

### THREE DWELLINGS DETRIMENTAL TO AMENITY

In a very recent decision of the Supreme Court of Victoria Hivance Pty Ltd v Moscatiello & Ors ([2020] VSC 183, 17 April 2020) Macaulay J was not persuaded that the beneficiaries of a single dwelling covenant would not suffer a “substantial injury” if a multi-dwelling development was to be permitted on the land burdened by the covenant.

The proposal was of the type that has been developed all around suburban Melbourne - three two-storey townhouses in Reservoir on a “quarter acre block’.

The decision is interesting because of the emphasis the Court placed on the evidence of the defendant beneficiaries with respect to the amenity they enjoyed in the area within which they lived; and the precedent effect of modifying the covenant.

The Court summarised the critical questions in the case to be [3]:

- (a) Does the neighbourhood retain a special distinctive character engendered and sustained by the single-dwelling covenant?
- (b) (b) If so has the plaintiff shown that a relaxation of the single –dwelling restriction on the property will not diminish that distinctive character either –
  - (i) directly (immediately), because of the construction of the proposed three-dwelling development, or
  - (ii) in the longer term, by establishing or contributing to a body of precedent that allows more multi-dwelling in the area?

As readers will be aware section 84 of the Property Law Act provides that the court has power to modify a restrictive covenant if satisfied, amongst other things, that “the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction” (s.84 (1) (c )).

What was meant by ‘substantial injury’ was considered in Randell v Uhl [2019] VSC 668 at par [85] (Derham AsJ).

“... The dichotomy in the section is not between vexatious and non-vexatious claims but is between cases involving some genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other”.

“the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant”.

Assessing whether there will be a substantial injury requires a comparison between:

(Randell [85] (d))

The benefits initially intended to be conferred and the benefits actually conferred by the covenant; and

The benefits, if any, which would remain after the covenant has been discharged or modified.

If the evidence establishes that the difference between the two will not be substantial, the plaintiff has established a case for the exercise of the courts discretion under s 84 (1) (c) of the PLA.

The question to be decided when considering neighbourhood character in Hivance was:

“Does a distinctive character of the area, intended by and supported through the single-dwelling covenant, remain intact and, if so, would the relaxation of that restriction realistically harm that character and cause an injury of substance to the beneficiaries of the covenant?”

In answer to that question, the Court considered the evidence that had been given by the Beneficiaries under the covenant, who described the characteristics of the area within which they lived, and which led them to purchase their homes there.

[21] Such an amenity or ambiance of an area is sometimes hard to put into words. Nonetheless, with remarkable consistency, the defendants highlighted the large and generous proportions of the blocks of land, the sense of open space and privacy; the predominance of family homes.....; and the absence of congestion..... In my opinion, the ‘lived experience’ of those who dwell in the neighbourhood, those who have an occupant’s sense of the environment, is not only relevant but weight may be given to it.”

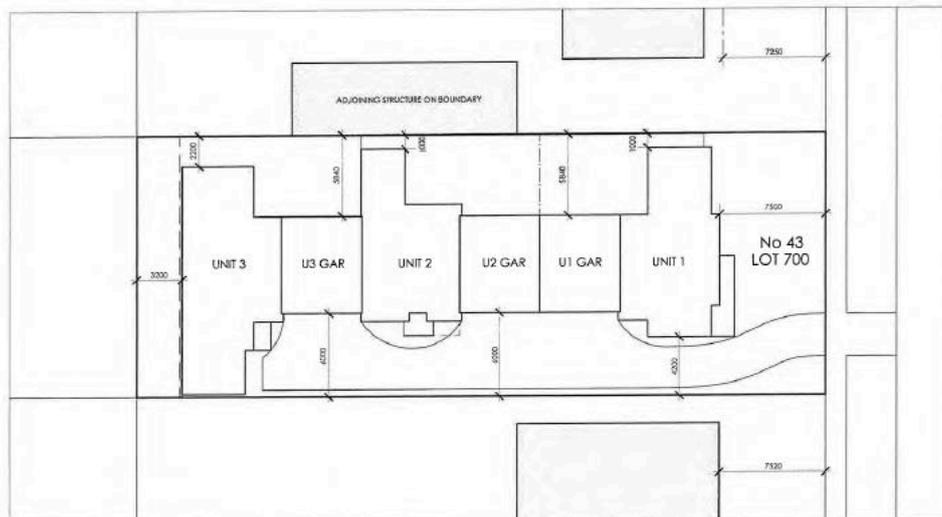
The Court determined that the whole of the evidence was found to indicate that the distinctive character of the area remained intact; and that character amounted to a real and practical benefit for the members of the neighbourhood, including the beneficiaries of the covenant on the property.

The Court in Randell also referred to the 'precedent value' of a modification. That is where a modification could be used to support further applications resulting in further encroachment, thus defeating the object sought to be achieved when the covenant was imposed. This reasoning was adopted and referred to in Hivance.

[41] "Perhaps the more significant form of potential injury to the beneficiaries, however, would arise from the precedential effect of relaxing the covenant.... [43] "Each further relaxation of a restriction either cements the particular precedent as the acceptable norm rather than the exception or, logically, heightens the risk that the next application will bring the situation closer to the flood-gate scenario".

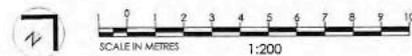
**43 ALLENBY AVE**  
RESERVOIR

SD01  
1/4  
27.01.17



SITE PLAN

| DEVELOPMENT SUMMARY         |   |   |   |
|-----------------------------|---|---|---|
| SITE AREA                   | 921m <sup>2</sup>                           | BUILDING SITE COVERAGE                      | 383.87m <sup>2</sup> (41.67%)               |
| DENSITY                     | 1.307                                       | SITE PERMEABILITY                           | 348.85m <sup>2</sup> (40.05%)               |
| GROSS BUILDING AREA / UNIT: |   |   |   |
|                             | UNIT 1                                      | UNIT 2                                      | UNIT 3                                      |
| GROUND                      | 43.52m <sup>2</sup>                         | 71.84m <sup>2</sup>                         | 94.83m <sup>2</sup>                         |
| PORCH                       | 7.93m <sup>2</sup>                          | 4.73m <sup>2</sup>                          | 2.49m <sup>2</sup>                          |
| GARAGE                      | 43.07m <sup>2</sup>                         | 43.07m <sup>2</sup>                         | 43.07m <sup>2</sup>                         |
| FBI                         | 84.52m <sup>2</sup>                         | 70.18m <sup>2</sup>                         | 44.54m <sup>2</sup>                         |
| TOTAL                       | 212.45m <sup>2</sup> (23.08m <sup>2</sup> ) | 186.81m <sup>2</sup> (20.11m <sup>2</sup> ) | 207.66m <sup>2</sup> (22.55m <sup>2</sup> ) |



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