

20 December 2024

Luke Mooney
 Planning & Property Partners Pty Ltd
 13/1 Collins Street
 MELBOURNE VIC 3000

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By email to: mooney@pppartners.com.au

Dear Luke

**PLANNING PERMIT APPLICATION 0448/24
 104 & 106 ST GEORGES ROAD, TOORAK VIC 3142
 LEGAL ADVICE AND RESPONSE TO FURTHER INFORMATION REQUEST**

You have instructed us that Stonnington City Council ('**Council**') has issued a Further Information Request dated 26 August 2024 ('**RFI**') with respect to Planning Permit Application 0448/24 ('**Permit Application**'). The Permit Application relevantly seeks permission to construct a multi-storey apartment building ('**Proposal**') at 104 and 106 St Georges Road, Toorak ('**Sites**').

The RFI requests for legal advice in respect to whether the Proposal complies with the restrictive covenant contained in Instrument of Transfer No. 1187626 ('**Covenant**') that burdens the Sites.

Specifically, RFI item 2 asks for clarification of the Covenant's interpretation and RFI item 3 asks for a list of beneficiaries of the Covenant and an associated map.

Our advice in respect of these matters follows. For the purposes of this advice, we have relied upon the plans prepared by Charles Wright Architects, dated 25 September 2023 and marked Revision 'TP-01' ('**Planning Drawings**').

SUMMARY OF ADVICE

Pursuant to s 61(4) of the *Planning and Environment Act 1987* ('**Act**'), Council cannot issue a planning permit that authorises anything which would contravene a registered restrictive covenant.

In summary, our advice is that:

- The Covenant **does not apply a single dwelling restriction** on the lots, rather, only a restriction on the materials used for the roof of a dwelling house;
- The **Proposal complies with the material restriction** because the proposed roof will be of roof slate tiles and shingles; and
- The **extent of excavation of the land does not contravene the Covenant** as the excavation works are not for the purpose of quarrying, but rather for the construction of residential development;

The Proposal does not breach the Covenant and accordingly, Council is not prevented from granting the Permit Application.

Our reasons follow.

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APPLICABLE PRINCIPLES IN INTERPRETING COVENANTS

The general principles of interpretation that apply to restrictive covenants are as follows:

- a) The object of interpretation is to discover the intention of the parties as revealed by the language of the document in question.¹ The principles are the same as those regulating the construction or interpretation of other written documents.²
- b) The words should generally be given their ordinary and everyday meaning and should not be interpreted using a technical or legal approach.³
- c) The words must always be construed in their context, upon a reading of the whole of the instrument⁴ and having regard to the purpose or object of the restriction.⁵
- d) The words of a restrictive covenant should be given the meaning that a reasonable reader would attribute to them.⁶ Whilst the reasonable reader may have knowledge of such of the surrounding circumstances as are available, these circumstances are generally limited to the most obvious circumstances having regard to the operation of the Torrens system and the fact that the covenant is recorded in the register kept by the Registrar of Titles.⁷ As the High Court held in *Westfield Management Limited v Perpetual Trustee Company Limited*:⁸

The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing placing the third party (or any court later seized of a dispute) in the situation of the grantee...

- e) The words of the covenant should be construed by reference to the location and the physical characteristics of the properties, which are affected by it.⁹
- f) The meaning of particular words depends upon their context and therefore cases that consider similar words provide no more than persuasive authority as to the meaning of words in a different document.¹⁰
- g) As a last resort, where the wording of a restrictive covenant is ambiguous, the covenant will be construed against the covenantor in favour of the covenantee,¹¹ enlivening the legal principle of *contra proferentem*. That is, where there is ambiguity, a provision is interpreted against the draftsman.

¹ Bradbrook and Neave's Easement and Restrictive Covenants, AJ Bradbrook and SV MacCallum, 3rd ED [15.3] ('Bradbrook'); *Prowse v Johnston & Ors* [2012] VSC 4 [55]-[58] ('*Prowse v Johnston*').

² *Ibid.*

³ *Clare & Ords v Bedelis* [2016] VSC 381 [31] ('*Bedelis*'); *Re Marshall and Scott's Contract* [1938] VLR 98, 99; *Ferella v Otvosi* (2005) 64 NSWLR 101, 107 ('*Ferella v Otvosi*'); *Ex Parte High Standard Constructions Limited* (1928) 29 SR (NSW) 274, 278 ('*High Standard Constructions*'); *Prowse v Johnston* [52].

⁴ *Bedelis* [31]; *Ferella v Otvosi* 107; *High Standard Constructions* 278; *Prowse v Johnston* [52].

⁵ *Bedelis* [31]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 [22].

⁶ *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 [157-158].

⁷ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528 [37]-[42].

⁸ (2007) 233 CLR 528 [39].

⁹ *Bedelis* [31]; *Richard van Brugge v Hare* [2011] NSWSC 1364 [36].

¹⁰ Bradbrook [15.4] citing *Christie & Pardon v Dalco Holdings Pty Ltd* [1964] Tas SR 34, 41.

¹¹ Bradbrook [15.6]; *Ferella v Otvosi* [21].

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COVENANT

The Covenant was executed on 2 October 1924 and subsequently registered on title on 9 October 1924. The operative passage is transcribed below:

'... will not erect upon either of the said lots hereby transferred any shops laundries factories works schools alms-houses hospitals or churches nor shall any halls or buildings of any kind to be used wholly or partly for any religious educational or charitable purpose or for public entertainment of any kind whatsoever or any hoarding for advertisement and that no quarrying operations shall at any time hereafter be carried on in upon the said land and no marl stone earth clay gravel or sand shall at any time hereafter be dug removed or carried away from the said land and that no dwelling house except one constructed with a roof of slate tiles or shingles at a cost of not less than One thousand five hundred Pounds exclusive of all architects fees and the cost of erecting any outbuildings and fences shall be or be allowed to be erected on either of the said Lots hereby transferred...'

For convenience, the specific restrictions contained within the Covenant are (in summary form):

- That no dwelling house except one constructed with a roof of slate tiles or shingles... shall be or be allowed to be erected on either of the said Lots (**'First Restriction'**);
- That no quarrying operations shall be carried out on the Site and that no marl stone earth clay gravel or sand shall be dug removed or carried away from the Sites (**'Second Restriction'**);
- That no shops laundries factories works schools alms-houses hospitals or churches nor shall any halls or buildings of any kind to be used wholly or partly for any religious educational or charitable purpose or for public entertainment of any kind whatsoever or any hoarding for advertisement (**'Third Restriction'**).

We note that the First Restriction also includes a suffix in respect of building costs – such restrictions are widely accepted to be anachronisms with no contemporary function. In any event, the Proposal would comfortably exceed the quantum identified in the Covenant.

Our advice in respect of each the Restrictions follows.

ANALYSIS

First Restriction – Does the Proposal comply with the First Restriction?

The Proposal on the Sites **would not breach** the First Restriction. The wording of the first restriction merely seeks to establish criteria for and restrict the features of any dwelling house that might be constructed on the Site – that is, a roof of slate tiles or shingles.

The First Restriction does not seek to limit the number of dwelling houses that may be constructed on the Sites. If it was the intention of the covenanting parties to restrict the number of dwelling houses, the Covenant could (and indeed would) specifically state this. The language used in the First Restriction does not evince an intention on the part of the covenanting parties to restrict the number of dwellings on the Sites.¹²

¹² *Prowse v Johnston & Ors* [2012] VSC 4 [55]-[58]

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The First Restriction can in this respect be contrasted with similarly worded covenants in the area. We note specifically the covenant dealt with by the Supreme Court in *Langdale Proprietary Limited v Sollas*¹³ which comprised the same restrictions but for specifically restricting the number of dwellings:

'One dwelling-house only shall be erected on each lot included in this contract and no dwelling-house except one constructed with a roof of slate tiles or shingles at a cost of not less than 2000 pounds... shall be or be allowed to be erected on each of the said lots.' [emphasis added].

The wording of the above covenant specifically restricts each lot to 'only' one dwelling house. Conversely, the language of the First Restriction does not seek to do so. On its terms, it only provides that any dwelling house(s) must employ certain roof materials.

We note this interpretation is consistent with that of the Supreme Court in *Tonks v Tonks*,¹⁴ wherein the Court found:

If the parties to the original covenant had wished to restrict the number of dwelling houses built on each of these lots they could have done so very simply and definitively by replacing the word "a" in the covenant with the word "one", or by making some similar simple amendment. The true construction of the covenant is that it prohibits the placing of any building on the land unless that building is a dwelling house. Provided that any building constructed can be properly described as a dwelling house there would be no breach of the covenant.

Similarly, the 'true construction' of the First Restriction is that it prohibits the placing of a dwelling house on the land unless such dwelling has a roof of slate tiles or shingles.

To the extent that it can be said there is any ambiguity in the word of the First Restriction, it is to be construed against the covenantor and in favour of the covenantee – i.e. the less restrictive interpretation is to be adopted.¹⁵

With respect to materials, the Proposal comprises a roof of slate tiles and shingles, as depicted in the Planning Drawings on Drawing No A960.

Therefore, the Proposal meets the First Restriction.

Second Restriction – Does the extent of excavation breach the Covenant?

It is our view that the Proposal's extent of excavation **would not breach** the Covenant.

The Proposal does not propose to carry out quarrying operations nor to excavate for the purposes of removing resources from the ground to collect and remove from the Sites. Rather, the Proposal will excavate the land for the purposes of constructing a residential building, thereby not breaching the Covenant.

This interpretation is consistent with Supreme Court in *City of Stonnington v Wallish & Ors* ('**Wallish**'),¹⁶ whereby a similar worded covenant is analysed by the Court with respect to quarrying and excavation:

'will not excavate carry away or remove or permit to be excavated carried away or removed any earth marl stone clay gravel or sand from the said lots or any parts thereof...'

¹³ [1959] VR 634 ('*Langdale v Sollas*').

¹⁴ [2003] VSC 195 [17].

¹⁵ Above n 11.

¹⁶ [2021] VSC 84 ('*Wallish*').

The Court found that despite the absence of the word 'quarrying' or an exception suggesting a broader intention, the covenant should be read as operating in a limited manner, that is, to prevent the quarrying or commercial extraction of 'earth, marl, stone, clay, gravel or sand' from the land,¹⁷ on the basis of the words used.¹⁸

Consequently, the covenant did not prevent the carrying out of excavation and carrying away of earth for the purposes of developing or constructing buildings on the land including the excavation of land for the creation of basements and other incidental works'.¹⁹

The Second Restriction restricts the removal of earth and resources from the land in association with quarrying operations, and not in association with any construction that would otherwise comply with the Covenant. This interpretation is only strengthened by the Second Restriction explicitly utilising the term 'quarrying', unlike the subject Covenant in *Wallish*.

The Proposal only proposes to conduct earthworks for construction of a residential building and not for quarrying purposes. The extent of excavation does not breach the Second Restriction.

Third Restriction

For completeness, it is our view that the Proposal clearly does not propose to erect any building prescribed in the Third Restriction, nor use the land or any building for those uses described in the Third Restriction.

CONCLUSION

The Proposal does not contravene the Covenant.

Consequently, section 61(4) does not prevent Council issuing a planning permit for the Permit Application.

Yours faithfully



SCOTT EDWARDS
Planning & Property Partners Pty Ltd

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¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid [59].



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Capital City Trl
Alexandra Ave

Buddle Dr

Grange Rd

Capital City Trl

Capital City

Hill St

Highgate Hl

Highgate Hl

St Georges Rd

St Georges Rd

Orrong Rd

Orrong Rd

Orrong Rd

Yarra Blvd

Yarra River

Towers Ln

Citylink

Citylink

Main Yarra Trl

Yarra River

Capital City Trl

Yarra Blvd

Capital City Trl

Yarra Blvd

Capital City Trl

APPENDIX A – BENEFICIARIES’ LIST

Lots on PS10179 & PS10196 – Present Street Addresses	
1 Hill Street, Toorak	1 Highgate Hill, Toorak
2 Hill Street, Toorak	2 Highgate Hill, Toorak
3 Hill Street, Toorak	3 Highgate Hill, Toorak
4 Hill Street, Toorak	4 Highgate Hill, Toorak
5 Hill Street, Toorak	5 Highgate Hill, Toorak
7 Hill Street, Toorak	6 Highgate Hill, Toorak
8 Hill Street, Toorak	7 Highgate Hill, Toorak
9 Hill Street, Toorak	8 Highgate Hill, Toorak
10 Hill Street, Toorak	9 Highgate Hill, Toorak
12 Hill Street, Toorak	10 Highgate Hill, Toorak
14 Hill Street, Toorak	11 Highgate Hill, Toorak
17 Hill Street, Toorak	781 Orrong Road, Toorak
16 Hill Street, Toorak	797 Orrong Road, Toorak
70 Grange Road, Toorak	801 Orrong Road, Toorak
72 Grange Road, Toorak	803 Orrong Road, Toorak
74 Grange Road, Toorak	805 Orrong Road, Toorak
76 Grange Road, Toorak	69 St Georges Road, Toorak
80 Grange Road, Toorak	71 St Georges Road, Toorak
86 Grange Road, Toorak	73 St Georges Road, Toorak
88 Grange Road, Toorak	75 St Georges Road, Toorak
92 Grange Road, Toorak	77 St Georges Road, Toorak
94 Grange Road, Toorak	79A St Georges Road, Toorak
100 St Georges Road, Toorak	79 St Georges Road, Toorak
102 St Georges Road, Toorak	81 St Georges Road, Toorak
108 St Georges Road, Toorak	83 St Georges Road, Toorak
116 St Georges Road, Toorak	85 St Georges Road, Toorak
118 St Georges Road, Toorak	96 St Georges Road, Toorak
120 St Georges Road, Toorak	1/98 St Georges Road, Toorak
124 St Georges Road, Toorak	2/98 St Georges Road, Toorak

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