



MANNINGHAM
BALANCE OF CITY AND COUNTRY

22 June 2006

Mr Nick Zoides
8 Arthur Street
DONCASTER Vic 3108

Dear Nick

Restrictive Covenants

I refer to our previous telephone discussion on the matter of Restrictive Covenants and more particularly, the mechanism for their removal, alternatively the basis of their protection and moreover, Council's position on general and specific aspects.

I undertook to write to you at the time we spoke and apologise for the delay in doing so.

We also discussed brief advice that I had received from Council's Solicitor, Maddocks Lawyers and while I am unable to forward a full copy of the advice, I am happy to forward relevant extracts of the advice. This is provided below.

Since we spoke, two other things have happened. Council's Statutory Planners have completed a general information sheet on this matter and, I have confirmed with Paul Molan that my verbal advice to you is consistent with advice that he and his staff have provided in public forums over a long period of Doncaster Hill consultations.

A copy of the Information Sheet – 'Restrictive Covenants' – is attached. You will note that it seeks to inform generally about such covenants and more specifically about how they can be removed and, how they can be retained.

My verbal advice to you about the mechanisms for removal of restrictive covenants was consistent with this information sheet and the advice of Maddocks. An excerpt of their advice follows and is predicated by a proposition put to Council, "*concerning the variation of restrictive covenants in the context of a Residential 3 zone applying to land rather than a Residential 1 zone*".

Maddocks advise –

"As I understand it, it is being suggested that if land is zoned Residential 3 rather than Residential 1, it would be easier for any restrictive covenant that affects the land to be modified by the Minister for Planning.

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In my opinion, the suggestion has no basis at all either in law or in practice. The suggestion is wrong.

Apart from a modification by consent, there are in the order of four mainstream methods of modifying a restrictive covenant. They are:

- *By making an application to the Supreme Court of Victoria for order for modification;*
- *By applying for a planning permit which authorises the variation of a covenant;*
- *By seeking a site specific amendment to the Scheme which specifically varies or removes a restrictive covenant;*
- *By the Minister (for Planning) making an order under section 201O of the Planning and Environment Act 1987.*

The last of these methods, namely by an Order of the Minister, is only available in the case of a "declared project". A declared project is defined under section 201E of the Planning and Environment Act as a development or proposed development declared by notice under section 201F to be of State or regional significance.

If my memory serves me correctly, as far as I am aware, the Minister has ever only used this power once, in the case of the development of Southbank or a similar scaled project some years ago.

The precondition to the Minister exercising his power to remove a covenant is, as you can imagine, a fairly sizeable project and in any event, one that qualifies as being of regional or State significance."

This latter piece of the advice is totally consistent with previous officer advice relating to properties 'within' the Doncaster Hill precinct where it would be beneficial for the property owners by consent or agreement to meet the objectives of the Doncaster Hill Strategy and under these circumstances **only**, Council is likely to support removal of a restrictive covenant.

Maddocks continue with supporting advice in this regard –

The circumstance I envisage where the zoning may be relevant is where land is zoned for business or industrial purposes and where due to some historical facts that are no longer relevant, the land was at one stage burdened with a single dwelling restrictive covenant. In that circumstance, I think that the zoning of the land for business or industrial purposes would be used to signify that the vastly different "policy" intent for the area of the subject land.

Finally, questions have emerged from some in the community regarding the intent or motivation of Council to request, facilitate or action removal of restrictive covenants.

Save for the specific sites and examples 'within' the Doncaster Hill precinct covered previously by Mr. Molan and addressed by Maddocks above, I can advise that Council has never discussed any intent; holds no plan or desire; and, has not foreshadowed any intention or interest at any time to take any action that would interfere with the protection that beneficiaries enjoy with Restrictive Covenants.

A related question seems to be – is anyone else likely to do so? Council is not able to speak for the Minister or his Government but again, it makes no sense legally, practically or politically for any Government to contemplate such action (unless it relates to an Order under section 210 of the Planning and Environment Act 1987).

Once again, I believe the Maddocks advice conveyed above reiterates that this 'suggestion is wrong'.

I trust that this advice satisfies your query.

Yours sincerely



John Bennie
Chief Executive

Attach.

Copy to	Cr. Warren Welsh	Koonung Ward
	Cr. Bill Larkin	Koonung Ward
	Mr. Paul Molan	Director Environmental Amenity