CONFIRMED MINUTES

FOR THE

GREATER SHEPPARTON CITY COUNCIL

DEVELOPMENT HEARINGS PANEL

Meeting No. 4/2012

HELD ON

THURSDAY 14 JUNE 2012

AT 10.00AM

AT THE COUNCIL HUNTER ROOM

90 WELSFORD STREET

CHAIR

JONATHAN GRIFFIN

COMMITTEE MEMBERS PRESENT: Jonathan Griffin, Braydon Aitken, Claire Tarelli

OFFICERS: **Andrew Dainton – Senior Statutory Planner**

Tim Watson - Planner

Steve Bugoss – Timer and Minute Taker

1. ACKNOWLEDGEMENT

"We the Greater Shepparton City Council, begin today's meeting by acknowledging the traditional owners of the land which now comprises Greater Shepparton. We pay respect to their tribal elders, we celebrate their continuing culture, and we acknowledge the memory of their ancestors".

2. APOLOGIES

Dean Rochfort, Colin Kalms (due to previously having declared a conflict of interest to the CEO on the item listed for consideration)

3. CONFIRMATION OF MINUTES OF PREVIOUS MEETINGS

Moved by Braydon Aitken and seconded by Claire Tarelli that the minutes of previous meeting held on 24 May 2012 be adopted.

Carried.

4. DECLARATIONS OF CONFLICTS OF INTEREST

None

5. MATTERS FOR CONSIDERATION

One item listed for consideration.

6. LATE REPORTS

None

7. NEXT MEETING

28 June 2012.

I N D E X

Application Details:

Responsible Officer:	Andrew Dainton

Application Number:	2011-383
Applicants Name:	Bruce Trotter for owner Wilgarnie Pty Ltd
Date Application Received:	5 December 2011
Statutory Days:	146 (14 June 2012)

Land/Address:	600 Archer Road KIALLA VIC 3631
Zoning and Overlays:	Residential 1 Zone Design and Development Overlay 2 Development Plan Overlay - Schedule 11 Land Subject to Inundation Overlay
Why is a permit required (include Permit Triggers):	A planning permit is required to remove easements and covenants under clause 52.02
Are there any Restrictive Covenants on the title?	Yes

Proposal

The application proposes to remove covenants and easements from the land which the applicant now considers unnecessary due to the residential subdivision of the land which was allowed by permit 2011-11.

The land is within the Kialla growth corridor and is zoned for residential purposes. Development plans have been established within the corridor as have section 173 agreements that establish developer contributions to upgrade public infrastructure such as roads.

Covenant G001244 – created in 1976 and Gas easement (Covenant 1)

This covenant and easement protects an existing high pressure gas main that is within the land. The easement protects a 4.6m wide piece of land that contains the gas main. The covenant informs the owner of the land of the existence of the gas main and prevents excavation that could disturb the gas main.

The application was notified to the APA, who did not object to the removal of the covenant or easement. The covenant becomes unnecessary as Archer Street road reserve will be widened by 8m to include the location of the gas main.

Covenant G001244 – created in 1976 (Covenant 2)

Covenant G672022 – created in 1977 (Covenant 3)

Covenant G993899 – created in 1978 (Covenant 4)

The three covenants all include the same clauses being:

1. *That any main buildings being a dwelling house or dwelling houses erected on the said land (other than the dwelling presently standing on the said land) shall contain a floor area of not less than 1000 square feet within the outer walls thereof such area*

being calculated by excluding the area of car port, terraces, pergola and or verandahs and garage

2. *That such main buildings shall be constructed of new materials and shall not be an already wholly or partly completed house moved onto the said land*

3. *That the said land shall not be used for carrying on any noxious or offensive trade or for mining operations or excavations for the recovery of sand, gravel, ore or other materials or the treatment of same*

4. *The not more the four adult dogs shall be kept on the said land*

Removal of electricity supply easement

The application seeks to remove parts of E-5 on LP112600 on lots 7, 8 and 9 and shown blue on TP480496W. The easement currently contains overhead powerlines. As part of the residential subdivision of the land these powerlines are being relocated into the Archer Road reserve, which will remove the need for the easement on private land.

Removal of water supply easement

The application seeks to remove a water supply easement on lot 9 on LP112600. The easement was created to be in favour of all lots in the LP; however lot 8 which is part of the residential subdivision is a lot that received the benefit of the rural water supply.

Objection to Application 2011-383

The application was advertised in accordance with the Act and one objection received from the land owner (Mrs Bolzonello) at 3 Marlboro Drive, Kialla (Lot 5 LP127594), who is a beneficiary to the covenant. The objector in an email to the Council stated their grounds of objection as:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*

- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land (2011-11) as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped.*

Summary of Key Issues

- The application seeks to remove easements and two covenants from the land

- The application was widely advertised and one objection received, which opposed the removal of the easements and covenants. This objector was a beneficiary to the covenant but is not affected by either easement to be removed.

- The covenants were registered on title before 1991, therefore section 60(5) of the Act applies. This section prevents the removal of the covenant unless the responsible authority is satisfied that (in summary):

    - Any owner who the covenant benefits will be unlikely to suffer any detriment of any kind (including any perceived detriment), and

    - If any owner has objected, that the objection is vexatious or not made in good faith.

    These tests must be met or the application must be refused.

- Numerous discussions, including a mediation meeting have been held with the objector (Mrs Bolzonello) and the developer (Bruce Trotter), however these discussions failed to resolve the issues and the objection was maintained. The objector disclosed ulterior motives for the objection being to try and get a road link to assist early development of the objector land. The objector did not expand their objection to relate to the permissions applied for, or to specify any detriment or perceived detriment that the granting of the permit might cause.

- The removal of all covenants is supported by the planning officer by reference to all decision guidelines except one of the tests of section 60(5) of the Act.

- The planning officer reports that the responsible authority can be satisfied that the objection has been made for an ulterior motive that does not relate to the permission sought and therefore is vexatious or has not been made in good faith.

- Even though the objector has not stated how the covenant removal causes real or perceived detriment it is still difficult for the responsible authority to be satisfied that the covenant removal would be unlikely to cause real or perceived detriment to any person for reasons that are expanded in discussion within this report.

- It is arguable that the application fails one of the tests of Section 60 (5). While there is objection by a third party then either decision (granting or refusing) is likely to result in a review by VCAT and for this reason it is a safer decision that a permit cannot be granted by virtue of Section 60 (5) of the Act.

- The application to remove the gas covenant has not been supported by a letter of consent from the gas authority, however the authority was notified and did not object. As the gas main will be within the road reserve and not private land the covenant becomes redundant and has no purpose, therefore no detriment could be caused by its removal.

- The removal of both easements is supported by the planning officer as they are no longer required or relevant.

Moved by Braydon Aitken and Seconded by Jonathan Griffin

Refusal to Grant a Permit

That the Council having caused notice of Planning Application No. 2011-383 to be given under Section 52 of the *Planning and Environment Act 1987* and having considered all the matters required under Section 60 of the *Planning and Environment Act 1987* decides to Refuse to Grant a Permit under the provisions of 52.02 of the Greater Shepparton Planning Scheme in respect of the land known and described as 600 Archer Road Kialla, for the removal of restrictive covenants created by instruments G001244, G672022, G579815 and G993899 from the land in Certificates of Title Vol.0955, Fol.584 (Lot 7 on TP 480496W), Vol. 09055, Fol.585 (Lot 8 on LP 112600) & Vol.0955, Fol. 586 (Lot 9 on LP 112600), and; the removal of easement E-5 created on LP 112600 and coloured blue on TP 480496W from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600, the removal of the easement E-3 on LP 112600 from Lot 9 on LP 112699 and the removal of the gas conveyance easement created by instrument G001244 from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600.

The reason of refusal is that the responsible authority is not satisfied that the removal of the covenants would be unlikely to cause a detriment or perceived detriment to any person and consequently a permit cannot be granted due to Section 60 (5) of the Act.

CARRIED

Subject Site & Locality

An inspection of the site and the surrounding area has been undertaken.

Date: 13 December 2011 Time: 4.20pm

The site has a total area of 24ha and currently contains:

- disused agricultural land
- a dwelling

The main site/locality characteristics are:

- the land is within the southern growth corridor and is experiencing residential development.
- to the west and north west of the land is the Kialla Lakes estate which is continuing to develop and consists of over 1000 developed lots
- to the north is the land in the Marlboro Drive precinct in which three permits have been issued for residential development
- to the south and east of the land is land in the RLZ which is affected by flooding and is in an investigation area to determine if the land is suitable for residential development

The Photos below show the existing site:

Access to subject property from Archer Road

Subject land, existing power line easement

Looking North down Archer Road across frontage of subject land

Subject land with existing power line

Permit/Site History

The history of the site includes:

- Planning permit 2011-11 allowed 600 Archer Road, Kialla to be developed for a staged residential subdivision of the land.
- Condition three of the permit requires that before the issue of SOC for the first stage the restrictive covenants be removed from the land.

Further Information

Was further information requested for this application? No

Public Notification

The application has been advertised pursuant to Section 52 (1AA) of the *Planning and Environment Act 1987*, by:

- Sending notices to the owners and occupiers of adjoining land.
- Placing a sign on site.
- Notice in Newspaper.

The public notice appeared in the Shepparton News on 6 January 2012.

The applicant provided a signed declaration stating the sign was displayed on the land between 6 January to 20 January 2012.

Objections

The Council has received one objection to date. The objection stated:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*
- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped*

The officer considers that the objection has not stated how material loss would be caused or perceived to be caused by the granting of the permit to remove covenants or easements and the second point made relates to an earlier subdivision permit granted, not the current application under consideration. The objection is further discussed under the consultation section.

Title Details

The title contains both restrictive covenants and easements which this application seeks to remove.

The title also contains a Section 173 Agreement which requires developer contributions as part of the residential subdivision of the land.

Consultation

Consultation was undertaken. Relevant aspects of consultation, included:

- A mediation meeting was held between the applicant, objector and planning officers Braydon Aitken and Andrew Dainton on 7 March 2012. This mediation explored if there was a compromise position that would allow the objection to the withdrawn.

Positions

Objector

- The objector informed that she has lived on the land for many years and does not wish to leave her home but wants the opportunity to subdivide the existing dwelling from the land and create a developable lot to the rear of the dwelling.
- The objector is concerned that this developable lot will be without access until the De Palma subdivision is developed, which provides an east west connection to the objectors land.
- The objector seeks to gain vehicular access from the Trotter land to the south so that the objectors land can develop.
- The objector informed that this road connection should be entirely at Trotter's cost.
- The objector informed the removal of easements and covenants from the land would devalue her land as access could not be gained until DePalma developed.
- The objector confirmed that their objection related to the easement and covenant removal.

Applicant

- The applicant was informed of the objectors position
- The applicant did not agree to provide road access to the objectors land

Planning officers

- The officers explained that the removal of the gas and electricity easements were inconsequential as the infrastructure was being relocated to the road reserve and the water supply easement did not provide water supply to the objectors land
- The officers explained the purpose of the gas covenant was to protect the pipeline whilst it was in private land. As the gas line will be within the widened road reserve the easement and covenant have no purpose and should be removed.
- The officers explained the removal of the covenant relating to size of dwellings and number of dogs was to ensure titles within the residential subdivision were not burdened by the covenants. It was suggested to the objector that when it comes time for their development it is likely they will also seek to remove the covenants.

- Officers offered to seek that the applicant amends their application to include removal of the covenant from the objectors land. The objector did not agree to this.
- Officers explained this was not the time to revisit the road layout and road connections to the objectors land. Officers informed that new road connections to the land are proposed through the DePalma development plan and directly from Marlboro Drive.
- Officers explained that as the objector is a beneficiary to the covenant, it is possible that the objection will require the officers to recommend that the application be refused.

In summary the mediation was not successful in the objection being withdrawn, however the objector did gain a greater understanding of the application and relevant considerations. Council officers gained an understanding that the objector feels aggrieved that the current Development Plan and subdivision to the south allowed by permit 2011-11 should have provided a road access through the objector's property as was understood by a plan viewed in 2005.

The history of events as understood by Council is that a proposed Development Plan prepared for the Marlboro Estate in 2005 and including the Mrs Bolzonello land and DePalma land and O'Callaghan land but not the Trotter land was exhibited as part of Amendment C57 to rezone land to Res1 and DPO. That plan showed two road links to Trotters land from the objectors land and from O'Callaghan land.

In 2007 an Amendment C71 and a proposed development plan was prepared for the rezoning of Trotters land to R1Z and DPO11. That plan did not include a road link to Mrs Bolzonello land and was exhibited to Mrs Bolzonello and no objection was received. At a later time an application for Development Plan 2007—9 was formally received by Council and again did not include the road link to Mrs Bolzonello land. Council's Planning Branch did not advertise the submitted development plan because it decided the plan should be refused for a variety of reasons of non-compliance with other requirements primarily about development contributions and a future road link to GV Highway south of the airport, but at a subsequent review hearing VCAT approved the Development Plan 2007-9 and directed that it did not require advertising.

Consequently permit 2011-11 that permitted subdivision of the subject land (Trotter Land) was approved without advertising as it was in accordance with the approved Development Plan 2007-9. Condition 3 of Permit 2011-11 required removal of the covenants before Statement of Compliance and lead to the current application 2011-383.

Unfortunately the Mrs Bolzonello sees application 2011-383 is her last chance to force a road connection by the developer to the south and is persisting with this objection despite the reason for their objection not being relevant to the current application to remove covenants and easements.

In relation to consideration of application 2011-383 the mediation was an important opportunity for the objector to relate the objection to the permission sought rather than the previous subdivision permit and to state some way in which the removal of easements or covenants could cause a detriment either real or perceived, however this did not happen. The objector disclosed the true motive for the objection being an attempt to force the

adjoining landowner to grant a road access to the objectors property where no rights previously existed and to pay for construction of such access.

The objector Mrs Bolzonello land is approximately 4.5 ha in area and abuts part of the subject land on the north side. Mrs Bolzonello's lot has a road frontage of about 33m to Marlboro Drive but this section of the lot has a large two storey brick dwelling which prevents an access road being created to the balance of the lot which might otherwise be developed for additional residential lots in future.

Development Plan 2007-9 shows the required additional access to be achieved through both of the two titles of land to the east (DePalma and O'Callaghan land) at some time in future in accordance with the approved Development Plan. The likely delay in timing of development of either of these lots may not suit Mrs Bolzonello.

A second mediation meeting was held on 12 April 2012 and also subsequent phone communications during which conditions were explored under which the objection could be withdrawn. Council planners were hopeful that the development plan could be amended to show a possible future road link replacing one residential lot with notation that the abutting owner was to have first right of refusal to purchase the lot and would be required to construct the road link. Ultimately the developer was not agreeable to creating two potential corner lots and having additional traffic from the northern land until such time as more direct road links were created. The developer wanted to maintain his land as a separate estate. Council planners would have supported the greater permeability of more links between adjacent subdivisions.

The applicant was informed that the application would be recommended for refusal at the Development Hearing Panel on the 26 April 2012. At the request of the applicant, the Panel adopted that a decision be deferred pending further correspondence between the parties.

The applicant requested that the Council proceed with the option of an agreement between concerned parties, which provided the objector the first right of refusal on an allotment of land abutting their property so as to create a road link if the purchase was undertaken.

Riordans Lawyers were requested to prepare an agreement at the request of the Council which was to be registered to title via a Section 173 Agreement, both parties have been unable to agree on the particulars of this agreement and the applicant has now sought a decision from the Development Hearings Panel.

Referrals

External Referrals/Notices Required by the Planning Scheme:

Referrals/Notice	Advice/Response/Conditions
Section 55 Referrals	Clause 66 of the scheme did not require referral of the application.
Section 52 Notices	The application was notified to Powercor and APA, neither of which responded to the notice. The application was notified to GMW who consented to the grant of a planning permit.

Internal Council Notices	Advice/Response/Conditions
	The application was not internally referred to any Council branches.

Assessment

The zoning of the land

The land is within the R1Z.

The R1Z does not trigger a permit and is not relevant to the consideration of the application.

Relevant overlay provisions

The land is within the DDO2, LSIO and DPO11. The overlays do not trigger a permit and are not relevant to the consideration of the application.

The State Planning Policy Framework (SPPF)

19.03-6 Pipe Line Infrastructure

Objective

To plan for the development of pipeline infrastructure subject to the *Pipelines Act 2005* to ensure that gas, oil and other substances are safely delivered to users and to and from port terminals at minimal risk to people, other critical infrastructure and the environment.

Strategies

Recognise existing transmission-pressure gas pipelines in planning schemes and protect from further encroachment by residential development or other sensitive land uses, unless suitable additional protection of pipelines is provided.

Plan new pipelines along routes with adequate buffers to residences, zoned residential land and other sensitive land uses and with minimal impacts on waterways, wetlands, flora and fauna, erosion prone areas and other environmentally sensitive sites.

Provide for environmental management during construction and on-going operation of pipeline easements.

As part of planning permit 2011-11 it is a requirement that the Archer Road reserve be widened to allow the existing high pressure gas pipeline to be within the road reserve and not located in private land.

The Local Planning Policy Framework (LPPF)- including the Municipal Strategic Statement (MSS), local planning policies and Structure Plans

There is no relevant local policy regarding the removal of easements or covenants.

Relevant Particular Provisions

52.02 – Easements, Restrictions and Reserves

Purpose

To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

Permit requirement

A permit is required before a person proceeds:

- Under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.

- Under Section 24A of the *Subdivision Act 1988*.
- Under Section 36 of the *Subdivision Act 1988* to acquire or remove an easement or remove a right of way.

This does not apply:

- If the action is required or authorised by the schedule to this clause.
- In the circumstances set out in Section 6A(3) of the *Planning and Environment Act 1987*.
- If the person proceeds under Section 362A of the *Land Act 1958*.
- In the case of a person proceeding under Section 36 of the *Subdivision Act 1988*, if the council or a referral authority gives a written statement in accordance with Section 36(1)(a) or (b) of the *Subdivision Act 1988*.

In this clause, **restriction** has the same meaning as in the *Subdivision Act 1988*.

Decision guidelines
Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

A planning permit is required to remove easements and restriction (covenant) under Section 23 of the *Subdivision Act, 1988*.

Officer's consideration

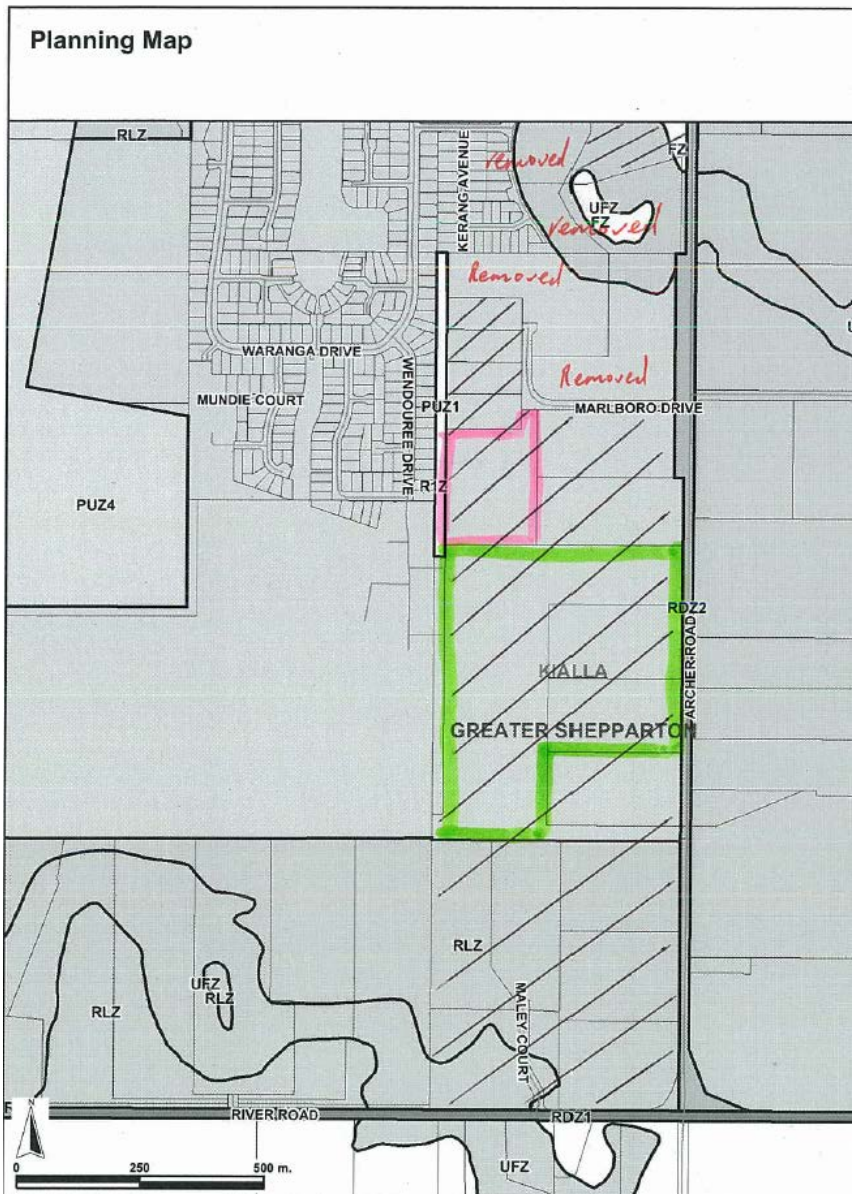
Covenants

The application seeks to remove four covenants, three of which relate to size of dwellings, number of dogs and noxious uses and one of which relates to the protection of the gas main.

The gas covenant beneficiary is the Gas and Fuel Corporation of Victoria and its successors and transferees.

These covenants have been removed from nearby properties by numerous developers in the growth corridor so as to avoid the newly created lots being burdened by the covenants.

The plan below shows as cross-hatched all land that is still burdened by covenants 2-4. The land seeking to remove the covenant is highlighted in green and the objector highlighted in pink. The plan also shows the four lots which have had the covenants 2 – 4 removed and are now either developed or being developed.



The clauses of the covenant are:

1. *That any main buildings being a dwelling house or dwelling houses erected on the said land (other than the dwelling presently standing on the said land) shall contain a floor area of not less than 1000 square feet within the outer walls thereof such area being calculated by excluding the area of car port, terraces, pergola and or verandahs and garage*

2. *That such main buildings shall be constructed of new materials and shall not be an already wholly or partly completed house moved onto the said land*

3. *That the said land shall not be used for carrying on any noxious or offensive trade or for mining operations or excavations for the recovery of sand, gravel, ore or other materials or the treatment of same*

4. *The not more the four adult dogs shall be kept on the said land*

The purpose of the covenant was to ensure dwellings were greater than 10 imperial squares in size and constructed of new materials and the number of dogs is limited on what would have been rural residential type lots. The covenant also prevents industrial uses and mining. Importantly the covenant did not restrict the number of dwellings on the land.

As development has and continues to occur in the corridor, developers have sought and obtained planning permits to remove the covenant, which has occurred until now without objection. Generally these old covenants have been replaced with more modern covenants which also stipulate minimum standards of size and construction for new dwellings on the estates.

Section 60 (5) of the Act states the following:

The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in sub-section (4) unless it is satisfied that—

a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and

b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

The objector has informed that their grounds of objection are:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*
- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped*

Consideration of Section 60(5)(a) Detriment including perceived detriment

In considering whether the removal of the covenant is unlikely to result in detriment or perceived detriment to beneficiaries the following matters are relevant:

- The covenant is about minimum dwelling size and using new materials, but does not restrict the number of dwellings to one which would have been an impediment to use of subdivided lots. Modern dwellings are unlikely to be below 95m^2 in floor area even without a covenant and the developer intends to replace the covenant with updated requirements to uphold standards for dwellings in the subdivision.
- Given the subdivision seeks to create conventional residential lots it is highly unlikely these lots will be used for mining or recovery of sand, gravel or the like.

- The R1Z prohibits the use of land for noxious or offensive trades, and the home occupation guidelines state that the 'occupation must not adversely affect the amenity of the neighbourhood in any way'

- The removal of the covenant could allow an increase in the number of the dogs on the land to be considered, however the Council's local law restricts residential lots to two dogs without a local law permit to protect the residential amenity of the locality

- Whether the covenant is removed or retained on title, the covenant does not prevent the residential subdivision of the land

- The Trotter land is some distance away from the lots in Marlboro Drive so that the standard of development on these new lots is unlikely to have any effect on the beneficiaries in Marlboro Drive.

The objector has stated a concern that the removal of the covenant will result in financial loss and prevent the development of their land in a timely manner. This detriment in the objector's mind has been expressed as loss of opportunity to force an adjoining owner to grant access and is unrelated to the permission sought. It is considered that there must be some allowance in interpreting section 60(5)(a) that the perceived detriment must at least relate to the permission sought.

VCAT has held that the detriment must relate to the operation of the covenant or flow from a breach of covenant. In *Dukovski v Banyule CC [2003] VCAT 190 (13/2/2003)* the detriment claimed was increased traffic, loss of view and neighbourhood character, but was held not to flow from a variation of a covenant which regulated only the frontage of dwellings, i.e., the way they face. Likewise in *Summerby v Hume CC [2003] VCAT 1968 (22/12/2003)* the construction of a second dwelling was held not to be a relevant detriment under a covenant regulating building materials and minimum floor area.

The matter of perceived detriment was considered by VCAT in Hill v Campaspe 2011, where Deputy President Gibson made the following comments:

The provisions of section 60(5)(a) require the Tribunal to be satisfied that the owner of any land benefiting by the covenant would be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the variation of the covenant.

The Tribunal has emphasised in various cases that this does not necessitate a finding that detriment would occur as a probability; rather it is sufficient that there be a possibility, which is neither fanciful or remote, that a detriment may occur. The concept of "any detriment" in the context of section 60(5)(a) is a very wide one. It is not a matter of there being some minor detriments outweighed by countervailing benefits, whether to the benefiting owner or to the community in general. If there is any detriment, whether or not outweighed by other considerations, then a permit can only be granted if such detriment is thought to be "unlikely".

For the current application the objector's perceived detriment is 'fanciful or remote' because the loss of opportunity to obtain road access at no cost may be a real or perceived detriment to the objector but it relates to the granting of permit 2011-11 for the subdivision to the south that did not include a road connection, and not in any way to this application to remove covenants or easements. In practical terms the subdivision to the south can take place without the removal of the covenants or the easements.

It is not necessary for a person to object for section 60(5)(a) to prevent the granting of a permit. The responsible authority must itself be satisfied that it is unlikely that any detriment whether small or perceived would be caused, and it does not satisfy the test that benefits might outweigh the detriment. This was considered in McFarlane v Greater Dandenong CC [2002] VCAT 469 (26/6/2002) which has been consistently followed:

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

The important point to make from the above is that the responsible authority must form its own opinion on the likelihood of any detriment including perceived detriment being caused by granting this permit independent of whether any objection has been received. A relevant objection virtually proves some degree of at least perceived detriment is likely or possible but the absence of objection does not prove it is not likely.

In this case of the objector asserting perceived detriment for a reason not related to the operation of the covenants or easement, the objection should not make any difference to the decision the responsible authority must make. The assertion by the objector that removing

the covenants or easements may cause detriment by altering any road access possibilities to the objector's land simply is not true, it has no relationship or bearing to that matter.

It is a consideration that the beneficiaries in Marlboro Drive are remote from the lots in the estate to the south from which the covenant would be removed. A useful reference is Ingberg v Bayside CC [2000] VCAT 2407 (30/11/2000). In this case the question whether the owner of the land benefited will be unlikely to suffer any detriment of any kind (including any perceived detriment) was treated objectively, and the Deputy President found that construction of 2 dwellings was unlikely to have a detrimental effect on a beneficiary who lived some distance away in a different street.

Is the objection vexatious or not made in good faith?

In Castles v Bayside 2004 Senior Member Byard made the following comments regarding detriment and about a vexatious objection:

> *38 Section 60(5) in fact imposes a high and strict test which severely restricts the ability of the Tribunal (on review) to modify a covenant. It severely restricts that possibility, but does not prevent it altogether.*
>
> *39 The sub-section provides that the permit for modification cannot be granted unless the responsible authority (or Tribunal) is satisfied in relation to paragraph (a) and (b) of sub-section 5.*
>
> *40 Paragraph (a) requires satisfaction that the owner of land benefited by the covenant will be unlikely to suffer any detriment of any kind as a consequence of the variation of the restriction.*
>
> *41 This is a severe test in that any detriment, even a minor one more than counter-balance by positive considerations, will be sufficient to bar the granting of a permit. However, the test is not whether it is possible for detriment to be suffered. It is sufficient for the Tribunal to be satisfied that the owner of the land benefiting is "unlikely" to suffer any detriment.*
>
> *53 So far as s.60(5)(b) is concerned, I am satisfied that the objections are vexatious. I do not mean that they are not made in good faith in the sense of being dishonest. I do not mean that they are vexatious in the sense of being raised to annoy or embarrass the applicant, or anyone else. They may amount to a very weak case against the proposal, but I do not need to decide whether they are vexatious in the sense of being so unarguable as to be utterly hopeless. I am satisfied that they are vexatious in the sense that they are designed to achieve an ulterior purpose. The objections by the owners with benefit are designed not to uphold the covenant and its purposes in terms of urban design, but to seek to achieve the defeat of the development proposal for reasons under-related to the covenant and because the Objectors do not like the proposal for such other reasons. I have found that these other reasons are unsustainable in terms of planning merits of the proposed development. I also find that they are not relevant to the covenant properly interpreted, or the purposes behind it. I therefore find, in the rather unusual circumstances of this particular case, and this particular covenant, that the objections are vexatious. I think the proposed modification to allow the development is appropriate and should be granted.*

A publication by Horsfall & Doyle - Restrictive Covenants in VCAT (The Last Two Years) - 2 March 2005 has studied cases involving Section 60(5)(b) that an 'objection must not be vexation or not made in good faith. A relevant extract is as follows:

> *22. In all the applications (except for Thompson v Greater Bendigo CC [2004] VCAT 1072 2/6/2004)) there has been no change in the application of the accepted principle that in S 60(5) (b) "vexatious" means groundless or having no merit without regard to the objector's attitude, intentions or honesty. See Ingberg v Bayside CC [2000] VCAT 2407 (30/11/2000) at [104] and Castles and Maney v Bayside CC [2004] VCAT 864 (11/5/2004) [53] in which the decision of Attorney General of NSW v Wentworth (1988) 14 NSWLR 481 as applied in Attorney General of Victoria v Kay [1999] VSC 30 and Attorney General of Victoria v Lindsay (unreported 16 July 1998) was followed. For an example of other conduct see Schock v Yarra Ranges [2003] VCAT 1733 (23/11/2003).*
>
> *23. The test of vexatious stated in Wentworth by Roden J is: "1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless ..."*

Following discussions with the objector, it is the officer's view that the objector is attempting to use this application as leverage to achieve road connection to the south, without incurring any cost of constructing the road to accelerate the development potential of their land.

Currently the objector is awaiting the abutting land to the east to be developed to provide for a road connection to the rear of the objector's property. The land to the east has a planning permit to develop the land in stages, and stage 3 which would construct a road adjacent to the objector land may be years away. Alternatively, the objectors land could be developed independently with direct access to Marlboro Drive, however this would involve demolishing the existing dwelling on the land, which the objector is not prepared to do.

It is considered that the objection does not relate to the permission applied for and is vexatious or has been made 'in bad faith'. It wasn't an inadvertent mistake or misunderstanding about the application or its possible effects it was a deliberate attempt to achieve a benefit of road access that in no way relates to this application.

Considering the test of 'vexation' in Wentworth, and the application of the accepted principle on the meaning of 'vexatious', it is considered relevant that the objection has been made for collateral purpose (a different purpose than the matter under consideration). This purpose attempts to force the applicant to provide road access in exchange for withdrawing the objection.

The objection is groundless and has no merit because it is not based on any relationship to the matter under consideration.

The objection can also be found to be vexatious by the test advanced by *Byard*, that the objection is made for an ulterior purpose.

Considering the above, the planning officer recommends that the responsible authority should decide that the objection is vexatious or not made in good faith.

A recent case of Tran v Brimbank CC [2011] VCAT 1560 has also decided a situation very similar to this application and found the application satisfied the requirements of Section 60(5)(a) and (b).

> *16. The critical factor here is that whilst it is true that the single objector couple live in a property which benefits from the covenant, that property is over 300 metres away in a different side street (ie Collins Street) which is located two blocks further across to the west. Accordingly, the objectors will have no line of sight at all from their property to the subject land, with or without any potential second dwelling being built on the subject land. Indeed, I would expect that the objectors would not be able to see any such second dwelling even if the objectors stood at any point in their own street. Similarly I would not expect there to be any discernable difference to the traffic or on-street parking levels on Collins Street with or without any second dwelling being built on the subject land.*
>
> *17. Some other relevant factors in favour of the proposal are that:*
> - *the abovementioned recent decisions by Senior Members Rickards and Komesaroff approved the removal of comparable restrictions affecting those other relevant nearby properties;*
> - *the reality is that there is already the beginnings of a trend to two or three unit redevelopment of other otherwise single dwelling lots in the locality; and*
> - *we know that the nearby 22 Erica Street property was able to have its equivalent restriction removed by planning permit without any VCAT involvement because (despite the wide notification to beneficiaries) no objection to such removal was made by any beneficiary.*
>
> 18. *Relying on the various factors set out above, I have considered the objection made by Mr and Mrs Colangelo who live at 25 Collins Street but consider their objection to be vexatious.*

This case is similar to the current situation. There was one objector asserting perceived detriment and the Tribunal found that it was unlikely in the circumstances of that objector being a few streets away that detriment would be suffered. It was also relevant that the covenant had been removed from other properties after advertising to all beneficiaries and receiving no objections, and a finding that the objection was vexatious.

Following the argument of the '*Tran*' case above it is reasonable to conclude that the objector is sufficiently removed from the Trotter land so as to be unlikely to suffer detriment and that the same covenants have been removed from adjacent land without objection.

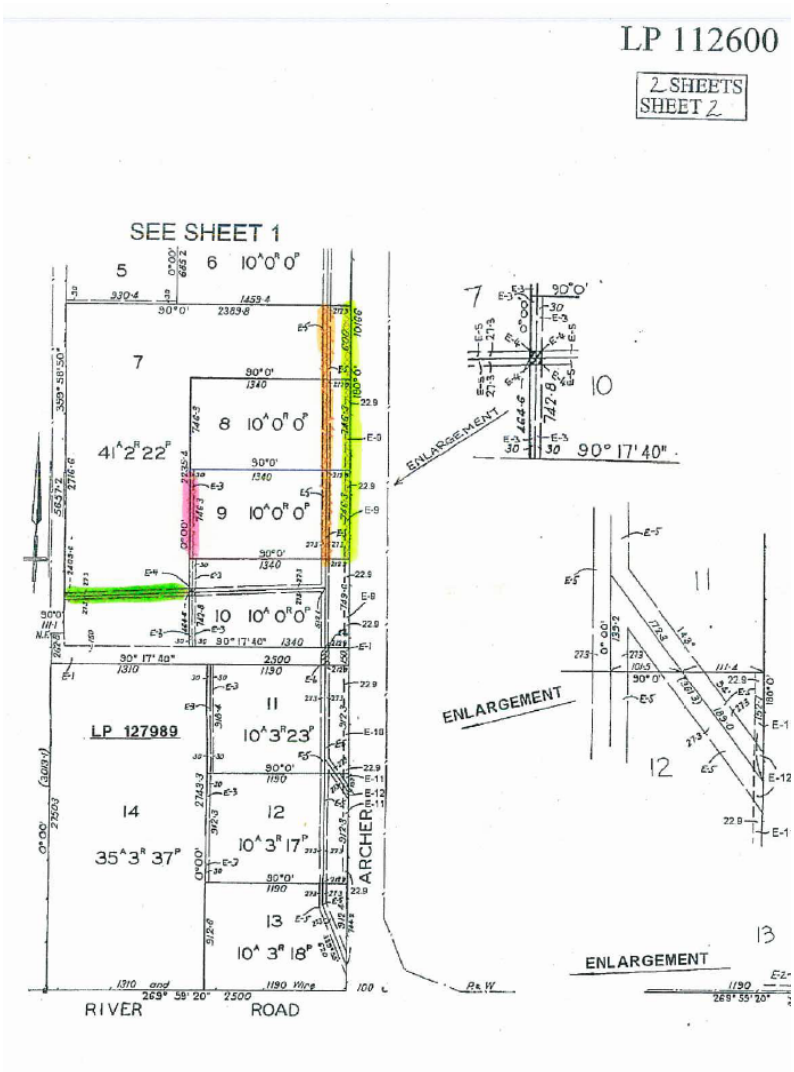
Officer's Summary regarding covenant removal

The problem with this application is the test of the responsible authority being satisfied that detriment of any kind including perceived detriment will be unlikely to be suffered by any beneficiary. In the absence of any objection it can be reasonably argued that the test is satisfied and a permit can be issued to remove the covenant.

While an objection exists, there is a possibility of successful argument at a review by VCAT that at least perceived detriment might be suffered by a beneficiary although such argument would need to be relevant to the current protection (e.g. dwelling size and materials or number of dogs allowed) afforded by the covenant and not the reasons so far advanced by the objector.

Unfortunately unless the objection is withdrawn the uncertainty regarding likelihood of perceived detriment of any kind being suffered by a beneficiary leads Council planning officers to advise that the application should be refused but only on this basis.

Plan of easements



Orange – Electricity supply easement

The application seeks to relocate the existing overhead electrical lines from the private land to within the Archer Road reserve. The relocation of the electrical lines removes the need for the land to be encumbered by an easement.

Yellow – Gas easement

The existing alignment of the high pressure gas line is within private land. As part of the development of the land the Archer Road reserve is widened by eight metres which allows the gas line to be located within the road reserve rather the private land. As the gas line will be within the road reserve the easement can be removed from the land.

Pink – Water supply easement

The existing water supply easement provides rural water to lots eight and nine on LP112600. Given the development of the land will remove the land from the irrigation district the easement will become redundant and can be removed from the land.

Green – Electricity supply easement

This easement contains an over head power line which upon the residential development of the land will be removed and relocated to the Archer Road reserve. This electricity supply easement will become redundant and can be removed from the land.

It is concluded the application to remove easements achieves acceptable planning outcomes and is not opposed to by the responsible authority.

The decision guidelines of Clause 65
Clause 65 includes the following reference:

Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.

Relevant incorporated or reference documents
There are no relevant incorporated or reference documents to this proposal.

Other relevant adopted State policies or strategies policies
There is no relevant adopted state or strategic policies to this proposal.

Relevant Planning Scheme amendments
There are no relevant planning scheme amendments to this proposal.

Are there any significant social & economic effects?
The application does not raise any significant social and economic effects.

Discuss any other relevant Acts that relate to the application?

Should a permit be granted a text plan will need to be lodged for certification under the *Subdivision Act, 1988*.

Conclusion

The application to remove covenants and easements is recommended for refusal by the planning officers only for the reason that one of the tests required by Section 60 (5) of the Act may be difficult to satisfy (being no likelihood of perceived detriment of any kind) and while there is an objection by a third party and covenant beneficiary however unrelated, it is highly likely that any decision will be subject to review by VCAT.

Otherwise the application achieves a beneficial planning outcome.

If the objection had have been withdrawn then the responsible authority could reasonably decide the application satisfies the tests of section 60(5) of the Act which would otherwise prevent the granting of a permit.

DRAFT
REFUSAL TO GRANT A PERMIT

APPLICATION NO: 2011-383

PLANNING SCHEME: GREATER SHEPPARTON PLANNING SCHEME

RESPONSIBLE AUTHORITY: GREATER SHEPPARTON CITY COUNCIL

ADDRESS OF THE LAND: 600 Archer Road KIALLA VIC 3631

WHAT HAS BEEN REFUSED: The removal of restrictive covenants created by instruments G001244, G672022, G579815 and G993899 from the land in Certificates of Title Vol.0955, Fol.584 (Lot 7 on TP 480496W), Vol. 09055, Fol.585 (Lot 8 on LP 112600) & Vol.0955, Fol. 586 (Lot 9 on LP 112600), and; the removal of easement E-5 created on LP 112600 and coloured blue on TP 480496W from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600, the removal of the easement E-3 on LP 112600 from Lot 9 on LP 112699 and the removal of the gas conveyance easement created by instrument G001244 from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600.

WHAT ARE THE REASONS FOR THE REFUSAL?

- The responsible authority is not satisfied that the beneficiaries of the covenant and particularly the objector will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the proposed removal of the restrictive covenants.

Meeting closed at 11.00 am.