Re Morihovitis - [2016] VSC 684

IN THE SUPREME COURT OF VICTORIA Not Restricted

AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S CI 2015 05059

IN THE MATTER of an application pursuant to section 84 of the *Property Law Act 1958* for the modification of a restrictive covenant by:

ANDREW MORIHOVITIS Plaintiff

JUDGE:	Mukhtar AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	22 February 2016
DATE OF JUDGMENT:	14 November 2016
CASE MAY BE CITED AS:	Re Morihovitis
MEDIUM NEUTRAL CITATION:	[2016] VSC 684

REAL PROPERTY Restrictive covenant Restriction to 'not more than one dwelling house and outhouses' Burdened land contiguous to unburdened land Common ownership Proposal to develop both lots as one Proposal to erect three level block of 21 apartments Presence of some multi-unit development in the greater neighbourhood Whether modification to covenant to allow apartment development of proposed larger scale 'will not substantially injure the persons entitled to the benefit of the restriction' No objectors joined as parties Scale and imposition of proposed development exceeds degree of changes in neighbourhood Onus not discharged Application refused *Property Law Act 1958* (Vic), s 84(1)(c)

REAL PROPERTY Application to remove restrictive covenant Beneficiaries expressing opposition out of court but not willing to attend court and be joined as defendants Function of the Court in unopposed applications Plaintiff's onus of proof Exposure of facts and opinion from town planner on ultimate issue Adoption of facts by Court Non-adoption of opinion from underlying facts

---

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D P Lloyd	Aughtersons Lawyers Pty Ltd
	No appearance by or on behalf of any beneficiaries of the covenant	

HIS HONOUR:

1. The plaintiff Andrew Morihovitis is the sole registered proprietor of residential land at 9 Highlands Road in Thomastown. He was so registered in June 2014. The land is a rectangular shaped lot with a street frontage of about 15 metres and a depth of 150 metres, creating an area of almost 700 square metres. A single storey dwelling is erected on the land. He also owns the adjoining land at 11 Highlands Road which appears to be of the same dimensions and area, and also has a single storey dwelling erected on it.

2. Mr Morihovitis proposes to erect a substantial block of apartments straddled across both lots of land. The development proposal is a three-level building. There is no underground level. There are to be nine apartments having one bedroom, and 12 apartments having two bedrooms. It is said that the bulk of the proposed development will be on 11 Highlands Road. Judging by the detailed plans that are before the Court, this appears to be a bulky or imposing unitary development that will spread itself over both lots. True it is, there are more apartments in the building on the no. 11 side — which will have 12 of the 21 apartments and 9 car parking spaces — whereas no. 9 will have 9 apartments, 11 car parking spaces and the driveway access to the building. A greater building

presence or footprint on the land at no. 11 is created, on paper at least, because the apartment block is to be built right up to the side title boundary with no. 13 Highlands Road, whereas there is to be a driveway on the no. 9 side, running along the side boundary with no. 7 Highlands Road to create a setback from the boundary.[1]

---

[1] See the planning report of Mr Robert Easton of Easton Consulting made on behalf of the plaintiff (Exhibit RWE-1), pp A104 to A110.

---

3. Mr Morihovitis' land at 9 Highlands Road is burdened by a covenant created in a transfer of land dated 25 June 1931. In that transfer his predecessor in title made this covenant with the transferor (with italics added)—

> ... COVENANT with the said Thomastown Station Subdivisions Proprietary Limited or its transferees the registered proprietor or proprietors for the time being of the land now comprised in the said Certificate of Title except the lot hereby transferred and their respective heirs executors and administrators and transferees that she will not at any time hereafter excavate carry away or remove or permit to be excavated carried away or removed any earth clay stone gravel or sand from the said land hereby transferred except for the purpose of excavating for the foundations of any building to be erected thereon and that *not more than one dwelling house and outhouses shall be erected on the said lot hereby transferred* ...

4. But the plaintiff's adjoining land at 11 Highlands Road has no such restrictive covenant. The land at no. 11 has the benefit of the covenant that burdens no. 9 (as do others in the area), but that will be immaterial to the applicant as common owner and proponent of the greater project over both lots. The absence of a single dwelling covenant on no. 11 immediately exposes the peculiar and testing feature of this application. Subject to planning laws and considerations, there is nothing on title to prevent the plaintiff as owner of no. 11 from building an apartment block, or at the least, there is no restrictive covenant getting in the way of a planning application to do so. But the presence of the restrictive covenant on no. 9 Highlands Road obliges the responsible authority under the *Planning and Environment Act* to refuse to grant a planning permit unless the covenant over that land is removed or varied.[2] Thus, by this application Mr Morihovitis seeks under s 84(1) of the *Property Law Act* to modify the single dwelling covenant on no. 9 by deleting and adding words as shown in this way

> ... not at any time hereafter excavate carry away or remove or permit to be excavated carried away or removed any earth clay stone gravel or sand from the said land hereby transferred except for the purpose of excavating for the ~~foundations~~ construction of any building and basement to be erected thereon ~~and that not more than one dwelling house and outhouses shall be erected on the said lot hereby transferred~~ ...

---

[2] See s 61(4).

5. In effect, this makes for a discharge of the covenant. The application if granted removes from the covenant any limitations on the number of dwellings within a building on no. 9 Highlands Road.

6. As argued, the specific ground of the application was s 84(1)(c) of the *Property Law Act* which empowers the Court to modify a covenant upon being satisfied 'that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.' The question whether a person entitled to the benefit of a covenant would not be substantially injured by the modification is a question of fact in each case, and the onus of proof (that is, an onus to prove the negative) is on a plaintiff. But, even if an applicant can bring a case within s 84(1), that only enlivens the court's discretion; it does not require the exercise of that power. [3] A court's mentality is to approach with caution because a covenant is a significant property right.

[3] See *Re Cook* [1964] VR 808, 813 ; *Stanhill v Jackson* (2005) 12 VR 224, 239 [40] ; *Maclurkin v Searle* [2015] VSC 750, [18] ff. See also *Bradbrook and Neave's Easements and Restrictive Covenants* (Third ed), 575-6.

7. A notional division of this project by reference to the two separate lots means the court is being asked to modify the single dwelling covenant on 9 Highlands Road so as to remove a hurdle in the way of Mr Morihovitis applying for a permit to erect on 9 Highlands Road part of a three-storey building containing nine dwellings. This is a significant step. Yet when it comes to a court applying the statutory test in s 84(1)(c) of the *Property Law Act* and examining whether this will not 'substantially injure' the beneficiaries of the covenant, the court cannot realistically but consider the whole project, the other half of which is on land that is not burdened by a single dwelling covenant. Consonant with that, it can be discerned that this situation informs the design of the whole building; that is, it appears to be designed with a bias of the build form on the non-burdened land at no. 11 Highlands Road to create holistically a less injurious context by which to judge the application.

8. The historical facts of the title and the covenant, as I will now selectively recite them, are stated in an affidavit of the applicant's solicitor Glen Andrew Egerton[4] and in a town planning report prepared on behalf of the applicant by Mr Robert Walter Easton of Easton Consulting.[5]

[4] Sworn 24 September 2015.

[5] Exhibit RWE-1 to his affidavit sworn 20 May 2015.

9. The land now known as 9 Highlands Road was originally transferred in 1931, with the burden of the covenant, as Lot 70 on Plan of Subdivision No 12114. That was part of the greater land in certificate of title volume 5179 folio 1035791. The land comprising that parent title was a large rectangular area of about 32.5 acres bounded by High Street, Pleasant Road, Mount View Road

and Main Street in Thomastown.[6] The plan of subdivision created 132 rectangular residential lots of near identical dimensions in a north-south grid street pattern, and, created 45 very much narrower lots which are shop sites that face High Street in an easterly direction. The next fact is that all but 16 of the lots in the subdivision have the benefit of the covenant that burdens 9 Highlands Road, and 5 of those 16 are shop sites. For convenience, Annexure A to this judgment is the plan of subdivision which shows by coloured shading the subject land (marked with an 'S') and shows the 16 lots that do not have the benefit of the covenant.[7] Mr Easton says, and I accept, that the boundaries of the entire subdivision LP12114 should be regarded as the neighbourhood for present purposes. But it can be seen from Annexure A that the very narrow strips of lots facing High Street, whilst part of the neighbourhood at the eastern periphery, are by size and nature and usage not highly material to the application here, and throughout this judgment I intend to concentrate on the residential neighbourhood apart from those shops. In saying that, I will not ignore the proximity of the subject land to the shopping strip (if that commercial activity is thought to lessen the injury) or, likewise, the medical centres in the north-east corner of the residential neighbourhood quite close to the subject property.

---

[6] On the plan of subdivision, Main Street was once called German Lane.

[7] Taken from Exhibit GAE-2. See also Fig 3, p 9 of Mr Easton's report.

---

10. Although all but 11 of the 132 residential lots have the benefit of the covenant, the next fact is that a good number of the residential lots are not burdened by a single dwelling covenant. Mr Easton's report states that in November 1949, that is, 18 years after the transfer of the subject land, there was a bulk transfer of 96 residential lots and 19 shop sites and the bulk transfer did not contain a single dwelling restrictive covenant.[8] His investigations also showed there were also other transfers of individual lots that did not contain such a covenant. Figure 13 of Mr Easton's report is a plan depicting the lots not burdened by a single dwelling covenant.[9] That plan is insufficiently legible in detail to reproduce here. However, Annexure B to this judgment is the Court's minor recreation of his Figure 13 using the plan of subdivision. The shaded lots are not burdened by a covenant. According to Mr Easton's report, I have annotated Annexure B with the notation 'S/D' to show the lots that are burdened by a single dwelling covenant.

---

[8] Para 8.2(1).

[9] See p 22 of his report.

---

11. Two things are noticeable from Annexure B. Nearly all the neighbourhood north of Highlands Road is free of a covenant. But, from the south side of Highlands Road, the area of the neighbourhood having the most lots burdened by a single dwelling covenant is the plaintiff's block. Mr Easton's view from these facts is that the neighbourhood as constituted by the whole of the subdivision is therefore not *defined* by the feature of a single dwelling covenant on title. As a whole, I cannot disagree with that view. But even so, what are the neighbourhoods' conspicuous building features?

12. The absence of single dwelling covenants on most of the residential lots to the north of Highlands Road explains the presence of some multi-unit development in that part of the neighbourhood. Mr Easton's report identifies with photographs the instances within that part of the neighbourhood where there has been more than one dwelling erected on the land. Such development ranges from dual occupancy to two, three and four units. Some of the individual units are double storey. Furthermore, in the plaintiff's 'neck of the woods' there are residential lots (not subject to covenant) that have become medical centres with adjoining car parks. For convenience, Annexure C to this judgment is an adaptation of Annexure B to show the instances of multi-unit housing in the neighbourhood. The circled digit in Annexure C signifies the number of dwellings on that lot. The annotation 'D/OCC' signifies a dual occupancy. So depicted, I think this gives a better perspective of housing density in the greater neighbourhood, and the location or spread of non-single dwelling housing.

13. From those investigations, as I see it, the tangible facts are these: although there are multi-unit developments of 2, 3 or 4 dwellings predominantly to the north of Highlands Road, there are no blocks of flats or apartment blocks in this neighbourhood; there are no developments that resemble the scale and land usage of the plaintiff's proposed development; nor are there developments that might be a progenitor of a 21-apartment building. That leads to the view, which I take, that this development is a departure, and a radical one at that, from the type or scale of multi-unit development not only in the plaintiff's block south of Highlands Road but in the whole subdivision. The plaintiff's development, with its driveway and car parking is three storeys and goes title boundary to title boundary.

14. Despite the scale of this development, no beneficiaries have come forward to state their objection in court or to be joined. On 16 October 2015, I made orders in accordance with established practice that required direct notice of the application to be given of this application to chosen beneficiaries that were in the immediate vicinity of the subject land as they stood to be particularly susceptible to any injury by the development. I also required those beneficiaries to be served with the plans of the development including floor plans and elevations. In addition, I required the plaintiff to display a notice on the premises notifying passers-by or observers about the proposal and the return date of the application in court for procedural directions.

15. An affidavit of the applicant's solicitor Glen Andrew Edgerton[10] states that after service of this application on those chosen beneficiaries, he or his staff received these communications:

---

[10] Sworn 8 December 2015.

(a) on behalf of the owners of 24 Highlands Road, the caller said she believed it would enhance the value of her parents' property;

(b) a call from a Mr Sam Singh of 12 Main Street Thomastown said he had no objection to the application;

(c) a call from a Mr Pietro Pennella said that he and his father 'would not object to a single storey unit development as opposed to a multi-storey residential complex' and 'that a multi-storey residential

complex may attract bad people and would also have car parking issues';

(d) a call from a Mr Arthur Minos of 18 Main Street Thomastown said that 'a few of his neighbours were concerned about apartments being built behind them';

(e) Paramendra and Jasma Kumar of 13 Highlands Road Thomastown wrote to state their objection to the application;

(f) Fabrizio Del Rossi of 5 Highlands Road Thomastown wrote to state his objection to the proposal;

(g) Ferdinando and Maria Cardamone of 37 Highlands Road Thomastown wrote to state their objection to the application;

(h) Amato Pennella and Gerarda of 35 Highland Road Thomastown wrote to state their objection but later, a phone call was made on their behalf to withdraw their objection. After the applicant's lawyers sent correspondence to them explaining the procedure if they wished to maintain their objection, they subsequently withdrew their objections;

(i) Stella Visaggio wrote to state her objection but, being informed of the procedure to maintain the objection, she subsequently called to say 'she would not be attending court and would withdrew her objection';

(j) Domenico and Marianna Altamura of 12 Highlands Road Thomastown wrote to state their objection and were sent correspondence to explain the procedure if they wished to maintain their objection;

(k) Mitre and Lena Matrovski of 9 Maritana Crescent Thomastown wrote to state their objection and after receiving explanatory correspondence from the applicant's lawyers, their daughter rang to say that her parents would not be able to attend court.

16. No objectors have attended Court. However, it is established in the legal authorities on these applications that the absence of objectors does not necessarily satisfy the onus of proof, and it certainly does not amount to implied assent. [11] But as is commonly submitted in these applications, the absence of objectors ought go some way to overcome a court's caution. In this case, it was submitted that the absence of objectors willing to advance their objection to a substantial development such as this was especially significant, meaning to say I think the Court should not be overly cautious or assailed by the scale of the development in the assessment of substantial injury. The submission went a little further. It was submitted that known cases where such applications were refused were, or tended to be, opposed applications on which the Court

could act on grounds of resistance from a beneficiaries according to evidence adduced by them. In this case, although it was said that the Court has to play devil's advocate, it was submitted the Court should, in the absence of objectors or any other evidence, act on the plaintiff's evidence.

---

[11] See *Prowse v Johnstone* [2012] VSC 4, [43].

---

17. I do not accept the amplitude of that submission. Applications to modify single dwelling restrictive covenants are becoming much more frequent in my experience, and they almost always involve modifying a single dwelling covenant. I feel impelled to remark that the presence or degree of resistance comes to depend upon the location of the area in question (but not always its affluence), its history, its entrenched amenity, the degree of community cohesion particularly in the face of a substantial multi-unit development. In areas where there is evidence already of multi-unit development on a noticeable scale to the point where the neighbourhood has already changed to a degree to alter it from being a single dwelling area to a mixed density area, the absence of objectors might naturally be taken by a court to be a recognition by landowners of irresistible change or a weary acceptance of the way things are. This may naturally incline a court to see the application as not causing substantial injury, and to grant the application. But I emphasize, it depends on the proposed development and conditions in the neighbourhood.

18. There is another discernible factor, in my experience, on these applications. It is frequently the case that objectors in court believe that the discharge or modification of a covenant is a process no different to planning applications before the local council or the VCAT. Upon being necessarily informed that they must be joined as defendants to adduce their objections, and possibly having their objections tested in court, they are averse to becoming involved in Supreme Court litigation. This is a matter the Victorian Law Reform Commission considered and published a Final Report in 2010 with recommendations. [12] Residents lament they do not have the time with working and family commitments to be involved in a court case, nor can they afford lawyers. There are some areas where the demographics are such that the residents are either elderly couples, sometimes migrants, who have neither the free time or energy or the means to resist proceedings. Furthermore, as the Court is in no position to state at the outset what the cost consequences might be, ordinary people do not want to be involved in litigation carrying with it the risk of costs. The Court is powerless, I think, to exact from a plaintiff an undertaking not to claim costs as a condition of proceeding. This all leads me to say, to my mind, the absence of objectors is to be taken to likely mean that affected residents are willing to leave it to the Supreme Court to decide the application according to law.

---

[12] Final Report 22, *Easements and Covenants,* 17 Dec 2010, Ch 8 at 8.32 (pp 119-21).

---

19. In this case, the scale of the development here is substantial and naturally arouses a strong sense of scrutiny and alertness to the onus of proof. The approach therefore, in assessing substantial injury, is to look at the evidence and for the Court to conduct its own scrutiny as an objective

exercise; that is, to proceed on the basis that the facts as put forward by the plaintiff's town planner concerning the neighbourhood, the housing density, the changes over time, and the amenity of the area to see if it can be said that a modification to the covenant will not impose substantial injury. That is not to diminish a town planner's opinion on that ultimate question. It is to say that the Court is still left to look at the objective evidence on which that opinion is based and see if the opinion is reasonably based or if a contradictory view on the same facts is also reasonably available on what is ultimately a legal test of substantial injury.

20. In that regard, the court proceeds on the basis that the manifest purpose or benefit of a single dwelling covenant is to maintain the building density in an area, variously put by saying that single dwellings keep the peace and tranquillity or ambience of an area, as the presence of multiple dwellings on land brings with it added use, more people (maybe tenants), more cars, more movement, reduction in land values and space, more noise or general hustle and bustle, more rubbish and waste collection, so on and so forth. It might also be said that in changing social times or social structures, households may no longer be made up of families or conditions in which a single dwelling area is to be taken as the norm or that restrictive covenants ought give way to statutory planning controls in times of increasing population, centralisation, and the demands for housing. But those macro or policy matters are exogenous to the legal nature and legal effect of a single dwelling covenant as a significant property right to the beneficiaries.

21. It must be accepted as significant, as is shown in Annexure B that a good many of the lots in the residential part of the neighbourhood (that is excluding the shops on High Street) are not burdened by any restrictive covenant, even though they have the benefit of the covenant over the subject land. Thus, as Mr Easton says in his report:

> 10.11 The nature of the covenants throughout this area are significantly different to those that normally apply in regard to restrictive covenants.
>
> 10.12 With particular reference to the 132 residential lots it is considered significant that no restrictive covenant was ever created on 101 of these lots. The covenants are also distributed randomly throughout the area and as such there is no scope for the covenants by themselves to dictate the nature of character of the area. To the extent that there is any particular character applying in this area then this character cannot be attributed directly to restrictive covenants.
>
> 10.13 A further feature of the covenants that do exist is that while limiting the number of dwellings they do not restrict other uses such as medical premises from being established or other uses not otherwise described in the covenant.

22. I think it should be accepted there is no overall mutuality in the burden of covenants to permit it to be said that, if covenants on title be the test, things were not planned by private treaty or transfer to ensure this was to be a single dwelling neighbourhood. The greatest concentration of the lots with a single dwelling covenant is in the applicant's block between Highlands Road and Main Street. For those on the northern side of Highlands Road that face directly the proposed development, there are only two blocks that have single dwelling covenants and the block directly opposite (Lot 80) is akin but has a slightly different covenant confined to one shop with or without a dwelling attached.

23. That concentrates attention on that part of Mr Easton's report which investigates the developments that have occurred in the plan of subdivision. Freed of a single dwelling covenant, what has been the nature and extent of multi-unit development in the neighbourhood? He describes this in paragraph 8.2 of his report. I need not repeat the narrative of his observations, but for convenience I can represent it by annotation to the plan of subdivision as shown in Annexure C to this judgment. This gives a ready visual appreciation of the spread and nature of the development.

24. From Annexure C, the first observation is to be made concerns the south-east area of the plan. That takes in lots 31-33, 73-74 and 75-76. Each of those clusters of lots is a medical centre with an adjoining car park. The cluster is alongside the shop lots that face High Street. I doubt if the medical centres would come under the description of commercial development but the point is made they are not residential developments, and medical centres would by nature attract nonresidential pedestrian movement or traffic comings and goings. The photographs in Mr Easton's report show the medical centres are not imposing purpose-built buildings but appear to be converted houses.

25. The next observation is the number of dual occupancies, including one opposite the subject land at lot 78. Most of the multi-unit development has occurred in the blocks north of Highlands Road. As shown on annexure B, most are developed with two units, some with three units and some with four. Some of the units are two-level buildings. It is hard to say that there is a particular concentration in any area of units. The least concentration is certainly in the block in which the applicant's land is situated. Most seem to be in the north-east area of the subdivision, close to the shops facing High Street.

26. Mr Easton looks at the impact of the proposal and his points can be adumbrated as follows:

    (a) the main impact of the proposal will be from the street frontage, that is, facing Highlands Road;

    (b) the building is only marginally higher than the unit development at No 6 Central Avenue (lot 143) which has four units, each of two stories. As a general rule he says slightly higher buildings are anticipated in closer proximity to commercial shopping centres;

    (c) the building proposal has a significant set-back at the upper levels from the rear boundary;

    (d) in looking at impact on neighbouring properties, any impact on the property at No 7 Highlands Road (Lot 71), which adjoins the eastern boundary of the subject land, has been reduced by the intended placement of the car park and driveway entrance immediately adjacent to it, which has allowed the bulk of the building to be set further from that boundary;

    (e) of the property at No 10 Main Street, which is immediately adjacent to the southern boundary of the subject land, he says that property is already impacted by the former police station immediately to its east which includes a large car parking area at the rear of that property. He says the set-backs on the upper levels of the proposed development reduces any impact;

(f) the property at No 12 Main Street is immediately south of the balance of the project on No 11 Highlands Road which is not subject to any restrictive covenant; and

(g) traffic impacts are not significant because many lots in the plaintiff's block are covenant free and therefore covenants had little scope to regulate traffic volumes, and in any event, the proximity to High Street makes it likely that traffic from the apartments will exit in that direction.

27. Mr Easton concludes therefore that the proposed development will not cause substantial injury. But he goes further to state the following conclusions (with my underlining):

> 11.1 It is my opinion that there have been material changes in the character of the neighbourhood since 1931 and that the continued existence of the restriction is impeding the reasonable use of the land in a similar manner to other properties which have been developed in close proximity.
>
> 11.2 It is also my opinion that it would be a reasonable and proper use of the land to enable the subject land to be developed with an apartment-style building spread across 2 lots and that there is no practical benefit for other persons to be secured by the retention of the covenant on half of that site and that the proposed discharge (or modification) of the restrictive covenant will not substantially injure the persons entitled to the benefit of it.
>
> 11.3 I further consider that due to the haphazard placement of covenants within this area and this street in particular, it would be appropriate to discharge the covenant entirely. This would further avoid the anomaly of new titles for 9 apartments having a reference to a varied covenant while 12 apartments would require no reference.

28. Mr Easton says in the alternative that if the covenant is not discharged then, in his opinion, it should be modified by replacing the expression 'except for the purpose of excavating for the foundations of any building to be erected thereon and that not more than one dwelling house and outhouses shall be erected on the said lot hereby transferred' with the expression 'except for the purposes of excavating for the construction of any building and basement to be erected thereon'.

29. In seeking a *discharge* of the covenant, his opinion seems to spread itself across the grounds in s 84(1)(a) and (c) of the *Property Law Act*. There can be some overlap between these different statutory grounds but the submissions by experienced counsel on the application were confined to a modification of the covenant on the popular or more readily approachable ground in s 84(1)(c) , that is, on the basis that the modification would not substantially injure the persons entitled to the benefit of it. However, I will adopt an expression of thought given by Mr Easton in paragraph 11.1 of his report (as quoted above) which informs my analysis and judgment of the application. The foundation of his opinion is that the plaintiff is looking to use the land 'in a similar manner to other properties which have been developed in close proximity.' That is to say, that the plaintiff here is doing something similar in manner to what numerous other beneficiaries have done in the subdivision in erecting a multiple number of dwellings.

30. To come to the point now: I cannot accept that this development involves the plaintiff's land being used *in a similar manner to other properties*. With all respect to Mr Easton whose planning reports are frequently adduced and acted on in these unopposed applications at least, I do not think that view is sustainable on the facts. I think this development of a 21 apartment block of three levels over 2 lots of land is a manifest deviation from the 'manner' in which other land has been used and the build form of development in the whole of the subdivision. And if I was to notionally sever the two lots of land at no. 9 and no. 11 Highlands Road, I would say the same: the development of the land at no. 9 Highlands Road into a three storey 9 dwelling apartment block is not a proposed use '...in a similar manner to other properties ...'. There are no apartment blocks in the neighbourhood. There are no multi-unit developments exceeding 4 dwellings anywhere in the subdivision. Looking especially at Appendix C, the least amount of extra development is in the plaintiff's block and on the north side of Highlands Road that faces the plaintiff's side of the street. The medical centres appear to be converted houses and not medical blocks, and even with the adjoining car parks I cannot see how, in the aggregate, it can be concluded that the proposed apartment block is a development in a similar manner. It would be a different matter if the application was to seek modification of the covenant to enable to construction of 2, 3 or four units. *Then,* there would be basis for contending that such a modification was in keeping with 'manner' of development in the neighbourhood as a basis of persuading a court that there would be no substantial injury.

31. To make the comparison that I have, leads to the content of the applicable legal principles on an application such as this. Mr Lloyd's submissions referred to the useful summary of the legal principles in *Vrakas v Registrar of Titles* [13] to which adherence has been given in *Prowse v Johnstone* ,[14] *Wong v McConville* ,[15] *Morrison v Neil* ,[16] *Maclurkin v Searle* [17] and *Oostemeyer v Powell*. [18] There is no need to reproduce, once more, a digest of the guiding principles. The dominant principle is that a comparison exercise is to be done to see if the modification as sought will inflict substantial injury to the benefit of the restriction. I think it need be no more complicated than saying what was said in *Re Ulman* [19] that 'the proper approach is to compare what the covenant before modification permits to be done in on the land which it binds, with what it would permit to be done after modification.' If the difference is not substantial then the statutory ground is attracted.

---

[13] [2008] VSC 281, [23]-[48] .
[14] [2012] VSC 4, [97] *ff*.
[15] [2014] VSC 148, [33] *ff*.
[16] [2015] VSC 269, [61] *ff*.
[17] [2015]VSC 750, [31]*ff*.
[18] [2016] VSC 491, [47] *ff*.
[19] (1985) V Conv R 54-178 at 63,420 cited in *Prowse* at 104 . See also *Vrakas v Registrar of Titles* [2008] VSC 281, [35] .

---

32. In that regard, it is routinely argued in these applications (and was here) that in assessing injury the court is to compare the worst that could be done under a full exploitation of the existing single dwelling covenant, with, the worst that could be done on the land with the modified covenant.

Thus the argument typically goes: a single dwelling covenant could not prevent an aesthetically grotesque or imposing three storey house extending as close as possible to all four boundaries, which might be no different to a three story block of apartments flats if the covenant is removed or modified. Therefore, the argument goes, in the hypothetical comparison exercise there would be no substantial injury.

33. I find this argument unpersuasive, because it is an untrue or incongruous comparison. True it is, a single dwelling covenant does not prevent, subject to planning laws, the erection of an imposing building in dissonance with the as-built features of a neighbourhood or the sensibilities of good taste. But, why should that matter in the legal exercise? The large and imposing dwelling is still a single dwelling and the landowner is free to have it built. Moreover, as recognised in *Prowse* [20] the 'worst case' test, as a hypothetical, pays no heed at all to the realistic probabilities of a plaintiff bringing about the worst that could be done under the existing covenant. The realities here are evident from Attachment C, in that, the numerous landowners that have developed their land have not gone beyond dual occupancies, or multi-unit developments with 4 dwellings at most.

---

[20] [2012] VSC 4, [104].

---

34. In contending that that substantial injury would not be caused by the granting of the application, Mr Lloyd made the following additional contentions.

35. First, the plaintiff here was not looking to depart from the residential quality or feature of this neighbourhood. That is to say, he was not looking to build on the two blocks some disagreeable commercial development. In that sense, as I understood the submission, there was to be no disturbance to the essentiality of the covenant in preserving a residential quality to land usage. I took the submission to be the starting point forensically for the central contention that a modification of the covenant for this proposal would not inflict substantial injury. Yes, this is proposed to be a residential development but I think to say in effect 'It could have been a lot worse' does not confront the question whether as a residential development it substantially injures the benefit given by a single dwelling covenant.

36. Secondly, it was submitted the key question was whether a modification would cause substantial injury and attention had to be focused on the word 'substantial'. I agree. It was accepted there was a judgment to be made about substantial. It was also accepted that it was not possible for any Court to ignore the bulky look of the development, but the Court was asked to not be preoccupied with the look and form of the proposed development but should adhere to the statutory question of whether there would be substantial injury which means real or actual injury and not prejudicial or subjectively held views about apartment buildings as a built form. Here, it was submitted that the land was close to a strip of shops and medical centres. It would be a different matter, it was submitted, if the subject land was further away from the shops and closer to the central precinct of the neighbourhood. Thus counsel posed the test this way: even accepting there will be a *reduction* in the benefit conferred under the covenant, the question was whether the beneficiaries would be substantially injured by that reduction, for it does not necessarily follow that because of that reduction, there will be substantial injury in relation to the enjoyment of their property as beneficiaries of the covenant.

37. I think this suggested test in effect repeats rather than elucidates the statutory ground. The plaintiff is acknowledging there will be injury, but says it is not substantial. The onus is on the plaintiff to make out that ground.

38. The benefit of a single dwelling covenant in a residential area is, as I have said, necessarily intangible in the sense of maintaining a certain quality or ambiance in an area; a quality of living not reduced by higher density housing, congestion, reduction of open space, reduced land values, more people and traffic, and demand on municipal amenities. The judgment to be made about 'substantial injury' turns on the nature and degree of the injury to those benefits. Here, in my judgment, the location of the proposed development is not so removed from the residential area of the neighbourhood that it can be regarded as being sufficiently far away from it to say that such changes will not be seen and felt. It will be a conspicuous part of the neighbourhood. It will be the only apartment block in the neighbourhood. The scale of the project and its departure from the scale of any existing residential developments in the neighbourhood, means that if it does not of itself create the sort of notorious problems of higher density living as I have identified them, it will in my judgment be the beginnings of altering the character of the neighbourhood.

39. Thirdly, it was submitted that to allow the application for modification does not amount to the Court approving the plans for development under the planning laws. That is, approving the application does not mean the Court is approving the plans. The Court would be doing no more than removing an impediment for the plaintiff to apply for a planning permit and the responsible authority can then assess the proposal having regard to planning schemes and regulations and standards. That is true, but I do not see how that prospect relieves the Court from its adjudicative function in this, an antecedent legal exercise under statute, about the right or benefit under a covenant which exists independently of the planning laws.

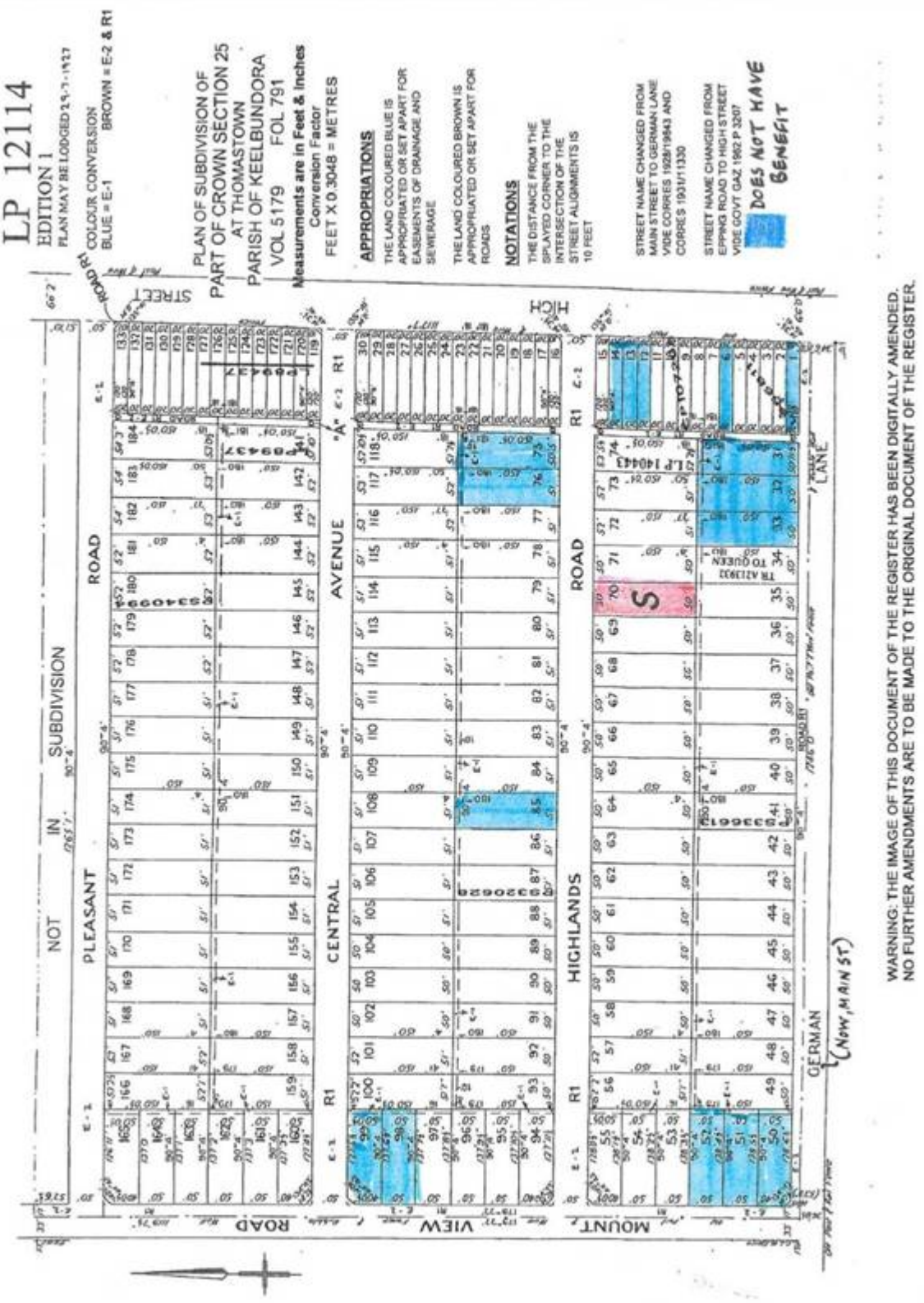
40. Cases have made it clear that it is no part of the Court's function to consider whether a proposed development would or would not be desirable or acceptable under town planning regulations and considerations. [21] I see a general point of appeasement that modern planning laws ought be trusted to prevent or reduce overbuilding and overshadowing and require setbacks and such matters to minimise injury to nearby residents or to the amenity of an area. But this general appeal to the planning laws as providing a collateral check on a development misunderstands I think the function of the Court on applications under s 84 of the *Property Law Act*. Restrictive covenants date back to *Tulk v Moxhay* in 1848. To put it in plain terms, Mr Morihovitis has bought land knowing of a negative covenant on it which binds him as if he made it by private contract. He cannot use the land in defiance of that contract. By statute this Court might discharge that obligation or modify it if doing so will not cause substantial injury to those to whom the promise was made. That cannot be done by saying or assuming that the planning authority will ensure that the apartment development is in accordance with planning laws and regulations. The question for the Court is whether the landowner should be relieved of his promise and allowed to build an apartment block in the first place, before it is subjected to planning scrutiny. For the reasons I have given, in my judgment the plaintiff has not shown that the proposed modification will not cause substantial injury to those to whom the covenant was given.

---

[21] See *Prowse v Johnstone* [2012] VSC 4, [104].

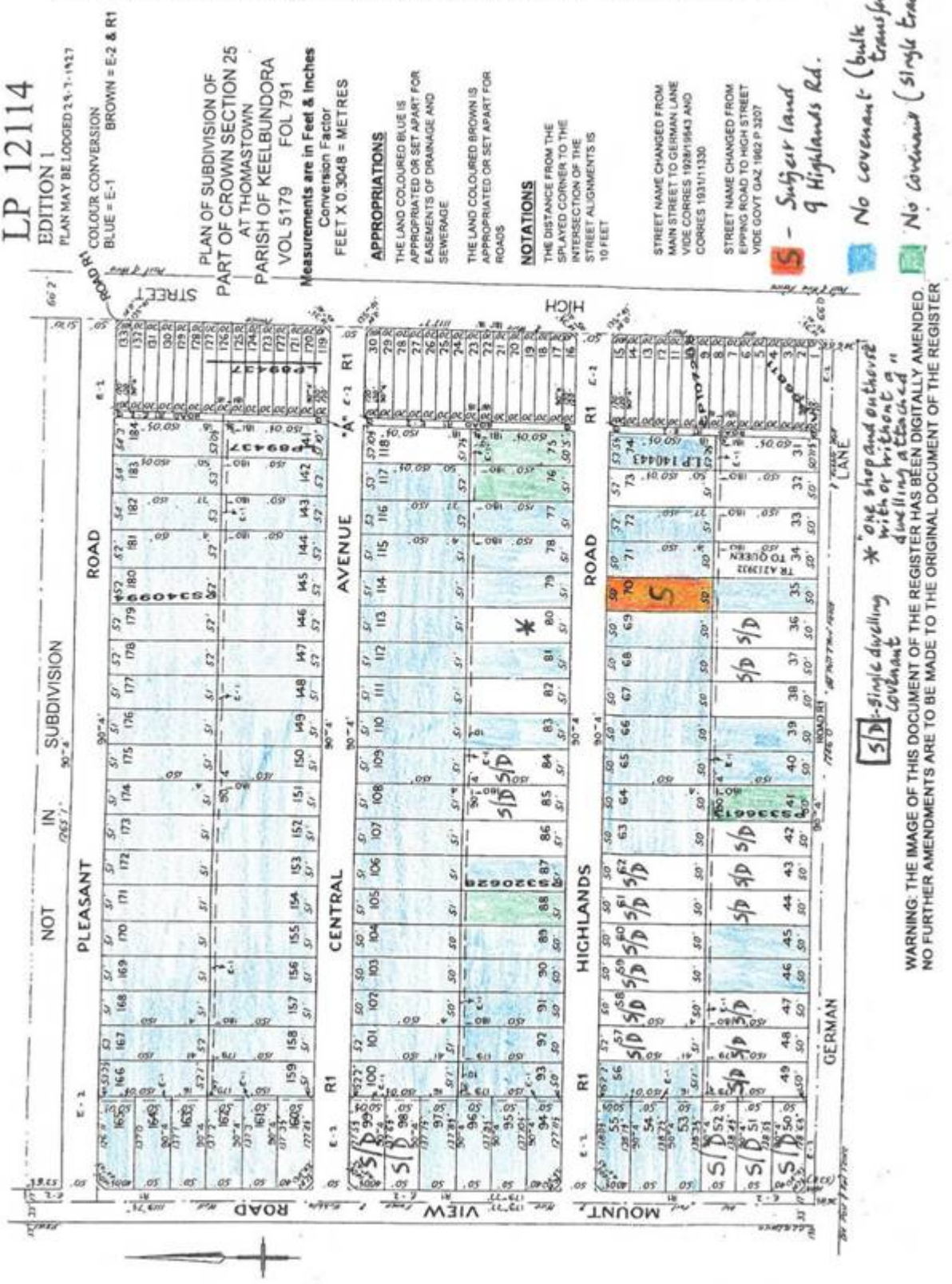
41. The Court shall order that the application is refused, and the proceeding is dismissed.

ANNEXURE A



A21

ANNEXURE B



ANNEXURE C