - (c) loss arising from change to the character of the neighbourhood; or
  - (d) any other material detriment -
- as a consequence of the removal or variation of the restriction."<sup>48</sup>

This provision is a retreat from the earlier legislation which allowed precedence to be given to town planning considerations over privately imposed planning restrictions.

4.18 The effect of this provision was considered by the Planning Division of the Victorian Administrative Appeals Tribunal in *Pletes v City of Knox*.<sup>49</sup> According to the Tribunal, a permit may be granted if planning considerations favour its grant unless it falls foul of the above tests.<sup>50</sup> Planning considerations do not prevail over the tests, though they may be relevant to the issue of the likelihood of loss or detriment. Nor is it a question of balancing planning considerations in favour of variation or removal against loss to any owner of land benefited by the covenant as a consequence of the proposed variation or removal.<sup>51</sup> The loss referred to in paragraphs (a), (b) and (c) must be a "material" loss, that is, not a trivial and inconsequential loss, based on an objective standard.<sup>52</sup> Relevant to this is the purpose and effect of the covenant. The Tribunal decided that a permit should be issued to vary the

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<sup>46</sup> See J Toohar *A Setback for Public Planning?* [1991] LIJ 721, 721.

<sup>47</sup> *P and A Strachan v City of Malvern and W A McLeod* (1990) 5 AATR 295.

<sup>48</sup> *Planning and Environment Act 1987* (Vic) s 60(2).

<sup>49</sup> (unreported) Administrative Appeals Tribunal of Victoria 16 March 1993.

<sup>50</sup> J Toohar "Double Trouble" in *Discharging Restrictive Covenants: Dual Occupancy and the Duality of Forums* (1993) 10 Environmental and Planning Law Journal 365, 368.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

restrictive covenant to allow a dual occupancy development on the lot of the applicant. It did so because:

". . . the proposed variation did not result in any material loss of amenity to benefited land because the subject site and the access to the proposed dwelling were isolated from any benefited land. It also decided that there was no material loss arising from change to the character of the neighbourhood. This was due to a number of factors: the neighbourhood had remained relatively quiet and pleasant despite the existence of a number of dual occupancy developments; a large proportion of the neighbourhood allotments was not benefited land; and the grant of a permit in this case would not create a precedent. This was ensured by 'leaving the covenant and its protection intact so far as possible' and this could be done by permitting a variation where practicable, rather than a removal."<sup>53</sup>

### (c) Queensland

4.19 In Queensland private property rights and the wider community interest reflected in town planning schemes are balanced by requiring the town plan to be taken into account when an application is made to extinguish or vary a restrictive covenant. In considering whether to extinguish or vary a restrictive covenant, the court is required to take into account ". . . the town plan and any declared or ascertainable pattern of the local government for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area".<sup>54</sup> The court is also required to consider ". . . the period at which and the context in which the . . . restriction was created or imposed and any other material circumstance." Because it must be proved that the covenant is *contrary* to the public interest, this provision does not necessarily see more regard given to public policy considerations. According to Bradbrook, MacCallum and Moore:

"It is not sufficient merely to prove that it is in the public interest that land be developed in a particular manner. The nature of the onus imposed by the legislation is such that the provision is seldom argued in practice."<sup>55</sup>

An order extinguishing or modifying a restriction may direct the applicant to pay to any person entitled to the benefit of the restriction a sum by way of consideration to make up for -

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<sup>53</sup> Id 369.

<sup>54</sup> *Property Law Act 1974* (Qld) s 181(2).

<sup>55</sup> A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) 703.

- (a) any loss or disadvantage suffered by that person in consequence of the order;  
or
- (b) any effect the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it.<sup>56</sup>

**(d) Tasmania**

4.20 In Tasmania the Recorder of Titles or the Supreme Court<sup>57</sup> may extinguish or modify a restrictive covenant if he is satisfied that:

" . . . the continued existence of the interest would impede a user of the land in accordance with an interim order or planning scheme, or, as the case may be, would, unless modified, so impede such a user."<sup>58</sup>

Thus private rights are made subordinate to planning legislation. An order that a restrictive covenant be extinguished or modified may direct the applicant to pay any person entitled to its benefit such sum by way of compensation or consideration as the Recorder or Court may think just to award under either one of the following heads:

- "(a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge, extinguishment, or modification; or
- (b) a sum to make up for any effect that the interest had, at the time when it was imposed, in reducing the consideration then received for the land affected by it."<sup>59</sup>

**(e) England**

4.21 In England, any person interested in land affected by a restrictive covenant may apply to the Lands Tribunal for an order wholly or partially discharging or modifying the restriction. Such an order may be made if the Tribunal is satisfied that -

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<sup>56</sup> *Property Law Act 1974* (Qld) s 181(4).

<sup>57</sup> An application must be made to the Recorder who must determine the application himself unless he considers that it is of such a nature that it should be determined by the Supreme Court: *Conveyancing and Law of Property Act 1884* (Tas) s 84F(1).

<sup>58</sup> Id s 84C(1)(b).

<sup>59</sup> Id s 84C(7).

- \* by reason of changes in the character of the property or the neighbourhood or other circumstances of the case the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or
- \* the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
- \* those entitled to the benefit of the restriction have agreed, either expressly or by implication, by their acts or omissions, to the restriction being discharged or modified; or
- \* the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.<sup>60</sup>

4.22 As to the second ground above, some reasonable use of land is impeded if the restriction either does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them or is contrary to the public interest, and money will be adequate compensation for the loss or any disadvantage which that person will suffer from the discharge or modification.<sup>61</sup> In determining whether a case is one falling within this ground and in determining whether a restriction ought to be discharged or modified on this ground the Lands Tribunal must:

" . . . take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."<sup>62</sup>

In practice, an application based on public purposes has rarely been successful. Three possible reasons for this have been advanced -

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<sup>60</sup> *Law of Property Act 1925* (UK) s 84(1).

<sup>61</sup> Id s 84(1A).

<sup>62</sup> Id s 84(1B).

- \* The Tribunal has not accepted that a grant of planning permission implies that the discharge or modification of a restrictive covenant is a positively good thing.<sup>63</sup>
- \* A "restriction which inhibits development is not contrary to the public interest *per se*."<sup>64</sup>
- \* The "mere preservation of `sanctity of contract' (i.e. existing obligations) is itself a public interest and that the applicant therefore requires to show that his proposal is so `important and immediate' as to `override all objections', `the test being that the proposed development should make a material contribution towards meeting a need, which a single house could hardly be said to do.' Thus, he must show that there is a need for housing in the area, that the sort of housing proposed is appropriate to that need and that his contribution will be a significant step towards meeting that need."<sup>65</sup>

4.23 On making an order, the Tribunal may direct the applicant to pay any person entitled to the benefit of the covenant a sum by way of consideration either -

- \* to make up for any loss or disadvantage suffered by him in consequence of the discharge or modification; or
- \* for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.<sup>66</sup>

## **5. SUSPENSION OF RESTRICTIVE COVENANTS WHICH ARE INCONSISTENT WITH TOWN PLANNING SCHEMES**

4.24 In New South Wales paramount consideration is given to public interest considerations by providing that where a restrictive covenant is inconsistent with a town planning scheme, the scheme, to the extent of the inconsistency, shall prevail. This ensures that land is used in the best interests of the community as reflected in the policy enunciated in

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<sup>63</sup> P Polden *Private Estate Planning and the Public Interest* (1986) 49 Mod LR 195, 209.

<sup>64</sup> Ibid.

<sup>65</sup> Id 209-210 (footnotes omitted).

<sup>66</sup> *Law of Property Act 1925* (UK) s 84(1).

a town planning scheme. For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or with relevant consent, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a restrictive covenant specified in the instrument shall not apply to any such development or shall apply subject to the modifications specified in the instrument.<sup>67</sup> Approval must first be given by the Governor or the responsible Minister.<sup>68</sup>

4.25 The effect of this provision is to suspend the covenant so long as the planning scheme remains unchanged. If the scheme is altered to remove the inconsistency, the covenant revives. For this reason, the New South Wales Land Titles Office does not remove from a title a notification of a covenant which is merely suspended.<sup>69</sup> However, because banks are reluctant to lend money secured by a title where there is a breach of a covenant shown on the title even though the covenant has been suspended, developers often apply to the Supreme Court to have the covenant extinguished or modified.<sup>70</sup>

## 6. APPROVAL OF SUBDIVISIONS OF LAND

4.26 In the other States the subdivision of land is generally dealt with by local authorities,<sup>71</sup> unlike the position in Western Australia where it is dealt with by the Western Australian Planning Commission.<sup>72</sup> Generally a local authority may approve the application subject to conditions. In Queensland, any conditions imposed by the local government "attach to the land and are binding on successors in title".<sup>73</sup>

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<sup>67</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 28(2).

<sup>68</sup> Id s 28(3) and (4).

<sup>69</sup> New South Wales Land Titles Office *Review of the Law of Positive Covenants Affecting Freehold Land* (Discussion Paper 1994) 25.

<sup>70</sup> Ibid.

<sup>71</sup> *Development Act 1993* (SA) s 33; *Subdivision Act 1988* (Vic) s 5; *Local Government Act 1962* (Tas) s 464(1); *Environmental Planning and Assessment Act 1979* (NSW) ss 77(3) and 91(1); *Local Government (Planning and Environment) Act 1990* (Qld) s 5.1.

<sup>72</sup> Para 3.2 above.

<sup>73</sup> *Local Government (Planning and Environment) Act 1990* (Qld) s 5.1(8).

## **Chapter 5**

### **DISCUSSION**

#### **1. INTRODUCTION**

5.1 The major issues discussed in this chapter are -

- \* Should all or particular uses of restrictive covenants be abolished?
- \* Should the use of restrictive covenants be controlled or restricted?
- \* How should inconsistencies between restrictive covenants and town planning schemes or by-laws be resolved?
- \* Should provision be made for restrictive covenants in gross?
- \* What measures should be provided to enforce or ensure compliance with restrictive covenants?
- \* Do local authorities require any additional powers to control the development or use of land?

The following paragraphs contain a discussion of a range of options for dealing with restrictive covenants. However, the Commission has not formed a final view on any of them and welcomes comment on any or all of them.

## 2. SHOULD CERTAIN USES OF RESTRICTIVE COVENANTS BE ABOLISHED?

### (a) Introduction

5.2 Restrictive covenants are used to serve a number of purposes. Their use for some of these purposes has been criticised and the question arises whether their future use should be abolished either generally or for particular purposes or whether their use should be limited.<sup>1</sup>

5.3 Arguments for abolishing or curtailing the use of restrictive covenants are -

- \* The use of restrictive covenants was initially developed at a time when town planning and building laws did not exist or were rudimentary. Matters such as the density of developments and the use of land which were not controlled then are now controlled by town planning schemes and matters relating to building standards are now controlled by building codes and town planning schemes.
- \* Town planning schemes are prepared by a democratically elected body through a process of consultation with those likely to be affected by the scheme. It is incongruous that restrictive covenants which are created by private agreement can curtail the use or development of land in a way which is inconsistent with the aims sought to be achieved by planning laws. A similar argument applies to other controls provided by legislation such as the building codes.
- \* So far as estate developments are concerned, alternatives such as planning policies<sup>2</sup> can be used to achieve the same purposes as restrictive covenants.
- \* Restrictive covenants can be a trap for the unwary. For example, in one case of which the Commission is aware, a land owner built a duplex on a block in accordance with the town planning scheme unaware that 60 years ago a restrictive covenant was placed on it providing that only one residence could be built on it. The land owner did not become aware of the covenant until she attempted to register a strata plan at the Land Titles Office for the

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<sup>1</sup> The modification or extinguishment of existing restrictive covenants is discussed below: paras 5.23-5.24.

<sup>2</sup> Para 3.16 above.

development. The registration was refused because of the existence of the covenant. If she is unable to have the covenant extinguished, she may only be able to sell the units separately on a "purple title" which is likely to have a lower value than a strata title property.

- \* Restrictive covenants are inflexible. Once they are created it is a costly and difficult, if not impossible, process to have them extinguished or modified. Planning laws can be amended if there has been a change in circumstances which justifies permitting a change in land use or development, though this process is complex and time consuming.<sup>3</sup>
- \* Restrictive covenants may frustrate the implementation of public policy as reflected in planning laws, for example, the policy of encouraging higher density development in the Perth metropolitan area.

#### 5.4 Arguments against the abolition of restrictive covenants are -

- \* Those who purchase a property burdened by a restrictive covenant freely agree to be bound by it and, in the case of estate schemes, they also benefit from the covenants which burden other blocks in the estate.
- \* Although planning and building laws overlap to some extent with restrictive covenants, for example, where a town planning scheme and a restrictive covenant contain different provisions as to the number of residences that can be built on a block, there are still areas where restrictive covenants operate without an overlap because they serve some private purpose, for example, a restrictive covenant which imposes a height restriction to protect a view for one block.
- \* It is unrealistic to expect local authorities to make provision for all the detailed matters for which restrictive covenants now commonly make provision, for example, covenants that prohibit the erection of rain water tanks or clothes lines or hoists which are visible from the street.

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<sup>3</sup> See para 3.6 above.

5.5 The following paragraphs contain a discussion of the effect the abolition of restrictive covenants would have on the major purposes for which restrictive covenants are used at present, namely -

- \* limits on the use of land;
- \* protecting the amenity of or standard of housing in an area;
- \* land management;
- \* private or individual purposes; and
- \* promoting some public interest.

**(b) Limits on the use of land**

5.6 One common use of restrictive covenants is to place limits on the use of land, for example, to limit the number of residences that can be built on a block. Town planning schemes also limit the use of land through Residential Planning Codes or other zones for particular uses. Where restrictive covenants are used for this purpose, there may be a conflict between the covenant and the scheme. In this context restrictive covenants place limits on the use of land which are inconsistent with the public purposes sought to be achieved by town planning schemes such as limiting the spread of the urban area by increasing the density of both inner and outer suburban areas. The abolition of the use of restrictive covenants to limit the use of land in a manner which is inconsistent with town planning schemes would promote the achievement of those public purposes.

**(c) Protecting the amenity of or standard of housing in an area**

5.7 Another major use of restrictive covenants is to protect the amenity of an area by prohibiting the use of certain materials even though their use is permitted by the Building Code of Australia or by controlling the standard of buildings and their general surrounds. This use of restrictive covenants has been supported because it ". . . provides lot purchasers

with assurances as to the standard of development to be expected in their community and affords a level of protection to the value of their real estate investment."<sup>4</sup> Concern has been expressed, however, that this increases the cost of housing by preventing the use of cheaper building materials.<sup>5</sup> The cost of housing may also be increased if restrictive covenants prevent owners from choosing standard home designs developed by builders without major modifications to the designs<sup>6</sup> or require facilities to be provided which are not required under a town planning scheme.<sup>7</sup> These restrictive covenants also limit innovation and may ban the use of more energy-efficient materials or colours. It is argued that those who wish to construct a house should be at liberty to do so as long as they conform with the town planning scheme and the Building Code of Australia. Otherwise, it is argued, restrictive covenants ". . . unjustly restrict people's freedom to choose where they wish to live, as well as the detail, inclusions and finishes of the ir proposed home."<sup>8</sup>

5.8 If this use of restrictive covenants were abolished, the purposes sought to be achieved by them could be achieved under town planning schemes<sup>9</sup> or the Building Code of Australia, which provides a general standard for the construction of buildings,<sup>10</sup> or by the use of alternatives to restrictive covenants such as design guidelines adopted as planning policies by local authorities.<sup>11</sup> These guidelines have the advantage that they -

- \* can be developed in conjunction with town planning schemes;
- \* are more easily amended through a public consultation process; and

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<sup>4</sup> Submission by the Urban Development Institute of Australia.

<sup>5</sup> A restrictive covenant may, for example, require walls to be constructed with concrete, clay bricks or stone.

<sup>6</sup> For example, a restrictive covenant may prevent the construction of a residence unless its floor area is greater than a prescribed area or unless it is further than a prescribed distance from the boundary if it has windows or doors through which the occupants can look inside the residence or on to the curtilage of a neighbour on a contiguous block.

Statement of Planning Policy No 1 Residential Planning Codes (as amended 1991) contains setback requirements to maintain standards of privacy, lighting and sunshine in relation to the adjoining block or blocks.

<sup>7</sup> For example, a restrictive covenant that requires that a tool storage area be provided under the roof of the residence. Statement of Planning Policy No 1 Residential Planning Codes (as amended 1991) does not require the provision of a storage area for single residences.

<sup>8</sup> Submission by the Housing Industry Association (WA).

<sup>9</sup> Para 3.11 above.

<sup>10</sup> Para 3.17 above.

<sup>11</sup> Para 3.16 above.

- \* can be enforced by local authorities, particularly at the stage where an application is made for the approval of the construction of a building on the blocks concerned.

**(d) Land management**

5.9 In some cases restrictive covenants are used for the purpose of land management.<sup>12</sup> This can occur, for example, where the subdivision of a block is approved and the intention is to use the new blocks for special rural purposes but they have not been zoned for that use with the associated land use controls.<sup>13</sup> Restrictive covenants allow the land to be managed in an appropriate way either indefinitely or until the land is rezoned. It might be argued that approval should not be given for a subdivision unless the appropriate land management controls are in place either through a rezoning of the land or the use of planning policies.

**(e) Private or individual purposes**

5.10 Some restrictive covenants have a private or individual purpose in that they are made for the benefit of only one block, for example, a covenant which limits the height of buildings that can be constructed on one block to protect the view from another block. Unless these covenants conflict with a town planning scheme or by-laws they serve a purpose which is not otherwise addressed.

**(f) Promoting some public interest**

5.11 In a number of cases restrictive covenants may be imposed to promote some public interest<sup>14</sup> such as the protection of a building of historical interest. Because they promote a public purpose, it is arguable that this use of restrictive covenants should not be abolished.

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<sup>12</sup> That is, for the purpose of preserving, protecting, conserving or enhancing the existing physical characteristics of or flora on the land or preventing the degradation of the land in a way which may be detrimental to the present or future use of the land.

<sup>13</sup> Para 3.12 above.

<sup>14</sup> Para 2.12 above.

### **3. CONTROLLING OR RESTRICTING THE USE OF RESTRICTIVE COVENANTS**

#### **(a) Prior approval of restrictive covenants**

5.12 If restrictive covenants are not to be abolished, their use could be controlled by requiring those wishing to use restrictive covenants (other than those referred to in the previous paragraph) to obtain approval for their use as a prerequisite to registration of the restrictive covenant at the Land Titles Office. Requiring approval of restrictive covenants would ensure that restrictive covenants did not conflict with the interests promoted by town planning schemes and local authority by-laws. At present the Western Australian Planning Commission sometimes requires that a developer, as a condition of approval of a subdivision, provide a written undertaking that restrictive covenants that limit the number of dwellings which may be constructed on a block will not be placed on the title of any blocks within the application area. This is somewhat haphazard because it is only considered if the Commission happens to learn of the developer's intention. Further, developers attempt to avoid such an undertaking by the use of other forms of restrictive covenant, for example, by requiring that the buildings on the block be not less than a minimum floor area. The major disadvantage of an approval process would be that it would increase costs for developers. It might also lead to delay in the completion of projects.

5.13 If prior approval of restrictive covenants were introduced, the responsibility for dealing with applications for approval could be conferred on either the Western Australian Planning Commission or local authorities. If the responsibility were given to the Commission, as is the case with applications for subdivisions of land,<sup>15</sup> the application could be referred for comment to the relevant local authority and any other public bodies that might be interested in the covenant. It may, however, be more appropriate to confer the responsibility on local authorities because the issues raised by restrictive covenants are more likely to be of concern to them than to the Commission because of their involvement in land management, town planning and building control. They are also in a position to develop planning policies in conjunction with developers as an alternative to the use of restrictive covenants.

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<sup>15</sup> Para 3.2 above.

5.14 To provide developers with some certainty as to the restrictions which would be likely to be approved, guidelines could be developed by the Ministry for Planning. Different guidelines could be developed for urban, semi-rural, special rural, rural and coastal zones dealing with, for example, the minimum area of the residence, the wall or roof materials that can be used, outbuildings, carports and verandahs, storerooms, fences, parking facilities for boats, cars and other vehicles, clothes lines, letter boxes, solar water heaters,<sup>16</sup> air conditioners and television antennas.

**(b) Limiting the duration of restrictive covenants**

5.15 Another approach to limiting the use of restrictive covenants both present and future is to provide that restrictive covenants should only be valid for a limited period of time,<sup>17</sup> say ten years.<sup>18</sup> However, to fix a period without any other provision is likely to create anomalies and undesirable consequences. Whilst some covenants could be regarded as obsolete after such a period has elapsed, others could be regarded as still necessary to preserve the amenity of an area. Some restrictive covenants, such as those imposing a height restriction to protect an outlook, could still have a significant effect on the value of the benefited block.

5.16 An alternative is to provide that a restrictive covenant expires after a limited period of time unless it is renewed by the owner of the benefited block. This option has the advantage that useful restrictions would not be lost automatically. However, it has a number of disadvantages -

- \* the owner of the benefited block might not know about a still useful and valuable covenant;
- \* even if he knew of the covenant, he might be ignorant of the need to apply for re-registration;

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<sup>16</sup> A J Bradbrook has suggested that covenants which impede or expressly prohibit the installation of solar devices should be declared void and unenforceable: A J Bradbrook *The Role of Restrictive Covenants in Furthering the Application of Solar Energy Technology* (1982-1983) 8 Adel LR 286, 312-314.

<sup>17</sup> At present some restrictive covenants expressly provide that they expire and cease to have effect from a prescribed date.

<sup>18</sup> Officers of the Ministry for Planning suggested this period. It was thought that this period was sufficient time for the character of an estate to become established while allowing for flexibility in the longer term. In a preliminary submission to the Commission, the Urban Development Institute of Australia stated that ten years is a commonly adopted term for restricting covenants amongst those involved in the land development industry.

- \* it would involve extra work for the Land Titles Office and there would be additional cost for the owner of the benefited block; and
- \* in the case of a building scheme or scheme of development the value of the restrictive covenant would be reduced if the re-registration did not apply to all the blocks in the scheme. It would be necessary to decide whether all block owners in the scheme should be required to seek re-registration to protect their interest or whether re-registration by one of them should keep the covenants of all of them alive.

#### **4. INCONSISTENCY BETWEEN A RESTRICTIVE COVENANT AND A TOWN PLANNING SCHEME OR BY-LAWS**

##### **(a) Introduction**

5.17 One difficulty with restrictive covenants at present is that there may be a conflict between a restrictive covenant and the provisions of a town planning scheme, for example, where a restrictive covenant prohibits the use of the land for a commercial purpose but the land is zoned commercial under the relevant town planning scheme. There may also be conflicts between a restrictive covenant and local authority by-laws. For example, a restrictive covenant may prohibit the use of certain building materials though the use of them may be permitted under the Building Code of Australia.<sup>19</sup> Another example is a restrictive covenant which prohibits the use of certain materials for fencing. This may conflict with a local authority by-law which sets standards for dividing fences and allows the use of those materials. Further, under the *Dividing Fences Act 1961*,<sup>20</sup> a sufficient fence includes any fence prescribed by a by-law of a local authority.

5.18 Where there is an inconsistency between a restrictive covenant and a town planning scheme, a person can apply to the Supreme Court for an order to extinguish, discharge or modify the covenant.<sup>21</sup> Such an application can be made, for example, by a person who wishes to build, in conformity with the scheme, more than one house on a block

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<sup>19</sup> Para 3.17 above.

<sup>20</sup> S 5.

<sup>21</sup> Unless all those with an interest in the land agree to the discharge or modification of the covenant (para 2.16 above) or a town planning scheme provides for the discharge or variation of a covenant (paras 3.19-3.20 above).

notwithstanding that a covenant prevents such development. However, the objects sought to be achieved by a town planning scheme may be frustrated because the Court is not required to have regard to the scheme in dealing with the application.<sup>22</sup> Reported cases in Western Australia<sup>23</sup> show that restrictive covenants are unlikely to be discharged or modified because of the existence of conflicting stipulations in town planning schemes.

5.19 The following paragraphs contain a discussion of the means by which provision could be made for town planning schemes or other provisions to override restrictive covenants or to liberalise the circumstances in which restrictive covenants can be extinguished or modified.

**(b) Allowing town planning schemes or by-laws to override restrictive covenants**

5.20 One approach is to give paramountcy to town planning schemes or parts of town planning schemes as was the case in Victoria<sup>24</sup> and is now done in New South Wales.<sup>25</sup> It could be provided that it is not a breach of a restrictive covenant to construct a building in conformity with a town planning scheme or part of a scheme<sup>26</sup> or that where a restrictive covenant is inconsistent with a town planning scheme or part of a scheme, the scheme, to the extent of the inconsistency, shall prevail.<sup>27</sup> It might be argued that this approach is unfair to those who have relied on a restrictive covenant and would be adversely affected by a change in the law. It would, in effect, allow annulment of an interest in land, namely, the interest of the owner in the benefit of a restrictive covenant. On the other hand, restrictive covenants which are inconsistent with town planning schemes may be inconsistent with modern town planning concepts and public policy such as the policy to increase the density of urban development. In any case, town planning schemes provide considerable protection for land owners. In particular they separate out incompatible uses of land, for example, by protecting private houses from nuisances caused by noise or smell from factories.

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<sup>22</sup> Para 2.20 above.

<sup>23</sup> Ibid.

<sup>24</sup> Para 4.16 above.

<sup>25</sup> Para 4.24 above.

<sup>26</sup> For example those relating to the Residential Planning Codes. On the other hand, those parts of town planning schemes which provide that a building shall not be erected so as to exceed a prescribed height in certain areas should not override restrictive covenants which impose height restrictions below that set in the town planning scheme. Generally such covenants are only concerned with private or individual purposes: para 5.10 above.

<sup>27</sup> This would need to be subject to any restrictive covenants imposed to promote some other public interest such as those referred to in para 2.12 above.

5.21 A similar automatic extinguishment or modification could also apply to restrictive covenants which conflict with local authority by-laws or regulations such as those relating to building materials. For example, in New South Wales, it is not a breach of certain restrictive covenants to erect a structure in brick veneer when the covenant requires brick construction.<sup>28</sup>

5.22 If a restrictive covenant was overridden by a town planning scheme, by-laws or regulations, those who owned land burdened by the covenant might make a significant financial gain while those entitled to the benefit of it might suffer a loss in the value of the benefited land if they were no longer able to enforce the covenant. To protect those who might suffer a loss, an owner of land protected by a restrictive covenant who was adversely affected by it being overridden could be given a right to obtain compensation from the person benefiting from that result, as is the case in Tasmania.<sup>29</sup> Any question as to whether any land was injuriously affected and as to the amount and manner of payment of the sum which should be paid as compensation could be determined by arbitration under the *Commercial Arbitration Act 1985*, unless the parties agreed on some other method of determination.<sup>30</sup> That assessment could be made under the heads of assessment provided in Tasmania.<sup>31</sup>

**(c) Liberalising the circumstances in which restrictive covenants can be extinguished or modified**

5.23 Another approach is to make the circumstances in which restrictive covenants can be extinguished or modified more liberal. One attempt at liberalisation made in Queensland and England is to allow the public interest to be taken into account on an application to extinguish or modify a restrictive covenant. These attempts have not been very effective.<sup>32</sup> In England, for example, the Land Tribunals may wholly or partially discharge or modify a restrictive covenant if the continued existence of a restrictive covenant ". . . would impede some reasonable user of the land for public . . . purposes or . . . would unless modified so impede such user".<sup>33</sup> However, in practice, applications based on public purpose have rarely been successful.

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<sup>28</sup> *Conveyancing Act 1919* (NSW) s 88C(3).

<sup>29</sup> Para 4.20 above.

<sup>30</sup> See *Town Planning and Development Act 1928* s 11(4).

<sup>31</sup> Para 4.20 above.

<sup>32</sup> Paras 4.19 and 4.21-4.22 above.

<sup>33</sup> Paras 4.21-4.22 above.

5.24 Another attempt at liberalisation has been made in Tasmania where a restrictive covenant may be extinguished or modified if its continued existence would impede a user of the land in accordance with a planning scheme.<sup>34</sup> This type of approach could be extended to allow not only a planning scheme but also building codes, by-laws and regulations to be taken into account. Any liberalisation of the circumstances in which restrictive covenants could be extinguished or modified could be accompanied by provision for an owner of land protected by the covenant who suffered loss as a result of the extinguishment or modification to obtain compensation from the person benefiting from the extinguishment or modification of the covenant in the manner referred to above.<sup>35</sup>

## 5. PARTIES TO A RESTRICTIVE COVENANT

5.25 Generally, under the existing law, only land owners can have the benefit of a restrictive covenant. Local authorities do not have the benefit of a restrictive covenant unless they can be made a party to a covenant by one of the means or devices referred to above.<sup>36</sup> As a result of the rule in *London County Council v Allen*,<sup>37</sup> a local authority which is not a party to a restrictive covenant cannot enforce it.

5.26 The question arises whether a local authority should be empowered to enter into a restrictive covenant even though it has no land capable of benefiting from a covenant. That is, should it be possible to create a restrictive covenant in gross? This is possible at present in specific circumstances under various Acts of Parliament.<sup>38</sup> More general powers to create restrictive covenants have been provided in other jurisdictions following the recommendation of the Commission of Inquiry into Land Tenures.<sup>39</sup>

5.27 The Commission of Inquiry into Land Tenures gave a number of examples of situations in which a restrictive covenant in gross could be useful. One of these, preserving the character of old buildings, is referred to above.<sup>40</sup> Another example is where a council approves the erection of more than one residence on a large rural block on condition that the owner will not seek a subdivision of the block. The council could enforce the condition by

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<sup>34</sup> Para 4.20 above.

<sup>35</sup> Para 5.22 above.

<sup>36</sup> Paras 2.10 and 2.11 above.

<sup>37</sup> Para 2.4 above.

<sup>38</sup> Para 2.12 above.

<sup>39</sup> Paras 4.2-4.4 above.

<sup>40</sup> Para 4.3 above.

requiring the owner to enter into a restrictive covenant in gross with the council as a party to it. They could also be used in the other circumstances, for example for land preservation, where other means or devices have been used to create restrictive covenants.<sup>41</sup> Empowering local authorities to enter into a restrictive covenant in gross would have two advantages -

- \* it would allow the authority to influence the content of the restrictive covenant, for example, where it was to be used for the land management of a subdivision; and
- \* it would allow the local authority to enforce the covenant, particularly long after the owner or developer had disposed of his interest in the land.

## **6. ENFORCEMENT OF RESTRICTIVE COVENANTS**

### **(a) Introduction**

5.28 At present, restrictive covenants are generally enforceable in the Supreme Court (in equity, by an injunction and damages in addition to or substitution for an injunction) by a party to the covenant or a successor in title. A Local Court also has jurisdiction to deal with equitable claims for damages up to \$25,000.<sup>42</sup> Where a local authority does not own land or an interest in land benefited by a restrictive covenant it does not have standing to enforce it. A number of issues arise, including whether other means for enforcing restrictive covenants should be provided and whether a local authority should have standing to ensure compliance with restrictive covenants on behalf of one of its residents or ratepayers where it does not own land or have an interest in land benefited by the covenant.

### **(b) Compliance with restrictive covenants**

5.29 One means of ensuring that a building is constructed in conformity with a restrictive covenant is to provide that the plans for the building must conform with the covenant before they are approved by the relevant local authority. This approach was at one time adopted by at least one local authority. At the request of the developer of a subdivision, the Council agreed to withhold the issue of a building licence pending the developer's approval of the

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<sup>41</sup> Paras 2.10 and 2.11 above.

<sup>42</sup> Para 2.27 above.

proposed building. Once the developer was satisfied that the plans conformed with the covenant, a stamped copy of the plans was sent to the Council. If the plans complied with the Council's requirements, a building licence was then issued. The approach was discontinued because a council does not have authority to withhold a building licence pending vetting of the building plans by the developer.

5.30 One option is to give such a scheme legislative effect by authorising local authorities to vet building plans to ensure that they comply with a restrictive covenant without the involvement of the developer. To be effective it would be necessary for the restrictive covenant to be registered with the local authority. A fee could be imposed on the registration of the covenant to cover the costs of registration, vetting of plans and enforcement of covenants, including field inspections to ensure construction was in accordance with the approved plans and any legal action which might be required. This approach has at least two difficulties -

- \* it delays the approval of building applications; and
- \* it results in additional work for the council's staff.

5.31 This approach would provide a means of preventing breaches of restrictive covenants in relation to the construction of a building. It would not, of course, provide a means of dealing with breaches of covenants in relation to existing buildings, breaches not related to building plans or breaches which occurred after the building was completed. For these breaches it would be necessary to use other means of enforcement.

**(c) Other enforcement mechanisms**

5.32 One drawback with existing civil remedies is that the owner of the benefited block bears the onus of instituting court proceedings against the owner of a burdened block whom he alleges has breached or is likely to breach a restrictive covenant. An alternative approach would be to allow the owner of a benefited block to apply to the local authority for the issue of a written enforcement notice to the owner of the burdened block directing him to -

- \* rectify any breach of a restrictive covenant<sup>43</sup> within a prescribed period, say 21 days; or
- \* within the prescribed period, cease or agree not to undertake any development that constitutes a breach of the covenant.

5.33 The owner of the burdened block, on being served with an enforcement notice, could be given the right, within the prescribed period, to apply to a court or tribunal for an order that the direction in the notice be varied or cancelled. On hearing the owner of the burdened block and the owner of the benefited block, the court or tribunal could confirm, vary or cancel the direction or award damages to the owner of the burdened block if he can be compensated adequately in money for the harm done to his interests as a result of the breach of the covenant. Where the direction was confirmed or varied, the owner would be required to comply with the direction as so confirmed or varied within say 21 days of the confirmation or variation or such other period as the court or tribunal should order. If the owner failed to make an application to the court or tribunal or if, on an application, the direction was confirmed or varied, and the owner did not comply with the order within the specified time, the local authority would be empowered to carry out whatever works were necessary to secure compliance with the direction. The costs incurred by it in carrying out such works could be recovered from the owner of the burdened block in any court of competent jurisdiction.<sup>44</sup> Where the breach of a restrictive covenant was not one that could be remedied by necessary work being carried out it could be made an offence to fail to comply with an enforcement notice with a daily penalty for a breach of a continuing nature, for example, keeping a horse on a property where that is prohibited by a restrictive covenant.

5.34 The court or tribunal could be either the Supreme Court, District Court, a Local Court or the Town Planning Appeal Tribunal. Local Courts have the advantage that they are more accessible because they are located in a number of Perth suburbs and in many country towns. If the jurisdiction were conferred on Local Courts, there would be a right of appeal to the District Court.<sup>45</sup> The Town Planning Appeal Tribunal is, as its name suggests, an appellate body. It consists of three members. One is a legal practitioner, one is a person having

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<sup>43</sup> Depending on the breach this might involve pulling down a building or altering it so as to remove the cause of the breach.

<sup>44</sup> This approach is similar to one in s 401 of the *Local Government Act 1960* in relation to the construction of buildings which do not comply with the plans and specifications for the building and s 43 of the *Metropolitan Region Town Planning Scheme Act 1959* in relation to the removal of any development commenced, continued or carried on on land in contravention of the Metropolitan Region Scheme.

<sup>45</sup> *Local Courts Act 1904* s 107.

knowledge of and experience in town planning and the final member is a person having knowledge and experience in public administration, commerce or industry.<sup>46</sup> At present it does not have any original jurisdiction. Nevertheless, it has the advantage that it is a specialist body dealing with planning matters.

5.35 Another similar approach would be simply to make it an offence to contravene or fail to comply with a restrictive covenant, as is the case with breaches of town planning conditions<sup>47</sup> and restrictions on the use of lots under the *Strata Titles Act 1985*.<sup>48</sup> The local authority could also be given power to remove or alter any building or other work which had been commenced or continued in contravention of the restrictive covenant, as can be done in the case of breaches of town planning conditions. Any expenses so incurred could be recovered from the person in default.<sup>49</sup>

#### **(d) Retaining existing remedies**

5.36 The introduction of other mechanisms to enforce restrictive covenants need not entail abolishing the existing remedies of an injunction (in the Supreme Court) or a claim for damages (in either the Supreme Court or a Local Court). In particular circumstances a person may prefer to apply for an injunction or seek damages rather than rely on any new mechanism for enforcing a restrictive covenant. However, the use of an injunction is likely to be less attractive if a new mechanism is introduced because an injunction is a discretionary remedy and the adequacy or appropriateness of other remedies is a consideration in favour of denial of an injunction.<sup>50</sup>

#### **(e) Giving local authorities standing to enforce restrictive covenants**

5.37 At present, a local authority which does not own land benefited by a restrictive covenant does not have standing to enforce it by taking action in either the Supreme Court or a Local Court on behalf of one of its residents or ratepayers. One question which arises is

<sup>46</sup> *Town Planning and Development Act 1928* s 42(2).

<sup>47</sup> Para 3.13 above. This system was severely criticised at 103 of the *Report of the Committee of Inquiry into Statutory Planning in Western Australia* (1984).

<sup>48</sup> Where a strata plan is lodged for registration under the *Strata Titles Act 1985* the plan may by an appropriate endorsement restrict the use to which a lot or part of a lot may be put: *Strata Titles Act 1985* s 6(1). Where this occurs, it is an offence for a proprietor, occupier or other resident of the lot to use it, or permit it to be used, in a manner that contravenes the restriction: id s 6(2).

<sup>49</sup> Para 3.14 above.

<sup>50</sup> M J Tilbury *Civil Remedies Volume 1 Principles of Civil Remedies* (1990) 297 para 6040.

whether a local authority should be given standing to enforce a restrictive covenant in these courts. Arguments against this are -

- \* restrictive covenants are private arrangements entered into between landowners, which are otherwise enforceable only as between landowners and their successors in title;
- \* local authorities may be reluctant to take action in relation to minor breaches, preferring to rely on community education or community pressure against the person who breached the covenant;
- \* local authorities may not have adequate funds to undertake proceedings in the courts or a tribunal to enforce covenants; and
- \* their decision-making processes may mean that they are not well suited to taking timely action to prevent a breach of a covenant.

5.38 Arguments for giving local authorities standing or power to enforce restrictive covenants on behalf of the parties who have the benefit of them are -

- \* although restrictive covenants involve private planning, they are akin to functions which local authorities undertake at present in relation to town planning and the construction of buildings in order to protect the amenity of areas in the municipality; and
- \* it might be less prejudicial to relations between neighbours if enforcement action was taken by a public body such as a local authority.

## **7. ADEQUACY OF LOCAL AUTHORITY POWERS TO REGULATE LAND IN THEIR AREA**

### **(a) Imposing conditions of a continuing nature on subdivisions**

5.39 At present neither the Western Australian Planning Commission nor local authorities have power to impose conditions of a continuing nature on land on the approval of a

subdivision of land. Applications for subdivisions are dealt with by the Western Australian Planning Commission which may impose conditions on its approval of a subdivision, but such conditions must be capable of being carried out before the approval becomes effective.<sup>51</sup>

5.40 There may, however, be circumstances in which it would be desirable for a condition of a continuing nature to be imposed at the time a subdivision of land is approved. A local authority might wish, for example, to impose continuing conditions for the purpose of land management either indefinitely or until the land concerned was rezoned.<sup>52</sup> A restrictive covenant in gross<sup>53</sup> is one means of doing this so long as the land owner is prepared to enter into such an agreement.<sup>54</sup> Another means of dealing with these matters is through conditions imposed on the land under a town planning scheme. However, because of the time and the process required to amend a town planning scheme, the amendment may not be completed before the land is subdivided. The question arises whether the Western Australian Planning Commission or a local authority should be given an express statutory power at the time of the approval of a subdivision of land to impose conditions of a continuing nature relating to land management which would attach to the land and bind successors in title.<sup>55</sup> These conditions could be subject to a right of appeal in the same way as conditions attached to a subdivision by the Western Australian Planning Commission<sup>56</sup> and could be enforced in the same way as town planning conditions.<sup>57</sup> If conditions were imposed they could be extinguished by the local authority once the need for them had passed, for example, if the land was rezoned or the town planning scheme was appropriately amended.

5.41 Allowing a local authority to impose conditions in relation to land management at the time of subdivision would involve a departure from the existing system in which applications for subdivisions of land are dealt with by the Western Australian Planning Commission. The present position was reviewed in 1984 by the *Report of the Committee of Inquiry into Statutory Planning in Western Australia*. The Committee did not support delegation of subdivision control to local authorities for the following reasons:

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<sup>51</sup> Para 3.2 above.

<sup>52</sup> For example, it might wish to limit the number of horses that could be kept on a property in a special rural zone, prevent or limit the extraction of ground-water or require trees to be maintained on the property.

<sup>53</sup> Paras 5.25-5.27 above.

<sup>54</sup> Entering into the agreement could be made a condition of the approval of the subdivision by the Western Australian Planning Commission or the Town Planning Appeal Tribunal.

<sup>55</sup> Conditions of a continuing nature can be imposed in Queensland: para 4.26 above.

<sup>56</sup> *Town Planning and Development Act 1928* ss 26 and 38.

<sup>57</sup> Paras 3.13-3.14 above.

- “the present system of centralised subdivision control is simple, efficient and generally convenient for the applicant;
- the State planning agency is better equipped to administer subdivision control and to carry out the consultations necessary with other State Government departments and instrumentalities;
- Whilst some local authorities may have the resources to administer subdivision control, there would be many local authorities which would not have adequate staff or resources;
- Centralised subdivision control achieves greater uniformity and consistency in procedures, policies and standards;
- Delegation of subdivision responsibility may well lead to delays in the planning process.”<sup>58</sup>

5.42 It might be considered that it would unduly complicate the approval process to give local authorities power to impose conditions of a continuing nature on subdivisions. On the other hand, allowing the Western Australian Planning Commission, if not a local authority, to impose conditions of a continuing nature would supplement the existing subdivision provisions by allowing the imposition of conditions of local interest where existing controls in town planning schemes were inadequate. It would also avoid the need for the use of the device of a deed between a developer and a local authority.<sup>59</sup>

#### **(b) Enforcement of planning policies**

5.43 At present, where a town planning scheme provides for it, a local authority may adopt a planning policy to regulate the development or use of land in its area.<sup>60</sup> According to the Model Scheme Text, planning policies are given statutory effect by reference to the provisions of the town planning scheme. By implication, they may be enforceable in the same

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<sup>58</sup> *Report of the Committee of Inquiry into Statutory Planning in Western Australia* (1984) 56.

<sup>59</sup> Para 2.11 above.

<sup>60</sup> Para 3.16 above.

way as provisions of town planning schemes.<sup>61</sup> However, to clarify the matter, the Commission suggests that they could be expressly made enforceable in the same way as the provisions of town planning schemes.

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<sup>61</sup> See paras 3.13-3.14 above.

## Chapter 6

### QUESTIONS AT ISSUE

6.1 The Commission welcomes comment, with reasons where appropriate, on any matters arising out of this Discussion Paper and in particular on the following questions -

#### **Limiting the use of restrictive covenants by developers or others involved in subdivisions**

1. Should all uses of restrictive covenants be abolished?

*Paragraphs 5.2-5.4*

2. Should particular uses of restrictive covenants be abolished and, if so, which ones?

*Paragraphs 5.5-5.11*

3. Should limitations be placed on the use of restrictive covenants by developers or others involved in subdivisions?

*Paragraph 5.12*

4. If so, should developers wishing to use restrictive covenants be required to obtain the approval of -

(a) the Western Australian Planning Commission; or

(b) a local authority; and

should such approval be a prerequisite to registration of the restrictive covenants at the Land Titles Office?

*Paragraphs 5.12-5.13*

5. Should the Ministry for Planning provide guidelines for the approval of restrictive covenants?

*Paragraph 5.14*

6. Should it be provided that restrictive covenants should only be valid for a limited period of time, say ten years?

*Paragraph 5.15*

7. Alternatively, should it be provided that a restrictive covenant expires after a limited period of time unless it is re-registered by the owner of the benefited block?

*Paragraph 5.16*

### **Inconsistency between a restrictive covenant and a town planning scheme or by-laws**

8. Should it be provided that it is not a breach of a restrictive covenant to construct a building in conformity with -

- (a) a town planning scheme;
- (b) by-laws, such as building by-laws, or regulations?

*Paragraphs 5.20-5.21*

9. If so, should any owner of land protected by a restrictive covenant who was adversely affected by it being overridden be given a right to obtain compensation from the person benefiting from that result as is the case in Tasmania?

*Paragraph 5.22*

10. Should the circumstances in which restrictive covenants can be extinguished or modified be made more liberal and, if so, in what manner?

*Paragraphs 5.23-5.24*

### **Parties to a restrictive covenant**

11. Should local authorities have power to enter into covenants in gross?

*Paragraphs 5.25-5.27*

### **Enforcement of restrictive covenants**

12. Should local authorities be authorised to vet building plans to ensure that they comply with a restrictive covenant?

*Paragraphs 5.29-5.30*

13. Should it be possible to enforce a restrictive covenant by a mechanism which allows the owner of the benefited block to apply to the local authority for the issue of a written enforcement notice to the owner of the burdened block directing him to -

- rectify any breach of a restrictive covenant within a prescribed period, say 21 days; or
- within the prescribed period, cease or agree not to undertake any development that constitutes a breach of the covenant.

If so, should the owner of the burdened block be given the right, within the prescribed period, to apply to a court or tribunal for an order that the direction in the notice be varied or cancelled.

*Paragraphs 5.31-5.33*

14. If so, should the court or tribunal to which the application can be made be the -

- (a) Supreme Court;
- (b) District Court;
- (c) Local Court; or
- (d) Town Planning Appeal Tribunal.

*Paragraph 5.34*

15. Should it simply be an offence to contravene or fail to comply with a restrictive covenant as is the case with breaches of town planning conditions?

*Paragraph 5.35*

16. Should a local authority also be given power to remove or alter any building or other work which had been commenced or continued in contravention of a restrictive covenant, as

can be done in the case of breaches of town planning conditions? Any expenses so incurred could be recovered from the person in default.

*Paragraph 5.35*

### **Retaining existing remedies**

17. If other mechanisms to enforce restrictive covenants are introduced should the existing remedies be retained?

*Paragraph 5.36*

### **Standing**

18. Should local authorities be given standing to enforce restrictive covenants?

*Paragraphs 5.37-5.38*

### **Power to regulate the use of land**

19. Should the Western Australian Planning Commission or a local authority have power to approve an application for a subdivision of land subject to conditions of a continuing nature relating to land management which would attach to the land and bind successors in title?

*Paragraphs 5.39-5.42*

### **Enforcement of planning policies**

20. Should it be provided expressly that planning policies can be enforced in the same way as town planning schemes?

*Paragraph 5.43*

## **Appendix I**

### **LIST OF THOSE WHO MADE PRELIMINARY SUBMISSIONS<sup>1</sup>**

Applecross Residents Association  
Town of Bassendean  
City of Belmont  
Shire of Busselton  
Shire of Chittering  
City of Cockburn  
Shire of Collie  
P Davis, Market Development Supervisor - WA, BHP  
Shire of Exmouth  
J C Fawkner  
City of Gosnells  
Shire of Harvey  
Housing Industry Association Limited, Western Australian Division  
Shire of Irwin  
Shire of Katanning  
Shire of Manjimup  
Shire of Pingelly  
J A D Treloar, Town Planning Consultant  
Urban Development Institute of Australia  
Shire of Williams  
I Withnell

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<sup>1</sup> One person who made a confidential submission is not included in this list.

## **Appendix II**

### **CITY OF WANNEROO**

#### **EXTRACTS FROM TOWN PLANNING SCHEME NO 1 (as amended)**

##### 5.11 Planning Policies (Amendment 647 - 8.10.1993)

- (a) Council may prepare a planning policy (herein called "a Policy") which may make a provision for any matter generally, or any particular class of matter, related to the planning or development of the Scheme Area, or to one or more parts of the Scheme Area; and may amend or add to or rescind a Policy so prepared.
- (b) A Policy shall become operative only after the following procedures have been completed;
  - (i) Council having prepared and adopted a draft Policy shall publish a notice once a week for two consecutive weeks in a newspaper circulating within the Scheme Area giving details of which it may be inspected and during what period submission may be made; that period being not less than 21 days.
  - (ii) Council shall review the draft Policy in the light of any submissions made and then resolve to either finally adopt the draft Policy with or without modification; or not proceed with the draft Policy.
  - (iii) Following final adoption of a Policy; notification of its adoption shall be published once in a newspaper circulating within the Scheme Area.
- (c) The Council shall keep copies of any Policy with the Scheme documents for public inspection during normal hours.
- (d) An amendment or addition to a Policy may be made after the Policy has become operative and shall be made in the same manner as provided for in subclause 5.4.5(b).
- (e) A Policy may be rescinded by:
  - (i) preparation or final adoption of a new Policy pursuant to this clause, specifically worded to supersede an existing Policy; or
  - (ii) publication of a formal notice of rescission by the Council twice in a local newspaper circulating in the Scheme Area.

- (f) A Policy shall not bind the Council in respect of any application for planning approval but the Council shall have due regard to the provisions of the Policy and the objectives which the Policy is designed to achieve before making its decision.

## **Appendix III**

### **CITY OF MELVILLE**

#### **EXTRACTS FROM TOWN PLANNING SCHEME NO 3 (as amended)**

##### **5.14 RESTRICTIVE COVENANTS**

5.14.1 Subject to the provisions of Clause 5.14.2, a restrictive covenant affecting any land in the Scheme Area whereby or the effect of which is that the number of residential units that may be constructed on the land is limited or restricted to a number less than that permitted by the Scheme, is hereby extinguished or varied to the extent that it is inconsistent with the provisions of the Scheme, as the case requires.

5.14.2 Where Clause 5.14.1 operates to extinguish or vary a restrictive covenant the Council shall not grant planning consent to the development of the land (in this Clause referred to as "the subject land") which would but for the operation of Clause 5.14.1 have been prohibited unless:

- (a) written notice of the proposed development in a form approved by the Council has been given to:
  - (i) the owners of all lots adjoining the subject land; and
  - (ii) any other person who in the opinion of the Council was entitled to the benefit of or to enforce the restrictive covenant extinguished or varied by that Clause or who would have been so entitled but for the operation of that Clause and is likely to be affected by the proposed development of the subject land;
- (b) the notice referred to in paragraph (a) hereof states that submissions may be made to the Council within the period specified therein (not being less than 21 days after the date of service of the notice);
- (c) any submissions received by the Council are considered by it; and
- (d) the Council is satisfied that the proposed development of the subject land will not be out of character with or prejudicial to the amenity of the locality by reason of the appearance design or height of the proposed building or the materials or finish thereof.