

Single Dwelling Covenant Policy

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Responsible Directorate: City Planning

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1. Introduction

1.1. Our Values

We have six values - with 'think customer' and 'act with integrity', being at the centre of everything we do and our new leadership framework describes and sets expectations for our leaders. Our values and behaviours guide the way we work and lead.

How we work	How we lead
<ul style="list-style-type: none">• Think Customer experience• Act with integrity• Work together as one• Explore better ways• Treat people with respect• Own it, follow through	<ul style="list-style-type: none">• Lead by personal example• Build trust• Create shared direction• Inspire possibility• Empower others

1.2 Introduction

A restrictive covenant (covenant) is a private legal agreement between a land owner and purchaser (with the intent that it binds subsequent purchasers) which is registered on the Certificate of Title.

Covenants are most commonly applied when an owner subdivides land and wishes to apply some restrictions on the future use or development of the lots created. For example, a common covenant prevents the development of a lot for more than one dwelling. Other common covenant restrictions within the City of Boroondara may include (but are not limited to):

- Specifying particular building materials;
- No quarrying;
- No industrial uses;
- No treatment of infectious diseases;
- Minimum cost of construction;
- Minimum front setback;
- Type of front fence; and
- Form of a proposed building.

Covenants bind any future purchasers of the land to comply with the covenant restrictions unless the covenant is varied or removed. Any subsequent purchasers of lots in the original subdivision held by the original owner at the time the covenant was

entered into have the benefit of the covenant.¹ These beneficiaries are able to enforce the restrictions of the covenant through the Supreme Court.

Council is not generally a party to covenants and is unable to enforce a covenant on behalf of a legal beneficiary unless Council owns land or has land vested in it which has the benefit of the covenant.

There are three methods of removing or varying a covenant, as follows:

- Application to the Supreme Court pursuant to Section 84 of the *Property Law Act* 1958;
- Application for a planning permit to vary or remove a covenant; and
- Planning Scheme Amendment to introduce a site specific provision which varies or removes the covenant.

Further information on covenants is provided on Council's website:

<https://www.boroondara.vic.gov.au/planning-building/planning-permit-applications/restrictive-covenants>

1.3 Purpose

The purpose of this policy is to recognise and reinforce the relevance and importance single dwelling covenants have in relation to the ongoing management of development of land in parts of the municipality.

Council acknowledges its broader role to plan for the housing needs of its current and future populations. However, it recognises the need to balance the demand for more diverse housing with the protection of existing features of the municipality which benefit residents and visitors. These features include, but are not limited to, heritage, neighbourhood character, amenity and the environment. Covenants can have an influence on all of the above. Covenants which limit the number of dwellings on a lot to one (single dwelling covenants) can be particularly effective in maintaining attractive neighbourhoods and on preserving the amenity of adjoining and nearby properties.

1.4. Scope

This policy applies to proposals to remove or vary registered single dwelling covenants using any of the following methods:

¹ Not all covenants operate in this manner and appropriate advice should be sought in respect to identification of beneficiaries.

- Application to the Supreme Court pursuant to Section 84 of the *Property Law Act* 1958;
- Application for a planning permit to vary or remove a covenant; and
- Planning Scheme Amendment to introduce a site specific provision which varies or removes the covenant.

1.5. Objectives

- To ensure the removal or variation of single dwelling covenants will not result in development which negatively impacts on the existing neighbourhood character, heritage and environmental value of an area;
- To ensure the removal or variation of single dwelling covenants will not negatively impact on the amenity of beneficiaries and adjoining and nearby properties; and
- To establish criteria for the extent of Council's involvement in Property Law Act applications to discharge or modify single dwelling covenants in the Supreme Court.

1.6 Policy

Application to the Supreme Court pursuant to Section 84 of the *Property Law Act* 1958

1. Before Council makes a decision whether to join a Property Law Act application made to the Supreme Court to discharge or modify a covenant, Council will obtain professional advice as to:
 - Whether Council is a beneficiary of the covenant; and
 - The nature and purpose of the covenant.
2. If Council is a beneficiary of the covenant and in deciding whether to join a Property Law Act application as a party, Council will determine the extent to which the discharge or modification of the covenant will injure Council's private law beneficial interest in the covenant.

This will be done in part by comparing the benefits initially intended to be conferred, and actually conferred, by the covenant and the benefits, if any, which would remain after the proposed modification or discharge. In so doing, Council will take into account the potential developments or uses that would be permitted by the covenant and the realistic probability of those developments occurring.

3. Council will identify and determine whether other beneficiaries of the covenant have joined the application as a party and the extent to which those beneficiaries:
 - Have a stronger beneficial interest in the covenant than Council;
 - Are resolved and able to defend the covenant by their involvement in the application; or
 - May have their entitlement to an order for costs in their favour prejudiced by Council's involvement in the application as a party.
4. The likely legal costs incurred and Council resources required to join the application as a party and whether the costs and resources justify the beneficial interest sought to be defended.

Given that Council is unable to enforce a covenant on behalf of a legal beneficiary, it is not appropriate for Council to fund other beneficiaries' cases.

Similarly, Council's role can not be the advocate on behalf of other beneficiaries.

Application for a Planning Permit to Vary or Remove a Covenant or request for a Planning Scheme Amendment

In determining whether to grant a permit or support a planning scheme amendment Council will consider whether:

- (a) The single dwelling covenant is obsolete;
- (b) There have been changes in the character of the neighbourhood to the extent the covenant is no longer relevant;
- (c) Varying or removing the covenant benefits the beneficiaries and the wider community;
- (d) The variation or removal of the single dwelling covenant will not unreasonably affect the amenity of beneficiaries and adjoining and nearby properties including through any of the following:
 - Loss of privacy
 - Overshadowing
 - Loss of daylight
 - Loss of significant views
 - Building bulk
 - Noise
 - Increased traffic

- Loss of on-street car parking;
- (e) The variation or removal of the single dwelling covenant will result in a development of the lot which will respect and positively contribute to the existing or preferred neighbourhood character including the following considerations:
- Retention of mature trees
 - Landscaping
 - Building height and form
 - Setbacks
 - Open space
 - Site Coverage
 - Vehicle accommodation
 - Roof pitch
 - Materials;
- (f) The variation or removal of the covenant will not create an undesirable precedent;
- (g) The variation or removal of the single dwelling covenant would be consistent with broader strategic planning objectives of Council as set out in Boroondara Planning Scheme as follows:
- Planning Policy Framework;
 - Neighbourhood Character Policy; and
 - Clause 65 (Decision Guidelines);
- (h) The interests of affected persons.

In the event that an application is made for a multi-dwelling proposal on land affected by a single dwelling covenant, Council strongly advises applicants to simultaneously, either as part of the same application, or via a separate application, apply to vary or remove the covenant so all matters relevant to the proposal and the covenant are considered together.

1.7 Application Requirements

Application for a Planning Scheme Amendment

Any request for a planning scheme amendment to remove or vary a covenant must be accompanied by the following material, as appropriate:

Documents

1. A letter requesting Council prepare a planning scheme amendment and seek Ministerial authorization.
2. The fee for stage 1 of the amendment consideration, and a completed Agreement to Pay Panel Costs form.
3. The history of the sequence of the subdivision which gave rise to the covenant. This will assist in determining the dominant or servient tenements who may be affected by the application. Specific documents to be supplied include:
 - A copy of the original parent title from which all land in the subdivision (including the applicant property) was created.
 - A copy of the original plan of subdivision.
 - Copies of all the Titles of lots in the original plan of subdivision.
 - Copies of all original transfers of land issued for all lots in the relevant plan of subdivision.

Submission

4. Details of how the covenant is obsolete.
5. Details of any changes in the character of the neighbourhood to the extent the covenant is no longer relevant;
6. Details of the benefits arising from the removal or variation of the covenant to beneficiaries and the wider community.
7. Details of how the removal or variation of the covenant will not adversely affect the amenity of the beneficiaries and the adjoining and nearby property owners and occupiers.
8. Details of how the variation or removal of the single dwelling covenant will result in a development of the lot which will respect and positively contribute to the existing or preferred neighbourhood character.
9. Whether the removal or variation of the covenant creates an undesirable precedent.
10. Whether the amendment can be supported by local or state government policy in the Boroondara Planning Scheme and if so, in what way.
11. Whether the application is consistent with an overall strategic framework plan for the area or the municipality.
12. Whether the variation or removal of the covenant will deliver net community benefit.
13. Any other relevant information.

Council is not required to commence a planning scheme amendment, and may resolve, even if all of the above information is submitted, that an amendment is not suitable, and should not be commenced.

Application for a Planning Permit to Vary or Remove a Covenant.

Information required to be provided with an application for a planning permit to remove or vary a covenant is as follows:

Documents

- A planning permit application form and fee.
- A copy of the Certificate of Title of the subject site (searched within the last 28 days and the instrument of transfer of title including the covenant).
- A copy of the original parent title from which all land in the original subdivision (including the applicant property) was created.
- A copy of the original plan of subdivision.
- Copies of all of the current titles of lots from the original plan of subdivision which benefit from the covenant (all searches must be less than 28 days old).
- Copies of all original transfers of land issued for the lots created in the original subdivision.
- A letter from a suitably qualified legal practitioner in the field of property law, identifying which properties within the plan of subdivision benefit from the covenant.

Submission

- Details of how the covenant is obsolete.
- Details of any changes in the character of the neighbourhood to the extent the covenant is no longer relevant;
- Details of the benefits arising from the removal or variation of the covenant to beneficiaries and the wider community.
- Details of how the removal or variation of the covenant will not adversely affect the amenity of the beneficiaries and the adjoining and nearby property owners and occupiers.
- Details of how the variation or removal of the single dwelling covenant will result in a development of the lot which will respect and positively contribute to the existing or preferred neighbourhood character.
- Whether the removal or variation of the covenant creates an undesirable precedent.
- Whether the amendment can be supported by local or state government policy in the Boroondara Planning Scheme and if so, in what way.
- Whether the application is consistent with an overall strategic framework plan for the area or the municipality.

- If the covenant was created after 25 June 1991, whether the removal or variation of the covenant will be likely to cause financial loss, loss of amenity, loss arising from change to the character of the neighbourhood or any other material detriment.
- Any other relevant information.

This information is not exhaustive and applicants should include any other information considered necessary. Applications should also have regard to this policy and Neighbourhood Character Policy (including the Boroondara Neighbourhood Character Precinct Statements 2013) of Clause 22.05 of the Boroondara Planning Scheme.

1.8 Corporate Framework

The consideration to discharge or modify a covenant in the Supreme Court is limited to narrow legal criteria which are a matter of private property law and not a matter of public planning law. However, any request to amend the Boroondara Planning Scheme or application for a Planning Permit to vary or remove a covenant should be considered in the context of the corporate framework.

The relevant provisions are set out below:

Boroondara Community Plan

The Boroondara Community Plan (BCP) 2017-27 sets out the 10-year vision for Boroondara's future based on the identified values, aspirations and priorities, including:

'Through the BCP, we are committed to striving to enhance wellbeing for people who live, work, study or recreate in the municipality as an outcome of everything we do. We will focus on providing a high quality of liveability through our planning, services, places and spaces to enable all members of the community to make healthy choices. We will prioritise action focusing on improving health in order to achieve the community's vision for Boroondara's future.'

- Priority Theme 4: Neighbourhood Character and Heritage

Strategic Objective 4: Protect the heritage and respect the character of the City to maintain amenity and liveability whilst recognising the need for appropriate, well-designed development for future generations.

Relevant strategies for how Boroondara will achieve this:

Strategy 4.1 Encourage the planning of well-designed new development that is appropriately located, and does not negatively impact on established residential streets and valued neighbourhood character.

Strategy 4.4 Encourage development in and around our commercial centres, with an emphasis on increasing housing diversity by having the appropriate planning controls in the Boroondara Planning Scheme.

Strategy 4.6 Engage with owners and developers to achieve a balance between development and protection of neighbourhood character, heritage and amenity.

- Priority Theme 7: Civic Leadership and Governance

Strategic Objective 7: Ensure that ethical, financial and socially responsible decision making reflect community needs and are based on principles of accountability, transparency, responsiveness and consultation.

Relevant strategies for how Boroondara will achieve this:

Strategy 7.2 Ensure transparent decision making through open governance processes.

Strategy 7.5 Ensure sound financial management while allocating resources to deliver strategic infrastructure and services that meet community need.

Municipal Strategic Statement

- Clause 21.04-1 Urban Design

Key issues

- *Achieving high quality urban design outcomes through development.*
- *Ensuring built form outcomes enhance streetscapes and maintain local amenity.*
- *Ensuring that the built environment caters to the needs of diverse user needs.*

Objective 1

To achieve high quality urban design and built form outcomes.

Relevant Strategies

1.1 Facilitate development that respects and positively responds to the physical characteristics of the site and sensitively manages its various interfaces.

1.2 Support building design and internal layout of new buildings to achieve high quality passive surveillance, engagement and safety within the public realm.

1.3 Require development to be responsive to existing streetscape patterns and themes.

1.4 Require development to treat landscape as an integral part of the overall design.

1.5 Maintain the City's streets and laneways as high quality public spaces.

- Clause 21.04-2 Neighbourhood Character

Key issues

- Loss of mature trees and gardens, and new development that does not provide adequate space for new vegetation, particularly canopy trees.
- Development which does not respect or positively contribute to the existing or preferred neighbourhood character.

Objective 2

To ensure that the City retains its distinct neighbourhood character identity.

Strategies

2.1 Maintain the City's valued residential amenity including landscaped settings and leafy streets.

2.2 Minimise proposals for subdivisions without approved buildings in all residential zones that create lots smaller than those in the surrounding area.

- Clause 21.04-5 Heritage Conservation

Key issues

- *Ensuring new works to heritage places are respectful to the heritage significance of the place.*
- *Loss of heritage built fabric and cultural sites from development.*

Objective 7

To identify and protect all individual places, objects and precincts of cultural, aboriginal, urban and landscape significance.

Strategies

7.1 Conserve and enhance individual heritage places and precincts, and aboriginal and cultural features.

7.2 Require development to respect and enhance heritage buildings and precincts.

2. Accountabilities

For all queries or feedback regarding this policy document, please contact the responsible officer below.

Contact	Contact number	Contact e-mail
Manager Statutory Planning	9278 4888	boroondara@boroondara.vic.gov.au
Manager Strategic Planning	9278 4815	boroondara@boroondara.vic.gov.au

3. References

3.1. Related documents

- the *Planning and Environment Act* 1987; and
- the *Property Law Act* 1958.

3.2. Definitions

Restrictive Covenant (covenant)	A private legal agreement between a land owner and purchaser that is registered on the Certificate of Title.
Beneficiary	Anyone who has benefit of a restrictive covenant and is able to enforce the restrictions of a covenant through the Supreme Court.
Planning Scheme	A legal document that sets out the framework against which planning permits are assessed. It is made up of policies and controls for the way land may be used and what development is appropriate. All municipalities in Victoria have a planning scheme.
Planning Permit (permit)	A legal document that gives permission for a use or development on a particular site, issued under the <i>Planning and Environment Act</i> 1987

