Written in pencil or in ink: Private covenants and their legacies for housing and planning in Victoria

Abstract: Through Australia's history, private developers have introduced restrictive covenants to property titles. Typical private covenants stipulate building materials, limit dwelling numbers, and prohibit particular land uses or the sale of alcohol. Covenants, like zoning, have tended to "put the single-family, owner-occupied home at the pinnacle of uses to be protected", and have functioned as security for homeowners (Fischel 2004).

This paper explores the power of private arrangements – from the past, and from more recent developments – in influencing contemporary housing and planning outcomes. We analyse 75 sampled Victorian planning tribunal cases substantially concerned with private covenants over 2013-2016. Legislative changes to Victorian planning legislation have meant – through a combination of legislative creep and apparent drafting errors – restrictive covenants now explicitly take precedent in permit assessments.

We examine patterns in what covenants restrict; the hearing types and issues raised; and outcomes. We profile spatial patterns in the ages of covenants arising in planning disputes. Showing idiosyncrasies where decisions are determined by whether covenants are (literally) written in pencil or in ink, we argue covenants sometimes have enduring 'ink' legacies, compared to the transient 'pencil' of strategic policy. This is despite the covenants frequently being either directly contrary to current planning policy; or simply being nonsensical and outdated.

We argue covenants illustrate the varied genealogy of planning: Booth's (2005) characterisation of planning as originating in private rights and morphing into public interest. This interlinked history is relevant to conflict over density and to the rebound of private zoning in response to urban consolidation.

Key words: covenants; Victoria; law; housing; density; history

Introduction

Through Australia's history, private developers have introduced covenants to property titles. Typical private covenants stipulate building materials, limit dwelling numbers, and prohibit particular land uses or the sale of alcohol. While some serve to protect business interests, covenants, like zoning, have tended to "put the single-family, owner-occupied home at the pinnacle of uses to be protected", and have functioned as security for homeowners and sale features for property developers (Fischel 2004).

While contingent on legal precedents or legislative changes, covenants can have enduring legacies, sometimes proving less transient than public urban planning policies. The case we consider here is the State of Victoria, where – through a combination of legislative creep and apparent drafting errors – covenants now explicitly take precedence over public policy considerations in permit assessments. Victoria's arrangement for covenants also brings some surprising and idiosyncratic matters into the realm of planning assessments and appeals.

Drawing on a sample of 75 recent Victorian planning appeals involving covenants, we examine the role of covenants and private planning in the genealogy of planning in Australia, and the implications for contemporary planning theory and practice. We show how the provisions of private covenants exert a disproportionate weight in planning outcomes in Victoria, in part due to critical legislative changes. With the discretionary power of developers often playing a central role, covenants can be illusorily in their early years, while older documents may be set in stone. The impacts of the status of covenants on planning decisions illustrate the historical crossovers between private and public interests in land use control, and the ongoing contingent nature of the balance between these interests.

Private Covenants and Public Planning

Private deed restrictions, or covenants, have been a feature of property or land law in England and Wales since around the 16th century. They experienced a surge in popularity in the late 18th and early 19th centuries, associated with enclosure acts and with the emergence of exclusive private squares in response to industrialization (Blandy 2006). Covenants were also rapidly adopted in the United States through the late 19th century (Fogelson 2005; Fischel 2004; Hirt 2014; Platt 2004; Whittemore 2012). Propelled by developers catering to an emerging middle class, popular American covenants emphasised strictly residential uses - pitched against the "nightmares" of mixed land uses, densities, and populations whose absence defined early suburbs (Fogelson 2005, Fischel 2004, Hirt 2014 p130).

As elsewhere with similar legal structures, Australia in the late 19th and early 20th centuries saw nascent planning through covenants, nuisance and public health laws, local by-laws and zoning. Covenants illustrate the varied genealogy of planning: Booth's (2002) characterisation of planning as originating in private rights and morphing into public interest. This legacy can be characterised in three ways. First, private 'zoning' formed the foundations for public zoning and later strategic planning, and were in part superseded by them (Booth 2002; Dennis 2000; Fischel 2004). Second, public policy and the notion of public interest in planning can be understood as an extension of private property rights, in the guise of other more altruistic objectives (Hirt 2014; Jacobs & Paulsen 2009; Taylor 2013). And third, private and public interests in the control of land can be in competition. This is especially the case when planning has taken progressive or other rights-based reforms, in contrast to the exclusion valued by covenants. A recent resurgence in private zoning and gated communities has been characterised as a reaction to changes in public zoning away from traditional exclusionary zoning (Deng 2003; Grant & Curran 2007; McKenzie 1994; Chen & Webster 2005).

The delineation of public and private rights in planning is historically and geographically contingent, the product of idiosyncratic legal decisions rather than inherent distinctions or alignments (Webster 2002; Slaev 2014; Platt 2004; Booth 2002). That covenants have their own legal status means they can embed values with an element of permanency amidst broader changes. Australian planning has discretionary, centralised elements in the UK tradition (Hirt 2014 pp84-85). It also has a history of US-style zoning as seen in the widespread 20th century use of residential zoning; and of subdivision, building and 'flat' codes (Lewis 1999 p44-45). In Melbourne, restrictive covenants were widely taken up in land boom subdivisions (Lewis 1999), and continue to be introduced to new developments. The

planning status of covenants in Australia varies in complex ways by state and territory - here we examine the case of Victoria.

Prior to 2000, covenants under the Victorian system were treated as external to planning considerations, in a manner consistent with most other jurisdictions. Under these frameworks, enforcement of covenants was achieved within a legal framework governing private property rights, principally *The Property Law Act 1958* and its predecessor legislation, notably the *Real Property Act 1918* (Code, 2001, p. 212; Tooher, 1992, pp. 63–4). If a party found themselves unable to use or develop their land due to a covenant, their traditional recourse was to remove or vary the covenant using property law mechanisms. At the same time, breach of a covenant was not a valid basis to refuse a planning permit. This recognised that the restriction was essentially a private legal matter.

However a combination of legislative creep and apparent drafting errors, occurring across successive changes to planning and subdivision legislation from 1987 to 2000, eroded that distinction in Victoria (see Tooher, 1992, pp. 74–82; Code, 2001, pp. 212–218; Victorian Law Reform Commission, 2010, pp. 98–101; Rowley, 2017, pp. 146–7).

The first key innovation under these changes was the provision of two mechanisms whereby planning instruments and processes can be used to remove or vary covenants (either through a planning scheme amendment or by issuing a planning permit). These were intended to provide a one-stop-shop removal mechanism in situations where a public interest planning consideration warranted removal.

The initial drafting of the legislation, however, left both the Land Titles Office and VCAT (as the appeals body for planning disputes) in doubt as to whether the planning permit mechanism could validly be used to remove covenants. Further legislation in 1991 and 1993 sought to reinforce this power, but responded to concerns about due process by introducing tests that had to be met for a permit for removal or variation to be granted. These tests are particularly restrictive for covenants introduced before 25 June 1991, for which they specify that a permit for removal or variation can only be granted if those legally benefitting from a covenant are unlikely to suffer detriment of any kind, including perceived detriment, as a consequence. The inclusion of *perceived* detriment, in particular, makes this a formidable test to overcome in contested planning matters, since any objection is likely to establish perceived detriment.

While this blunted the impact of the proposed one-stop-shop planning mechanism, and made the assertion of public rights interest in removing covenants less effective, in itself it did not subvert the traditional distinction between protection of public and private rights. That occurred with a second key change, introduced in 2000, which prohibited the issue of a planning permit that breached a covenant.

The intent here was again related to the one-stop-shop conceit, and sought to address difficulties in meeting the standards introduced in 1991 and 1993 (Victorian Law Reform Commission, 2010, p. 100). Those difficulties had meant that the usual approach had become to seek planning permission first, and later seek removal or variation of a covenant using mechanisms under property law. To avoid this two-step process, the Planning and Environment Act 1987 was amended to prevent granting of permits that would create a breach of a restrictive covenant, unless a condition was included on the permit specifying it only came into effect once a covenant was removed or varied. Again, however, the drafting of the legislation led to unforeseen consequences, with VCAT concluding that they (and other responsible authorities) did not have power to issue a permit at all – even with such a condition – until the covenant had been removed or varied.

The result was that covenants in Victoria were given a privileged status in the planning process: both hard to remove and, once applied, trumping any public interest considerations. This represented a complete reversal of the original legislative intent. Furthermore, once a permit is required, councils are drawn into the interpretation of covenants whether or not there remain interested parties. This assessment occurs in a framework notable for the wide extent of applicant and third party appeal rights. This means that exposure to the issue of private covenants flows through to Victoria's planning appeals body, the Victorian Civil and Administrative Tribunal (VCAT). These changes in responsibility and scope have had, as we now illustrate, several impacts on planning decisions in practice.

Method

We now present an analysis of 75 sampled VCAT cases involving private covenants over 2013-2016. Through our analysis of these cases we highlight the origins of private covenants and their legacies for planning more broadly; and also the ramifications of changes to the status of covenants peculiar to Victoria.

An initial sample of VCAT decisions was generated through searching the archive of VCAT decisions hosted by the Australian Legal Information Institute (AustLII). A keyword search initially identified Planning & Environment List decisions featuring the word "covenant." This initial list included 330 cases decided between October 2013 and November 2016. These were then reviewed to identify and discard cases not raising substantive issues - principally, covenants or checks mentioned in passing. This left 75 cases warranting more detailed examination.

Each case was read, and categorised according to the type of issue raised. Applications were also coded according to location, zone, and overlays (if applicable). Covenants were coded according to commonly encountered types (described below). Precise identification of numbers for each category was limited: many covenants covered multiple matters, or included provisions making categorisation against these categories ambiguous or arguable. Patterns and recurring themes were nevertheless evident in the studied sample.

Results

The sample of types of tribunal hearings involving convents comprised:

- Interpretation – applications involving a significant issue of interpretation (34 cases).
- Removal – applications to remove a covenant (10 cases).
- Variation – applications to vary a covenant (22 cases).
- Procedural – cases of a procedural nature (7 cases).

Some cases were in more than one category. Additionally, in many cases there was little practical distinction between removal and variation.

Key covenants types identified were covenants restricting:

- Development of land to a single dwelling.
- Development of land to dwellings but not restricting numbers.
- Construction materials (typically brick).
- Other buildings and works requirements (such as building envelopes).
- Uses that could be undertaken on the land.
- Removal of soil, or bans on quarrying.
- Development of land to a specified set of plans.
- Sale or consumption of liquor.
- Use or development to matters approved by a specified party.

VCAT decisions frequently only partially quote covenants. This, combined with the size of the sample, limits the ability to reliably quantify the numbers of different types of covenants applying.

We now consider the following two key themes of broader interest and implications in the VCAT cases:

- Covenants contrary to policy; and
- Nonsensical, trivial, and outdated matters.

Covenants contrary to policy

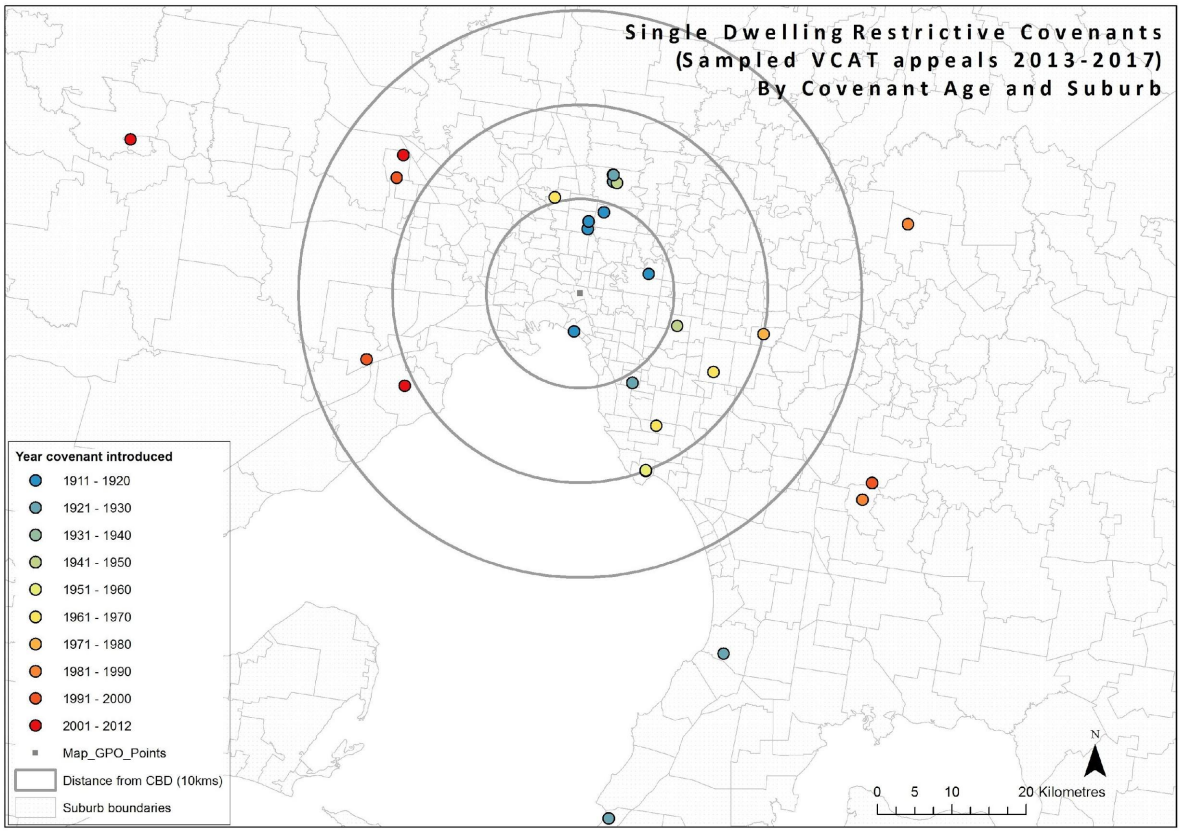
Private covenants can be directly contrary to public policy and be legally upheld – indeed, in Victoria, it is now the responsibility of the planning system to identify and uphold covenants even if directly contrary to policy. Two key examples in the sampled planning disputes are covenants restricting housing (particularly its density), and covenants restricting types of businesses (for anticompetitive reasons, or reflecting past moral values). Covenants precluding an increase in dwelling numbers often remain valued in residential areas, while urban intensification policies promoting the opposite have

proven controversial at best. In other cases, the implications of covenants can be obscure, yet equally weighted.

A common covenant type in the sampled cases sought to limit the use of land to a single dwelling. This has the effect of also determining land use and density. Through recent centuries, covenants have tended to "put the single-family, owner-occupied home at the pinnacle of uses to be protected", and have functioned as security for homeowners (Fischel 2004). Security from the risk of increased densities in neighbouring lots has commonly been sold as an attractive feature of residential developments, in Australia as elsewhere. At least 36 of the 75 cases were 'single dwelling' covenants, either solely or in addition to other restrictions.

The ages and locations of single-dwelling covenants that were the substantial focus of VCAT cases in the sample are mapped in Figure 1. These range over a century: from 1911 to 2012, with most decades represented. Dates and location roughly track suburban growth patterns: for example suburbs served by trams that are now middle ring in the pre and inter-war era (Coburg, Preston, Kew East); post-war growth suburbs such as Mt Waverley in the 1950s and 1960s; Narre Warren in the 1980s; and more recently Point Cook and Bacchus Marsh. The spread of single-dwelling covenants appearing in VCAT over the sample period 2013-2017 is far from exhaustive in terms of all such covenants in existence. The spatial and temporal spread seen in Figure 1 is indicative of locations which were developed with the intention of being limited to low-density residential use; and which have been subject to differing public policies and development pressures more recently.

Figure 1: Distribution of single-dwelling covenants, by age, in sampled VCAT cases 2013-2017



In some locations, single dwelling covenants can be contrary to housing strategies or to planning policies seeking to increase housing densities, or to encourage mixed or other uses. A clear example came in a 2015 Frankton case relating to a 1925 restrictive covenant that banned "shops, laundries, factories or works of any kind whatsoever" and anyone in future "at any time hereafter erect[ing] or allow[ing] to be erected more than one private dwelling on any one of the said lots hereby transferred." While the covenant and its restrictions were upheld, the VCAT member commented specifically on its inconsistency with housing policy:

> I would add only that the apparent conflict between the Frankston Housing Strategy and the impediment to its implementation presented by the widespread existence of the covenant can only be effectively resolved by a planning scheme amendment which removes the covenant from the area, or at least modifies it. (*de Weerd v Frankston CC* [2015] VCAT 855)

A common phrasing in covenants was that "not more than one dwelling house shall be erected". While some covenants were interpreted as 'single dwelling' clauses, a 2003 Supreme Court finding (*Tonks v Tonks* [2003] VSCA 195) determined that those simply restricting land to "a" dwelling could not be read as limiting land to "one" dwelling. This distinction between 'a' and 'one' threaded through tribunal discussion of allowable densities, for example *Tellis v Moreland CC* [2016] VCAT 1456. In some cases the legal beneficiaries of covenants pursued the issue. In others, objectors who were not beneficiaries themselves sought to use covenants (particularly single dwelling provisions) as one of several grounds for opposing higher density developments that might otherwise be considered consistent with planning policy. For example in *2bscene Design Pty Ltd v Boroondara* CC [2014] VCAT 1138, objectors claimed that a covenant extended to a single dwelling restriction, when it in fact only limited fence materials. While not successful in that case, that covenants have their own status within the Victorian planning system could make them an effective means of opposing development on a site. As the Tribunal put it:

> I referred to the belated attempt by the objectors to rely on the covenant as 'opportunistic'...nevertheless, the restrictive covenant does exist, whether the objectors were aware of it or not, and must be considered; not just because they may wish to rely upon it, *but simply because it exists* (*Muir v Bayside CC* [2015] VCAT 1930 *(4 December 2015* – emphasis added)

Outcomes of VCAT hearings on single-dwelling type covenants varied by wording and by covenant age. The standard for detriment in newer covenants (post-1991) was more clearly defined in legislation and it was therefore possible for the Tribunal to form a view it had not been satisfied. In older covenants, the need to establish only "perceived" detriment largely removed that discretion: if they objected, by definition they perceived some detriment (whether reasonably or not), and the Tribunal has been very reluctant to declare the test not met. This gave objectors a power close to a veto right for the pre-1991 covenants.

The sampled VCAT cases indicate single dwelling covenants have continued to be introduced in Victoria through later decades, and to be accompanied by restrictions on building materials. Brick was and remains a common requirement. For example a widely applied covenant dating from the early 1980s, in Narre Warren North, held that "a dwelling house must be constructed of brick or brick veneer", while a covenant from Hillside in 2001 restricted the number of dwellings; required a garage; set a minimum floor area; restricted materials to brick or colorbond; prevented temporary buildings; and required any plans to be approved by the vendor (developer). Such housing-related covenants on materials are – in addition to being surprisingly invasive in comparison even to government regulations – also potentially at odds with planning policies, insofar as newer potentially more efficient materials are excluded.

Covenants requiring brick echoed and extended the local 'brick areas' defined by Melbourne councils in the early 20th century. The brick clause introduced to the Altona Beach Estate between 1918 and 1922 was the subject of three VCAT hearings in the sample (*Iacono v Hobsons Bay CC* [2015] VCAT 769*; Srbinovski v Hobsons Bay CC* [2015] VCAT 1127*; Gardencity Altona Pty Ltd v Hobsons Bay CC* [2016] VCAT 1549). These provide a vivid example of the lasting power of residential covenants. The early 1920s subdivision had restricted development to brick, except by permission of the original developer - specifically the covenant requires that owners:

> ..will not erect upon the said land hereby transferred any shop or dwelling house of a less value than One hundred pounds nor...use any material other than brick and/or stone [or] other material approved of by the transferor for the main walls of any such shop or dwelling house without the consent in writing of the said Altona Beach Estates Limited....(*Iacono v Hobsons Bay CC* [2015] VCAT 769)

In this and in more recent covenants, variations in works or materials are subject to the approval of developers. This opens a raft of confusion especially when, as with Altona Beach Estates Limited, the

developer with sole power to grant variations no longer exists. Efforts to renew or vary the Altona Beach brick clause in the absence of the named developer were heard several times at VCAT and also the subject of a Supreme Court hearing.

The VCAT cases in the sample also covered anticompetitive clauses banning specific and sometimes obscure land uses. These were either introduced to protect particular businesses or interests; or to reflect values of the time about activities considered immoral or undesirable. At least nine sampled cases were in either or both these categories. Single-dwelling covenants, discussed above, tended to have some similar effects in that use of land was limited to dwellings. What is more striking about covenants relating to other activities is the power of the private provision to constrain change even as broader values and activities evolve - sometimes in the absence of beneficiaries, or at the least with a fairly narrow benefit contrary to policy principles of competition and efficiency. Terminology and ideas of harm may shift, but the covenants retain power to influence outcomes.

As examples, one covenant had banned a "real estate office" (*Mylonas v Darebin CC* [2016] VCAT 1583). Another related to a 2007 covenant preventing a place of worship or place of assembly (amongst other uses) (*Lein Trei Buddhist Benevolent Association Inc v Brimbank* CC [2014] VCAT 683). A 1928 covenant prevented, in addition to more than one dwelling, "shops laundries factories or works" – that case questioned whether a child care centre would breach this categorisation. A particularly specific clause in another covenant prevented, to protect other business owners, a shop being used for anything other than a Milk Bar (an outdated retail category) (*Le v Monash CC* [2016] VCAT 183). And in a case concerning the Garden City area originally developed by the State Savings Bank of Victoria, a covenant from the 1920s or 1930s served to prevent any (other) banks in the area by stipulating that:

> without the consent in writing of the said Commissioners (of the State Savings Bank of Victoria) their successors and transferees use or allow to be used the land hereby transferred for the purpose of transacting the business of a banker or erect on any of the said lots hereby transferred any building other than a shop or a shop and dwelling. (*455 Graham Street Developments Pty Ltd v Port Phillip CC* [2015] VCAT 1885)

Another historically-grounded case in the sample concerned a restaurant in the beachside area of Ocean Grove, covered by an 1888 covenant preventing the sale or manufacture of alcohol. Ocean Grove was first subdivided and developed as a Coffee Palace and resort by the Methodist Church in 1888, at the height of the anti-alcohol temperance era. Permission for the restaurant and liquor license had previously been granted, but a VCAT review of the decision was sought on the grounds it breached the anti-alcohol covenant *(Linaker v Greater Geelong CC* [2014] VCAT 236). VCAT determined that although the covenant was still legal, it was no longer enforceable due to a loophole in the original documentation – there were no longer identified beneficiaries to enforce the clauses. The covenant was varied to allow the restaurant to resume its liquor license. This mirrors similar changes internationally - the model town Bournville recently obtained its first liquor license after legal challenges to the late 19th century covenant (The Guardian, October 1st 2015).

Covenants involving nonsensical, trivial and outdated matters

Some of the sampled cases were notable mainly for the nonsensical, trivial, or outdated matters that needed to be considered and interpreted. Such covenants may or may not be directly burdensome in themselves, but in all cases they entail the involvement of local councils and the Tribunal by virtue of their interaction with the planning system. Such covenants frequently relate to matters that were of interest to the original parties to the covenant, but have little if any relevance to the broader community. It may or may not be the case that there are still parties to the covenant with an interest in the matter.

Examples in the surveyed cases included *Wolf-Clark v Mornington Peninsula SC* [2014] VCAT 217, where a covenant from 1929 required that "the sanitary system of [the] house shall not be other than septic tank or the Kaustine system." This remained in force despite a modern reticulated sewage connection being available. It is likely that in many such cases, where there is no planning permit required, the covenant is simply ignored. The bar on granting planning permits in breach of covenants removes this option for a set of developments defined by the arbitrary (in this context) distinction of whether planning permission is required or not.

Once triggered, such covenants then spark disputes about their meaning, complicating statutory interpretation. In the Victorian planning system, where controls are highly standardised throughout the state, interpretation of planning provisions unfolds in a context where the purpose of a provision is usually carefully documented and the interpretation of common terms (such as height) generally well understood. Covenants, however, expose authorities to the interpretation of covenants drafted by diverse parties for reasons that may now be obscure or no longer of interest. In *Muir v Bayside CC* [2015] VCAT 1930, for example, a covenant from 1956 required a house include "five main rooms," raising a question about whether a modern open-plan house may breach the covenant; the Tribunal concluded it did, despite some measure of functional separation within those spaces. *Tellis v Moreland CC* [2016] VCAT 1456 involved a covenant requiring "detached" dwelling houses, with the council concerned the proposed separation of buildings (70mm) was so trivial it did not satisfy the covenant. (VCAT disagreed). Several cases – such as *Konstas v Bayside CC* [2016] VCAT 412 – involved covenants requiring buildings to be constructed of specified building materials, raising issues of interpretation such as how much exactly of the building had to be constructed of that material.

A similar question of distinguishing the quantum of non-compliance that might meaningfully create a breach of seemingly absolute provisions arose in *Red Star Beaumaris Pty Ltd v Bayside CC* (Correction) [2015] VCAT 305, which involved a covenant preventing digging or removal of sand clay or gravel, and a question of whether the earthworks involved in constructing a road created a breach (council considered it did but VCAT disagreed). An extract from VCAT's reasoning (at paragraphs 187-188) gives a sense of the tortured discussion about legal technicalities without connection to merits that can arise. In this case the Tribunal found itself debating whether the bar on soil removal amounted to a bar on removing "a little" or "a lot":

> …this argument called up the notion of a spectrum between a little and a lot, presumably with a possibly hazy dividing line somewhere along the spectrum to distinguish between a little, not constrained by the covenant, and a lot that would be.
>
> This argument was not replete with any principle whereby such a dividing line might be discerned or defined. That rather leaves open the proposition that there is no intended difference along the spectrum between a little, a moderate amount, a larger amount, a lot and a very large amount.

Our implicit criticism in citing such a paragraph is not of the Tribunal, but of the framework that requires Tribunal Members to parse such philosophical language in the absence of a legitimate public interest in doing so.

Unlike the planning scheme amendment process, which includes various procedural hurdles and review processes before provisions can be given the statutory weight of subordinate legislation, there is no consistent quality control mechanism applicable to covenants. This can lead to documents of troubling provenance gaining statutory force. In *Poulakis v Moreland* CC [2016] VCAT 1017 the Tribunal found itself interpreting a covenant requiring consent for works from the "Australian Widows Fund Life Assurance Society Limited or its successors." However in interpreting this covenant the Tribunal noted (at paragraphs 30 to 31):

> In that formulation the word successors, where first appearing, appears to have been struck out in pencil and the word transferees written in in pencil although it is not possible to be sure from the photograph copy of the Transfer of Land provided.
>
> Where the word successors secondly appears it is struck out in red and the word transferees has been written in. There are multiple notations in red ink in the margin in various hands some of which might be initials intended to apply to such amendments.

The provenance and meaning of the document is here partially deduced from choices of stationery. This is less than the standard of rigour and clarity one would hope for from a binding statutory provision.

At their worst, such covenant mechanisms can create difficult to resolve blights on property. For example, several of the surveyed cases involved covenants requiring consent of specified bodies, such as the Housing Commission (*Planning and Design Pty Ltd v Greater Geelong* CC (No. 2) [2014] VCAT 522), State Savings Bank of Victoria (4*55 Graham Street Developments Pty Ltd v Port Phillip*

CC [2015] VCAT 1885) or specified companies (*Edwards & Associates Pty Ltd v Mornington Peninsula* SC [2014] VCAT 1153). While such consent covenants generally defer, either in their framing or as a matter of law, to successor bodies, such mechanisms can still create difficulties. For example in *Aldemir v Hume CC* [2015] VCAT 1889 consent was required from a particular company before any building was erected. However that company had deregistered, meaning its right of consent was now vested with the Australian Securities and Investments Commission (ASIC). Yet ASIC, perhaps understandably, did not feel empowered to resolve such matters when asked, advising the permit applicant that it would:

> …not provide consent as requested. ASIC cannot stand in place of the company to determine whether the design and specifications of the verandah and decking that was built are appropriate. ASIC will not use its power to vary or remove any enforceable encumbrance.

While it may be understandable that ASIC would be reluctant to express a view on the decking preferences of long-defunct subdivision companies, the legal reality is that such a situation creates an impasse and clear potential for planning blight.

A final point about corporate consent covenants arises from *Waterfront Place Pty Ltd v Port Phillip CC* (Red Dot) [2014] VCAT 1558. The classic application of such a covenant is to provide certainty for buyers in an estate over and above that entrenched in planning controls. In this matter, such a covenant had been applied in the mid 1990s requiring buildings to conform to particular plans except with the consent of the developer, Mirvac. Over time, site circumstances changed and the developer wished to pursue a higher rise built form than shown in the initial plans. The question therefore arose as to whether a change to the plans would breach the covenant. However the Tribunal noted in this instance that the covenant offered its legal beneficiaries no practical protection, because the terms of the covenant allowed the developer unfettered discretion to alter the plans to which the covenant referred.

In one sense this is simply a cautionary tale for prospective purchasers relying on such agreements. However, the Victorian framework poses the question as to whether it is appropriate to place public authorities and Tribunals at the centre of such disputes, and to implicitly place the weight of the planning system behind seeming guarantees that may, in fact, turn out to be illusory.

Discussion: Private Power and Public Interest

Covenants by their nature generally serve a private interest. This is illustrated by one of the most common situations in which they are imposed: serving as an assurance from a developer to a prospective purchaser. The range of outcomes in a public interest sense - from benign, to nonsensical, to actively against the public interest - emerges unpredictably from the preferences of these private parties. The perceived certainty for the original beneficiaries is a narrowly accruing private benefit, weighed against potential for a widely cast potential public disbenefit.

Yet the cases studied illustrate that even for the originating parties, the perceived certainty afforded by covenants can be illusory. This is highlighted by the powerful role of the developer in typical agreements. While they promise certainty to homebuyers, covenants are typically written such that what is promised is actually a referral to the developer, who may then do as they see fit. The Beacon Cove covenant discussed, for example, threw the weight of the public planning system behind the enforcement of a covenant, only to highlight that it afforded no actual guarantees. Newer covenants thus highlight the illusory nature of guarantees.

On the other hand, older covenants – especially those introduced before 1991 – have an immense, static power in Victoria. Again, covenants between developer and purchaser provide some of the clearest cases of the distortion of the mechanism. When the peculiarly overpowered legal status of covenants is combined with the demise of individual developers, the result can be to place severe and restrictive limitations on land, with the dead hand of the law enforcing the rights of entities that no longer exist. The resultant impacts on planning decisions can be nonsensical. The three Altona Beach cases discussed triggered a somewhat absurd series of events nearly a century later – with homeowners seeking permission from VCAT, the Supreme Court, and ASIC, to vary or remove the terms of the covenant stipulating building materials. Thus covenants can be illusory in their early years, and later be set in stone.

As our analysis has shown, the nature of relationships between private covenants and public planning vary. Some provisions are outside of the scope of planning, serving as additional controls on land catering to preferences or values. While colours or aesthetic practices (permissible laundry placement, for example) are the more common, native vegetation covenants or covenants for affordable housing might be similarly categorised (Adams & Moon 2013; Gurran et al 2008).

In other respects, private covenants predate formal zoning and strategic planning, and have been partly overshadowed by them. The provisions of many covenants have later come to be replicated by zoning and planning, making them largely moot. Noxious industry, for example, is prohibited in modern residential zones.

Other typical covenant exclusions are contrary to modern zoning, with restrictions rigidly upholding values and definitions of past eras, for example by excluding any type of shop; new housing forms; or new land use types now broadly considered residential in nature such as child care centres. Such restrictions not only go beyond planning but, as we have shown, are often directly contradictory to planning policies. The provisions of such covenants, and their exact legal foibles (written in pencil or in ink), exert a disproportionate weight in planning outcomes in Victoria in part due to legislative changes.

Yet covenants do not even need to be contrary to the public interest for the Victorian system to represent an undesirable shift of burden on to the public sector and wider community for a narrow private benefit. The burden of administering the covenants now falls on all parties who must lodge an application (through additional burdens of preparing title searches) and when questions arise about interpretation, the burden of unpicking the legal complexities falls both on later private parties and public institutions such as local councils, VCAT, and the courts. As VCAT noted in *Stoops v Frankston CC* [2008] VCAT 1337:

> Planning and planning laws are public laws in relation to which the public has an interest, quite apart from people who might have a specific interest in specific proposals. What has been done has been to adopt planning procedures created under public law as a means of providing a private property remedy in relation to private property rights.

A 2010 review by the Victorian Law Reform Commission (2010, p. 106) echoed this concern, arguing that "it should not be the role of government bodies to enforce private agreements between citizens, or the private property rights of citizens."

While we do not argue for or against the continued use or status of restrictive covenants – and a comparison with other jurisdictions may highlight risks from other approaches - our analysis concords with the argument that the extent of public resources currently given to private covenants in Victoria is questionable. Ironically, the empowerment of covenants in Victoria as outlined approximately paralleled the shift of planning controls in the state to more discretionary performance-based models from the late 1990s (Buxton, Goodman & Moloney 2016, Rowley 2017). Here the core planning controls have, increasingly, been written figuratively in pencil, being negotiable and changeable, with VCAT exerting considerable power to vary them in accordance with the circumstances of particular planning applications. Yet covenants have been written in figurative ink, exerting an immutable power that binds both councils and Tribunals rigidly.

While the merits of a flexible and discretionary planning system are much debated, it is odd that the special case that warrants a diversion from the normal approach serves private not public interests. The increased weight given - however inadvertently - to upholding private covenants in Victorian planning processes has limited the scope of public interest in decision making, while extending the administrative burden of permit assessments into private matters. Some of the planning outcomes we have highlighted are directly contrary to public policy, or concern trivial issues sometimes without even any clear private beneficiaries. The genealogy of planning shows there is no clear or inevitable way to disentangle public and private interests in land use. The ongoing influence of private covenants, and how this has been exaggerated in Victoria, illustrates how precarious and contingent a balance this is.

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