

What is a Restrictive Covenant? And What to Do About It?

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A restrictive covenant is a private written agreement between two or more landowners that imposes restrictions upon the use and development of land (the burdened land) for the benefit of other land (the benefited land). A common example is an agreement with the owner of a neighbouring property not to build on the land above a specified height. This private agreement can be recorded on the title of the burdened land. It then becomes a registered restrictive covenant, which will be legally binding on all subsequent owners of the burdened land.

How do you determine whether a restrictive covenant affects your property?

A title search, conducted through the Land Titles Office, will reveal whether a piece of land is affected by a restrictive covenant. This process can be quite time consuming if the land has been subdivided a number of times.

What kinds of limitations can a restrictive covenant impose?

There is no limit to the kind of restriction that can be imposed through a restrictive covenant. The only requirement is that all landowners concerned agree to the covenant.

Consequently, restrictive covenants can cover any aspect of the use of a block of land. For example, restrictive covenants may affect the number of buildings that can be constructed on the land, the maximum height of the building, or the materials that can be used to construct the building,

Restrictive covenants are often used in the following situations:

- Where developers subdivide land and impose rules on the use of each lot for the benefit of other lot owners;
- Where a council seeks to preserve the character of a particular neighbourhood;

As most restrictive covenants do not have an expiry date, it is common for old restrictive covenants to restrict the current use of the land in an inconvenient way. One recent case in the Supreme Court of Victoria¹ involved a 1912 restrictive covenant which required the owner to build their house only with stone or brick at a cost of at least £600, to build no more than one house, to refrain from subdividing the land, and to refrain from excavating the land except to construct the slab. This restrictive covenant prevented the current owner from developing the property and building a basement car park on the land.

How do you remove or alter a restrictive covenant?

The three main ways of removing or altering the terms of restrictive covenants are:

1. Applying to the Supreme Court of Victoria under section 84 of the Property Law Act 1958;
2. Requesting an amendment to the planning scheme affecting the land under part 3 of the Planning and Environment Act 1987; or
3. Applying for a planning permit under part 4 of the Planning and Environment Act 1987.

Each of these methods is time consuming and highly technical, and potentially expensive. Legal advice is essential in interpreting the exact terms of a restrictive covenant, identifying the most suitable way to remove or vary it, and drafting the technical legal documents required.

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¹ *Prowse v Johnstone & Ors* [2012] VSC 4 (11 January 2012).