

# Restrictive Covenants

Some properties within Victoria are subject to a restrictive covenant, or covenant, which is registered on the Certificate of Title. These covenants may restrict how you use or develop the land and it is important that you are aware of any covenants affecting your property and the restrictions it may impose on you.

## What is a restrictive covenant?

A restrictive covenant is an agreement which prohibits the owners of a particular property from undertaking certain activities or building works on the property. These covenants need to be for the benefit of surrounding properties, usually in an attempt to preserve the character of a particular neighbourhood.

Historically, covenants were often used as a form of planning control to limit the development and/or zoning of particular areas prior to the current planning schemes.

These days, they are usually used by the original developer of the area to include particular rules or restrictions for all subsequent owners of the property.

## What does it mean if my property has a restrictive covenant on Title?

If a restrictive covenant is registered on your Certificate of Title, you have an obligation to ensure that you do not breach the terms of the covenant.

The specific clauses that apply to your property will depend on the wording of the covenant and you should always seek legal advice if you are unsure of the terms of the covenant applicable to your Title.

Common examples of restrictions that a covenant may impose on a property owner include:

- Restriction on your ability to subdivide the property;
- The requirement to construct any dwellings within certain parameters including the requirement to use a particular material or the dwelling to be a minimum size; or
- Restriction on your ability to use the property for commercial or residential purposes.

## Can I change or remove a restrictive covenant?

The most common restrictive covenant that causes issues for developers is the prohibition on constructing multiple dwellings. The Planning and Environment Act (Vic) 1987 does not allow council to issue a planning permit if the terms of the permit would allow a breach of the terms of a restrictive covenant.

If your property is encumbered by a restrictive covenant, you may wish to seek to have this modified or removed to allow you to use and/or develop the property as you wish.

The process of changing the terms of a covenant, or removing a covenant, will depend on several factors specific to your circumstances. It is not a guaranteed exercise and numerous factors will determine whether you are able to make any changes to your covenant.

Broadly speaking, there are two ways that you can make an application to modify or remove a covenant, each with its own pros and cons:

1. Make an application to your relevant authority for a planning permit which makes the required changes.

This process involves making an application to council to show that the properties which benefit from the restrictive covenant will be unlikely to suffer detriment of any kind as a result of the modification or removal. The authority must consider the interests of all affected persons before they will be satisfied that this test has been met.

Making an application under this process will require the engagement of a solicitor and a town planner.

2. Make an application to the Supreme Court for a Court Orders that the required changes are approved.

This process involves making an application to the Supreme Court to show that the covenant should be made void as a matter of law, or that the properties which benefit from the restrictive covenant will not be substantially injured as a result of the modification or removal.

Making an application under this process will require the engagement of a solicitor, a barrister and an expert town planner.

The most appropriate course of action will depend on numerous factors which vary on each particular covenant and circumstance.

If you would like further advice on how to best deal with a covenant burdening your land, please contact our office today.

### Can I enforce a restrictive covenant?

If you have a neighbouring property who you believe has breached a restrictive covenant, or if you have received notice that your neighbour is making an application to modify or remove a restrictive covenant, you may be able to submit an objection.

Our office can assist you in determining your rights in these circumstances and the options available to you to enforce the covenant's terms.

### ENCUMBRANCES ON TITLE

Certificates of Title may have any number of encumbrances registered on it, each with a different meaning and role.

Some examples that you may have seen on your Title include:

#### Restrictive Covenant

This is a contractual agreement between a developer and purchaser which can contain restrictions which burden a property for the benefit of other surrounding properties. The agreement is attached to the land and will continue to affect all subsequent owners. It is the beneficiaries of the covenant that can enforce its terms.

#### Section 173 Agreement

This is a contractual agreement between a property owner and council which can contain restrictions or ongoing obligations which must be followed. The agreement is registered on the Title for the property and will continue to affect all subsequent owners. It will usually be required as part of a condition of a planning permit when developing land. It is the relevant council that is responsible for enforcing its terms.



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