

INACTIVE

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1. Purpose

This planning bulletin explains the concept of restrictive covenants and outlines their use in the planning system. It is intended as a broad overview of the concept of restrictive covenants. Further advice should always be obtained in relation to particular circumstances.

The bulletin addresses concerns regarding the imposition of restrictive covenants in residential estates by land developers which are inconsistent with and undermine local planning scheme provisions and state planning policy. The concerns primarily relate to covenants limiting the number of residential dwellings on a lot or potential for future subdivision which is inconsistent with the density provisions of the local planning scheme.

The bulletin also clarifies the procedure for the extinguishment or variation to a restrictive covenant where the local planning scheme includes a clause which provides such a power as set out in the model provisions of the *Planning and Development (Local Planning Schemes) Regulations, 2015*.

2. What is a restrictive covenant?

A restrictive covenant is an agreement which restricts a landowner in the use or enjoyment of the landowner's land ('burdened land') for the benefit of other land ('benefited land') or for the benefit of a public authority. Restrictive covenants which benefit a public authority are referred to as restrictive covenants 'in gross' where there is no benefited land. A restrictive covenant binds not only the present landowner but also subsequent owners of that land, where the burden of the covenant is intended to run with the land.

A restrictive covenant is negative in nature in that it requires the owner of the burdened land not to undertake particular activities or exercise certain rights. A restrictive covenant should be distinguished from a positive covenant which requires the owner of the burdened land to take action for the benefit of other land. Apart from where legislation provides otherwise, positive covenants do not run with the land.

Examples of restrictive covenants include those which:

- prohibit the construction of more than one house on the burdened land;
- prohibit the building of a structure on the burdened land above a certain height;
- require the purchaser not to conduct a particular business or trade on that land, such as where the seller owns land in the vicinity which can benefit from the restrictive covenant; and
- are in favour of a local government which prevents the landowner from clearing the burdened land (in gross).

Restrictive covenants should be distinguished from:

- easements;
- notifications (memorials); and
- caveats.

An easement is a right enjoyed by a person with respect to the land of another person, for example, a right to travel over a neighbour's land to gain access to a roadway on the other side.

A notification is a notice on a certificate of title, registrable by an authority under powers given to the authority by legislation, alerting interested persons to some characteristic of the land in question,

or the ability to register further dealings in relation to the land. For further information on notifications on titles please refer to the Western Australian Planning Commission's (WAPC) Planning Bulletin 3.

A caveat is a warning recorded on a certificate of title that a person claims an interest in the land. A caveat may prohibit registration of a dealing with respect to the land absolutely or subject to the consent of the person who lodged the caveat. Often a tenant under a lease for more than five years will lodge a caveat to alert interested persons to the tenant's interest under the lease.

3. How is a restrictive covenant created?

A restrictive covenant may be created:

- by a deed setting out the terms of the restrictive covenant;
- on a transfer of land form containing the words creating the restrictive covenant; or
- on plans of subdivision under part IVA of the *Transfer of Land Act 1893*.

An instrument creating a restrictive covenant may be registered on the certificate of title for the land burdened and benefited by the restrictive covenant, although a restrictive covenant is not usually shown on the certificate of title to the benefited land. An exception to this is a restrictive covenant creating height restrictions, such as to protect a view. However, registration of an instrument creating a restrictive covenant gives that covenant no greater legal effect or enforceability than it would have had at common law. Landgate is responsible for the registration of restrictive covenants and should be contacted if queries arise.

4. Restrictive covenants as a condition of subdivision or development approval

Where appropriate, the WAPC or the local government, as the case may be, may require an applicant to enter into a restrictive covenant, either with the WAPC, the local government or another public authority, as a condition of approval. The power for the WAPC to impose conditions on subdivision approval arises under sections 138, 139, 143, 144, 148, and 151 of the *Planning and Development Act 2005*. The power to impose conditions on development approval is contained in clauses 68(2) and 77(4) of the deemed provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015*, clause 30(1) of the Metropolitan Region Scheme, clause 21 of the Peel Region Scheme, clause 27 of the Greater Bunbury Region Scheme and section 116 of the *Planning and Development Act 2005*.

Conditions which require a restrictive covenant to be entered into must always be within the power to impose conditions vested in the WAPC or the local government. In addition, such conditions should be used sparingly and preferably, where no other more transparent mechanism, such as a local planning scheme provision, is available.

A particular example of a condition requiring a restrictive covenant in relation to a subdivision or development approval is a condition requiring the applicant to enter into a restrictive covenant which aims to protect and preserve native vegetation, wetlands or other special flora or fauna of the area. Such a covenant is also known as a 'conservation covenant' and may restrict activities such as the clearing of land or allowing stock to graze on the land. The following particular legislation exists which allows the creation of conservation covenants:

- the Soil and Land Conservation Act 1945;
- the National Trust of Australia (WA) Act 1964; and
- the Transfer of Land Act 1893.

Which Act is applied depends on the purpose sought to be achieved in requiring such a conservation covenant to be made.

An authority and landowner who enter into a conservation covenant based on the powers given to that authority under the relevant legislation must ensure that the conservation covenant does not contain terms and conditions that extend beyond the powers contained in the relevant legislation. To this end, it should be noted that conservation covenants made under the *Transfer of Land Act 1893* and the *National Trust of Australia (WA) Act 1964* are expressed to be restrictive in nature. On the other hand, section 30B of the *Soil and Land Conservation Act 1945* allows owners to set aside land not only for protection but also for management of that land.

4.1 Soil and Land Conservation Act - conservation covenants and agreements to reserve

Conservation covenants and agreements to reserve are made under part IVA of the *Soil and Land Conservation Act 1945*. They are agreements between the Commissioner of Soil and Land Conservation and a landowner to set aside land for the protection and management of vegetation. A memorial of the agreement is registered on the certificate of title. A conservation covenant is irrevocable but an agreement to reserve is revocable. A covenant or agreement binds subsequent owners of the land for the period that the memorial is registered against the certificate of title.

A person who contravenes a covenant or agreement commits an offence and is liable to a penalty of up to \$2,000. A person authorised by the Commissioner of Soil and Land Conservation may do all those things required to be done under the covenant or agreement if the person bound by the covenant or agreement does not do them. There are also provisions for the collection

of expenses incurred by the Commissioner in exercising this power. The expense can be registered as a charge against the land.

4.2 National Trust conservation covenants

Section 21A of the *National Trust of Australia (WA) Act 1964* provides that the National Trust of Australia (WA), a community-based organisation, may enter into voluntary agreements with landowners, either permanently or for a specified period of time, restricting the planning, development or use of land. Unless a contrary intention is expressed, such an agreement is deemed to bind subsequent owners and occupiers of that land. The mission of the Trust is to conserve Western Australia's heritage. National Trust conservation covenants are designed to protect and conserve the natural heritage values of the land through a working partnership between the Trust and the owner.

4.3 Department of Parks and Wildlife conservation covenants

The Department of Parks and Wildlife (DPAW) has responsibility under the *Conservation and Land Management Act 1984* for the conservation and protection of flora and fauna in Western Australia. The DPAW runs a conservation covenanting program applying the provisions of the *Transfer of Land Act 1893* which provides for the making of restrictive covenants in gross. The DPAW conservation covenants are designed to protect and enhance the nature conservation values of private land and may apply to all or part of a property. These covenants are entered into between the landowner and the DPAW.

5. Extinguishing or varying restrictive covenants

Subject to the provisions of any legislation under which a restrictive covenant is made, restrictive covenants may be extinguished or varied by:

- agreement between the parties having an interest in the covenant under section 129B of the *Transfer of Land Act 1893*;
- an order of the Supreme Court under section 129C of the *Transfer of Land Act 1893*;
- where a restrictive covenant was created under part IVA of the *Transfer of Land Act 1893*, on the application to the Registrar of Titles by the landowner of either the burdened or the benefited land, or by the local government or public authority benefited, with the consent of all relevant persons;
- an application made to Landgate in accordance with section 129BB of the *Transfer of Land Act 1893* which provides a further mechanism whereby restrictive covenants in gross made under section 129BA of the *Transfer of Land Act 1893* may be extinguished or varied; or
- the provisions of a local planning scheme (see paragraph 6.2).

6. Restrictive covenants and local planning schemes

6.1 Relationship between restrictive covenants and local planning schemes

Aside from subdivision or development conditions requiring restrictive covenants, restrictive covenants have also been widely used as a form of private land use planning control, initially before local planning controls had become established and,

more recently, by private developers to provide additional controls to those available under local planning schemes in order to enhance the amenity and character of an estate. For example, developers often impose restrictive covenants mandating the type of building materials; roof pitch and colour; the design of fencing and retaining walls; landscaping; and the positioning of ancillary elements such as satellite dishes and aerials, air-conditioning units and clothes lines.

Restrictive covenants and planning controls are not related and provide for different forms of restriction.

A restrictive covenant is a restriction on title whereas planning controls arise from legislation regarding the use and enjoyment of land but which do not create an interest in land. Therefore, the existence of a restrictive covenant is not a relevant planning consideration in the determination of a development application except where the restrictive covenant arises from a planning decision. Conversely, the jurisdiction conferred on the Supreme Court to vary or remove a restrictive covenant is not conditioned by the provisions of a local planning scheme.

6.2 Extinguishing or varying a restrictive covenant under a local planning scheme

Restrictive covenants are appropriate to maintain amenity, streetscape and the character of an estate consistent with the intentions of the developer and the expectations of the homeowner. However, problems can arise where there is conflict between the restrictive covenant and the provisions of a local planning scheme. This has most commonly occurred where a restrictive

covenant purports to limit the number of dwellings or future subdivision of a lot, to a lesser number than permitted by the local planning scheme. Such covenants are inconsistent with current state and local planning policy and create inconsistency, confusion and uncertainty for landowners as to their development rights.

The WAPC will not approve subdivisions or endorse deposited plans which propose restrictive covenants which limit the number of dwellings, restrict the maximum area occupied by the dwelling, or the future subdivision of the lot in a way which is inconsistent with the provisions of the relevant local planning scheme or applicable state planning policy.

The combined operation of section 69 and clause 11 of schedule 7 to the *Planning and Development Act 2005* affects the enforceability of restrictive covenants as it allows a local government to include in a local planning scheme a provision which extinguishes or varies any restrictive covenant affecting land. However, in applying this power, it must be remembered that restrictive covenants are recognised property interests which should not be extinguished by a local planning scheme unless there are justifiable planning grounds.

Clause 35 of the model provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015* currently contains model provisions to extinguish or vary restrictive covenants which restrict or limit the number of residential dwellings which may be constructed in a way which is inconsistent with the provisions of the Residential Design Codes applicable under the local planning scheme.

In other cases, where it is demonstrated that a particular project is for the benefit of the local government as a whole and is impeded by an existing restrictive covenant, the WAPC may consider a local planning scheme amendment that extinguishes a restrictive covenant. This amendment must be accompanied by a process that informs all parties with an interest in the covenant, who must be given an adequate opportunity to comment. In cases where the restrictive covenant impacts on a large area or number of landowners, the local government should consider advertising the extinguishment of the restrictive covenant. It is also recommended that further notification be sent to the affected landowners to confirm the extinguishment or variation of a restrictive covenant after the event.

6.3 Notification on the certificate of title

The fact that a restrictive covenant has been extinguished or varied by a local planning scheme will not automatically be reflected on the relevant certificate of title. The owner whose land has been affected by a restrictive covenant being extinguished or varied in this manner must lodge the appropriate documents at Landgate before such changes will be reflected on the certificate of title.

Generally what is required is an application by the registered proprietor of the land (on Landgate form A5 or withdrawal of notification form) accompanied by a letter from the relevant local government, on letterhead addressed to the Registrar of Titles which sets out:

- a description of the land i.e. lot number, deposited plan number, certificate of title volume, folio number and address;
- the relevant clause in the local planning scheme which provides for the variation or extinguishment of restrictive covenants and the date that the clause was inserted in the local planning scheme and was published in the Government Gazette;
- confirmation that the land is in the local planning scheme area; and
- the Residential Design Code applicable.

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