VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P241/2021
APPLICATION NO. 426/2020/19P

CATCHWORDS

Section 184A of the *Planning and Environment Act 1987*; Registered agreement; Single dwelling restriction; Application to amend agreement; Purpose of agreement; Purpose of amendment; Change in circumstances; Disadvantage; Relevant permit

APPLICANTS	Robert & Ljubica Nikolovski
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
RESPONDENTS	Colin Turner & Others
SUBJECT LAND	10 Kingfisher Drive, Diamond Creek
HEARING TYPE	Hearing
DATE OF HEARING	6 September 2021
DATE OF ORDER	10 September 2021
CITATION	Nikolovski v Nillumbik SC [2021] VCAT 1054

ORDER

Decision affirmed

1 The decision of the responsible authority dated 5 January 2021 is affirmed.

Agreement must not be amended

2 In accordance with section 184G(1)(b) of the *Planning and Environment Act 1987*, registered agreement AB953866M must not be amended.

Geoffrey Code
Senior Member

APPEARANCES

For Robert & Ljubica Nikolovsk	David Di Giovanni, town planner, DD Planning
For Nillumbik Shire Council	Karen McPherson, town planner, Nillumbik Shire Council
For Colin Turner & Others	Joshua Brannelly

REASONS[1]

WHAT IS THIS PROCEEDING ABOUT?

1 Robert & Ljubica Nikolovski (in these reasons, the **applicants**) own the subject land, being a vacant residential lot.

2 The subject land is encumbered by registered agreement AB953866M (the **agreement**). The agreement was made under section 173 of the *Planning and Environment Act 1987* (the **PE Act**) and encumbers 95 other lots in the relevant subdivision in which the lots are located.

3 For the purposes of this proceeding, the agreement relevantly provides:

> **2.1 Single dwelling**
>
> Only one (1) single dwelling may be constructed on any lot on the Plan of Subdivision. No lot may be further subdivided so as to increase the number of lots in the subdivision.

4 The subject land is also encumbered by a registered restrictive covenant that, in summary, does not permit a dwelling to be constructed with a 'habitable area' less than 225 square metres and contains restrictions on specified building materials.[2]

5 The subject land has a significant rise of about 15 metres from the front to the rear, equating to an average gradient of about 25%. The gradient is somewhat lesser at the front and greater at the rear.

6 The applicants want the opportunity to seek approval to construct two dwellings on the subject land and to subdivide the land into two lots. They applied to the Nillumbik Shire Council (the **Council**) to amend clause 2.1 of the agreement (the **amendment**), as follows:

> Only one (1) single dwelling may be constructed on any lot on the Plan of Subdivision **except lot 18**. No lot**, except lot 18,** may be further subdivided so as to increase the number of lots in the subdivision.

7 The added words in bold comprise the amendments to clause 2.1. The subject land is lot 18 of the plan of subdivision.

8 The applicants gave the Council an informal 'design response plan' to assist the Council's assessment of the amendment. The plan shows the subdivision of the land into two lots. Each lot has a frontage of 16.85 metres and an average depth of about 61 metres. The lots have areas of 832 square metres and 892 square metres. The lots also contain building envelopes. See figure 1, below.

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[1] The filed submissions and exhibits of the parties, the filed statements of grounds and oral submissions at the hearing have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

[2] Written submissions on behalf of the applicants, paragraph 6. The application does not affect this covenant.

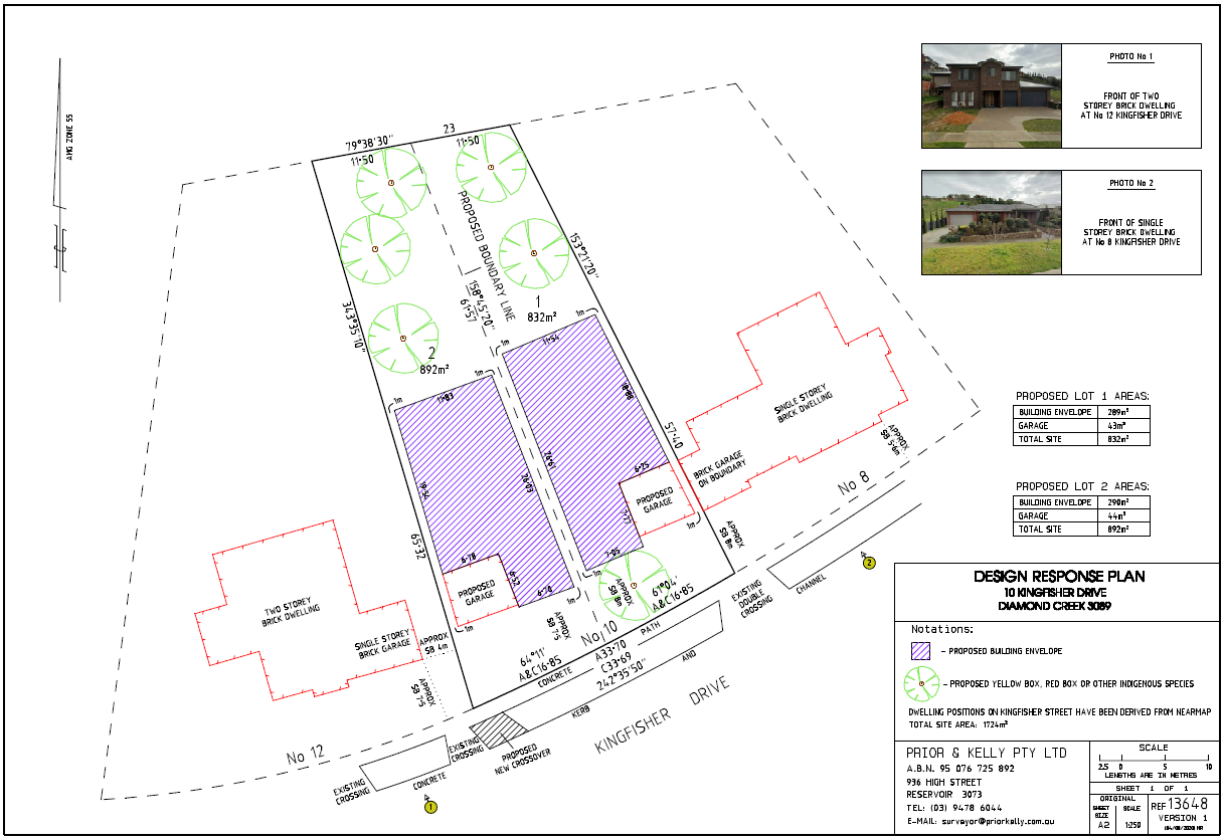

Figure 1 – Applicants' 'design response plan'

9 The applicants have not obtained the agreement to the amendment by the owners of any of the other 95 lots. In accordance with section 178A(3) of the PE Act, the Council agreed 'in principle' to the 'proposal' (ie the amendment). This allowed notice to be given under section 178C. Notice was given and the Council received 19 objections.

10 The Council refused the amendment on the grounds it was contrary to the purpose and objectives of the agreement and would disadvantage owners of other lots subject to the agreement.

11 The applicants have applied to the Tribunal to review the Council's decision. I will affirm the Council's decision for the following reasons.

ASSESSMENT

12 Broader planning objectives and considerations that would apply in a standard planning merits review do not apply in this proceeding.[3] The relevant considerations are those specified in section 178B(2) of the PE Act.[4] I will now address those considerations, as relevant.

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3 PE Act s 184G(4); *D&L MacPherson Nominees Pty Ltd v Bass Coast SC* [2016] VCAT 647 [21].

4 I agree with the Tribunal's observation in *D&L MacPherson Nominees Pty Ltd v Bass Coast SC* [2016] VCAT 647 [22] that these considerations are 'probably intended to be exhaustive' but should be interpreted widely.

Purpose of the agreement

13 The agreement was required as a condition of permit 134/2001/14P (the **permit**) issued under the Nillumbik Planning Scheme (the **Scheme**) in 2002 to subdivide the 96 lots.

14 The applicants refer to other provisions of the agreement and the officer's report on the subdivision to submit that the main purpose of the agreement is to create an area with an 'open bush feel'.

15 The applicants submit the amendment does not undermine this purpose having regard to the lot dimensions as shown on the design response plan and the space those lots provide for canopy trees. They also submit that the purpose has not been realised having regard to the significant absence of street trees and canopy trees on lots, even after about 18 years.

16 While the applicants identify various other purposes of the agreement, they give less emphasis to what I discern as its main purpose, viz to realise the amenity of a spacious residential estate with restrictions for one dwelling per lot and no further subdivision.

17 The purpose of the amendment is contrary to the purpose of the agreement, the latter being the matter I will now consider.

Purpose of the amendment

18 The effect of the amendment is to release the subject land from the single dwelling and further subdivision restrictions. It does not apply any restrictions to the subject land on the number of dwellings or number of subdivision lots. This is critical because, subject to the grant of permission by the Council under the Scheme, there would be no restrictions in the agreement.

19 This is a fundamental defect of the amendment. The applicants seek consideration of the design response plan as if it were the dwellings and subdivision that could be permitted if the amendment was approved.[5] This elevates the design response plan to something beyond its status.

20 Implementing the design response plan might be the applicants' current subjective intention. However, the applicants or their successors might propose another form of development with a greater number of dwellings or lots. That would be possible if the amendment was approved.

21 When I drew attention to this consequence at the hearing, the applicants saw the defect in the amendment. They sought to formally amend the application to include in the agreement a two dwelling and two lot restriction for the subject land.

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[5] Of course, the design response plan is not a development proposal for dwellings. The design response plan only confines future dwelling development to the envelopes shown on the design response plan.

22 I refused this application as it did not comply with the spirit of the Tribunal's relevant practice note of applying to amend proposals well in advance of a hearing so as to not disadvantage other parties or others with an interest in or affected by the application. It was also proposed 'on the run' and the text of the amendment was not included and was uncertain.

23 The applicants nevertheless asked me to exercise my discretion to ultimately approve the amendment with appropriate modifications to address the defect. I have considered but rejected exercising that discretion.

Change in circumstances

24 It is necessary to consider whether any change in circumstances necessitates the amendment.

25 The applicants rely on the failure of the agreement to achieve a residential estate with an 'open bush feel' as being a relevant change that supports the amendment.

26 I would give greater weight to the subdivision being almost fully developed with a single dwelling on each lot and each lot not being further subdivided. In other words, there has not yet been any breach or amendment of clause 2.1 of the agreement.

27 The applicants also rely on various changes to the planning policy and controls in the Scheme since the agreement. That is not surprising given the need for such matters to respond to changing social, economic and environmental circumstances. However, broader planning considerations do not have weight in this assessment, as I have already mentioned.

Disadvantage

28 It is relevant to consider whether the amendment would cause disadvantage to any person, whether or not a party to the agreement.

29 The amendment would not disadvantage the applicants, so the inquiry is about whether the amendment would disadvantage the owners or occupiers of any of the 95 other lots in the subdivision or any other lots outside the subdivision.

30 I agree with the Tribunal in *D&L MacPherson Nominees Pty Ltd v Bass Coast SC*[6] that 'disadvantage' is not the same as 'detriment' and that the authorities in relation to detriment in the context of proposals to remove or vary a restrictive covenant are of no assistance.

31 The ordinary meaning of 'disadvantage' includes any unfavourable circumstance or condition.[7] It therefore has a broad meaning, and I agree with the Tribunal's observation in *MacPherson* that it includes disadvantage in a planning or general sense.[8]

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6 [2016] VCAT 647 [48] ('*MacPherson*').
7 Macquarie Dictionary, online version 2021.
8 *MacPherson* [2016] VCAT 647 [49].

32 In the context of section 178B(1)(d), I would nonetheless only give weight to disadvantage that was caused as a consequence of the amendment and to disadvantage determined objectively.

33 Even though some of the purposes of the agreement have not been realised or not yet realised, the amendment may disadvantage owners of lots burdened by the agreement.

34 A disadvantage to owners and occupiers of the other 95 lots is the loss of certainty as to the number of dwellings that could be constructed on the subject land or number of lots in a subdivision of the subject land. This disadvantage is greater for those owners who purchased lots in the subdivision for whom the existence of the agreement was important in the decision to purchase. Several of the respondents submitted this was the case.

35 If the amendment was approved, two or more dwellings could be constructed on the subject land. The amendment contains no restrictions as to the siting, built form or appearance of the dwellings. Subject to the permission from the Council, they could be apartments (ie at different levels of a building), townhouses (ie attached multi-storey buildings each with ground level pedestrian access) or separate buildings in a side-by-side or tandem format.

36 Subject to the design of the dwellings, the disadvantage may be from a change to the amenity or character of the subdivision by a less spacious appearance from the public realm. If the design includes built form to the rear of the subject land, the disadvantage is likely from building bulk and other amenity impacts from lots in the subdivision, as well as more land excavation.

37 The amendment would cause some disadvantage to owners of other lots in the subdivision and therefore this is a factor that weighs in favour of refusing the amendment.

Reasons the Council entered the agreement

38 The parties took me to various passages from the officer's report on the application for permission to subdivide the land into 96 lots. That report shows an intention to make the subject land a larger lot because of its steep slopes and to minimise earthworks for a dwelling envelope. The same intention applied to surrounding lots with similar significant slopes.

39 Given the large dwelling size mandated by the restrictive covenant, constructing two or more dwellings on the subject land will require an extent of earthworks that would not be consistent with the Council's reasons.

Further liability under the agreement

40 It is relevant to consider, if the amendment is to remove land from the application of the agreement, whether the land would be subject to any further liability under the agreement.[9]

41 As a matter of 'form', the amendment does not remove the subject land from the application of the agreement. However, as a matter of 'substance', the amendment removes the subject land from clause 2.1 of the agreement.

42 If the amendment was approved, the subject land would remain subject to the other provisions of the agreement. This does not add merit to the application.

Relevant permit

43 It is relevant to consider any relevant permit or other requirements the land is subject to under the *Subdivision Act 1988*. The parties did not draw my attention to any of these 'other requirements, so the focus is on a 'relevant permit'.

44 What is a relevant permit depends on the facts and circumstances in each case.

45 There are some Tribunal decisions about 'relevant permit' in the context of an earlier legislative provision in section 184(4) of the PE Act that was repealed in 2013 when section 178B commenced. For example, in those cases the issue was whether a permit for land not subject to the agreement (eg 'neighbouring' land) could be a relevant permit.[10] That issue does not arise in this proceeding.

46 This is not a proceeding in which a permit has been granted after the date of the agreement which allows a use or development that conflicts with an obligation in the agreement. That was the kind of permit in the application to amend an agreement in *Sheradar Pty Ltd v Casey CC*.[11]

47 In this proceeding, the only potentially relevant permit is the permit to subdivide the land that created the subject land. The permit required the entering into the agreement and to contain a clause to the effect of clause 2.1.

48 The amendment does not affect the permit in a relevant way. The permit has been acted upon. The land has been subdivided and the agreement has been entered into and registered.

49 Although the permit might be relevant because it applies to the subject land, it is not relevant in the sense of being relevant as to whether the amendment should be allowed. The permit does not affect the ability to apply under the

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9 PE Act s 178A(1)(f).

10 See eg the discussion in *Sheradar Pty Ltd v Casey CC* 2011] VCAT 1414 [58]-[66]

11 [2011] VCAT 1414 ('*Sheradar*').

PE Act to amend the agreement and therefore neither advances nor detracts from the merits of the amendment.

CONCLUSION

50 For the above reasons, the Council's decision to refuse the amendment is affirmed. The agreement must not be amended.

Geoffrey Code
Senior Member