COV-02 Covenants - removal

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1 Overview

Covenants may be removed from the Register by either of the following:

- agreement between the parties having an interest in the covenant

- by an order of the Court

- by the implementation of a Town Planning Scheme (Ref: s.11 in Schedule 7 of the P&D Act, formerly being s.15 in the Schedule of the TP&D Act);

Note: Where a Covenant is for a specific term, and that term has expired, the covenant no longer has any effect. There is no need to apply for the discharge of a covenant.

1.1 Practice for the Removal of Time Expired Restrictive Covenants

This practice is for the purpose of restrictive covenants under s.129A and s.129B of the Transfer of Land Act 1893 (TLA) (common law estate restrictive covenants) that:

- have expired due to a time limit within the restrictive covenant

and

- do not contain unexploded ordnance provisions.

To have a restrictive covenant that has expired due to a time limit removed from a Certificate of Title prior to the transfer to a new registered proprietor, a signed letter must be provided by the responsible licensed settlement agent or lawyer and lodged at Landgate at the same time as the transfer document or within one week prior to electronic lodgement of the transfer by emailing the letter to dealings@landgate.wa.gov.au. The content of the letter need only contain the following line:
Restrictive Covenant [doc. #] may have expired and, if so, should be removed from Certificate of Title Volume [#] Folio [#].

Any approved Transfer of Land forms that contain a Limitations, Interests, Encumbrance and Notifications panel that have already been completed and executed, where a restrictive covenant has been left off as it has expired due to a time limitation, will continue to be actioned by Landgate’s Examination Team.

2 By Agreement (Section 129B of the TLA)

On the application of the proprietor of the land burdened and with the written consent of all persons having an interest in the burdened land (which includes all persons having an interest in the benefit or burden of the restrictive covenant), the Commissioner may instruct the modification or removal of the covenant as an encumbrance. Applications under this section can also be made where the land with the benefit and the land burdened revert to one ownership. The duplicate title(s) (if any) for the land burdened with the covenant must be produced.

3 By Order of the Court (Section 129C of the TLA)

On the application of the proprietor of the land burdened by the covenant, accompanied by an Order of the Court removing or varying the covenant, the Commissioner will direct the removal of the restrictive covenant as an encumbrance or the endorsement of the title with a memorandum that the covenant has been modified, as the case requires. Recourse to a Court Order is usually required in the case of estate covenants.

The Court has the discretion (except in the case of single dwelling covenants benefiting more than 10 lots - see below) in the number of consents it requires from the other proprietors in the estate. Certain criteria for discharge of restrictive covenants were laid down by Negus J in Smith v Australian Real Estate and Investment Co Ltd (1964) WAR 163. The duplicate certificate(s) of title (if any) for the land burdened by the covenant must be produced.

4 Single Dwelling Restrictive Covenants s.129C (1a)

With the introduction of the Transfer of Land Amendment Act 1999 (the Act) and the Transfer of Land Amendment Regulations Act 1999 (the Regulations) that came into operation on 1st June 1999, the mechanism by which a single dwelling restrictive covenant that benefits more than ten (10) lots may be extinguished, discharged or varied by an Order made by the Supreme Court under s.129C of the TLA has changed.

A single dwelling restrictive covenant is defined under the Act as a

“.....restrictive covenant that prohibits the construction of more than one dwelling on the lot burdened by the covenant.”

The burdened lot is the one upon which the restriction is placed. The benefited lot has the benefit or advantage of the restriction.

The Act introduces a precondition of written consent, which must be obtained before an application to extinguish, discharge or modify a single dwelling covenant can be heard by the Supreme Court. Written consent must be obtained from the registered proprietors and also from either their
mortgagee or chargee who is first in order of priority, of 51% of the lots with the benefit of a single dwelling covenant, located within a prescribed area.

Written consent is obtained by sending out of a special form of written notice that has been approved by the Registrar of Titles.

Note:

Where a benefited lot is co-owned, consent is deemed to have been given if, in the case of a joint tenancy, a majority of joint tenants provide written consent. If the lot is held as tenants in common, then consent is deemed to have been given if the registered proprietors who, between them, own the majority of the undivided shares in the lot provide written consent.

If the mortgagee or chargee does not consent, then the consent from the registered proprietor of that particular benefited lot cannot be counted. A lot is counted for the purposes of the prescribed area if at least part of it falls inside the prescribed area.

Regulation 8A contains a circle formula to define what is meant by the prescribed area. The prescribed area is determined by reference to proprietorship of lots with the benefit of a single dwelling covenant, located inside a circle of a certain radius from the lot wishing to remove the covenant.

The objective is to encompass 200 lots with the benefit of a single dwelling restrictive covenant. The formula contained in the Regulations stipulate a maximum size of the circles to recognise that there may be occasions when despite the size of the circles, 200 lots will not fall inside the circle.

In summary, under the Regulations:

- A circle with a radius of 250 metres from the centre of the lot that requests the removal of the single dwelling covenant is drawn.

- The size of the circle is increased incrementally by 10 metres, until either, at least 200 lots with the benefit of a single dwelling covenant fall inside the circle, or to a maximum radius of 270 metres, which equates to 3 circles.

The circle or circles must always be drawn by a licensed surveyor. The practical effect of these amendments is to make it more difficult for landowners within a neighbourhood of single dwelling restrictive covenants to obtain a Supreme Court Order to remove that covenant.

Landowners wishing to remove a single dwelling restrictive covenant must first obtain support to do so from the majority of those, within a circle, who are most likely to be affected by such removal.

Note:

The above requirements apply to all single dwelling restrictive covenants no matter how they were created (i.e.: by transfer, by deed or on plans of subdivision).

5 By Implementation of a Town Planning Scheme (Section 11 in Schedule 7 of the P&D Act)

A Local Government Authority may, by resolution and subsequent publication of same in the Government Gazette, remove a restrictive covenant as part of an amendment to a Town Planning Scheme.
The registered proprietor of the land may then apply (on a Blank application form) for the removal of the covenant as an encumbrance on the title, quoting the notice in the Government Gazette and producing a letter or other evidence from the Local Government certifying that the land the subject of the application, was released from all or a defined part of the covenant by resolution of the Council. The duplicate certificate of title (if any) for the land burdened by the covenant must be produced.

Note:

Prior to the proclamation of the P&D Act on 9 April 2006, the above-mentioned provisions were set out in s.15 of the Schedule to the TP&D Act.

6 Discharge and Modification of Restrictive Covenants Created under Part IVA

The proprietor of land burdened or benefited by a restrictive covenant created on a Plan under Part IVA of the TLA may apply on a Blank Application form for the restrictive covenant to be discharged or to be modified.

The application should contain the written consent of each person who has a registered interest in, or is a caveator in respect of, any land that is burdened or benefited by the restrictive covenant.

Where the above mentioned written consent has not been obtained, the procedures as set out in s.136J of the TLA must be complied with prior to the lodgement of the application.

In this circumstance the application must be accompanied by a statutory declaration from the applicant that contains the following information:

- That each person who has a registered interest in, or is a caveator in respect of, any land that is either burdened or benefited by the restrictive covenant has been given 28 days’ written notice of both the intention to make the application and the substance of it.

- That the notice(s) in writing (referred to above) have been properly served in accordance with s.240 of the TLA by ............................................. (insert the specific mode of service used, as authorised under s.240).

- That notice of both the intention to make the application and the substance of it has been published at least 28 days before the day on which the application is made in a newspaper circulating either throughout the State or in a district where the land is situated.

That both of the notices referred to above contained the applicants address for service of notices of objection to the proposed application or to any part of it. Refer to policy and procedure guide DOC-02 Parties to Documents for Landgate’s address requirements.

- That both of the notices referred to above contained the expiry date for objections to be received and the day on which the proposed application is to be lodged, that day being at least 3 days after the expiry date for objections to be received.

A copy of the notice that was published in a newspaper, showing the name of the newspaper and the day of publication should be attached to the statutory declaration of the applicant (Full page of newspaper required to be lodged with the application).

The above-mentioned statutory declaration must state the content of the notices to the registered
interest holders and the newspaper notice and not merely state that sections 136J (3) (a) and (b) of the TLA have been complied with.

The notices must clearly state:

- the applicant’s address for the serving of notices of objections to the proposed application or any part of it (refer to DOC-02 Parties to Documents for Landgate’s address requirements)

- the commencement date and the expiry date for the 28-day notice period in which objections can be received

and

- the approximate date on which the application will be lodged at Landgate, that date being at least 3 days after the expiry date for objections to be received.

The Commissioner will not direct the Registrar to discharge or modify the restrictive covenant if any objection has been made to the application or any part of it. Receipt of an objection will require the applicant to utilise s.129C of the TLA and obtain a Court Order for the removal or modification of the restrictive covenant.

Note:

It is recommended that the application be lodged as soon as possible after written consent has been obtained or as soon as possible after the expiration of the 3 day period in the case where consent has not been obtained. This will reduce the possibility of the registration of new proprietors or other interest holders before lodgement of the application. In this circumstance extra other notices would need to be sent.

If the restrictive covenant is a single dwelling restrictive covenant that benefits more than ten (10) lots, it can only be removed by an order of the Supreme Court after the provisions of s.129C (1a) of the TLA have been met (see section 3 of this guide).

7 Discharge and Modification of Restrictive Covenants in Gross

The proprietor of land burdened by a restrictive covenant in gross created pursuant to s.129BA of the TLA may apply on a Blank Application form for the restrictive covenant to be discharged or to be modified pursuant to s.129BB of the TLA.

The application should contain the written consent of the relevant Local Government or Public Authority, and the written consent of each person who has a registered interest in any land that is burdened by the restrictive covenant.

Where the above mentioned written consent has not been obtained, the requirements set out in s.129BB of the TLA must be complied with prior to the lodgement of the application. In this circumstance the application must be accompanied by a statutory declaration that contains the following information:

- That the Local Government or Public Authority and each person who has a registered interest in any land that is burdened by the restrictive covenant has been given 28 days’ written notice of both the intention to make the application and the substance of it.

- That the notice(s) in writing (referred to above) have been properly served in accordance with s.240 of the TLA by ............................................. (insert the specific mode of service used, as
authorised under s.240.)

- That the notice(s) of the intention to make the application and the substance of it, has been published at least 28 days before the day on which the application is lodged, in a newspaper circulating either throughout the State or in a district where the land is situated.

- That both of the notices referred to above contained the applicants address for service of notices of objection to the proposed application or to any part of it. Refer to DOC-02 Parties to Documents for Landgate’s address requirements.

- That the applicant has received no objection to the proposed application or any part of it at least 3 days before the application was proposed to be made.

A copy of the notice that was published in a newspaper, showing the name of the newspaper and the day of publication should be attached to the statutory declaration of the applicant (Full page of newspaper required to be lodged with the application).

The Commissioner will not direct the Registrar to discharge or modify the restrictive covenant if any objection has been made to the application or any part of it. Receipt of an objection will require the applicant to utilise s.129C of the TLA and obtain a Court Order for the removal or modification of the restrictive covenant.

Note: A Local Government or Public Authority that has the benefit of a restrictive covenant in gross created under s.129BA of the TLA may also apply for the restrictive covenant to be discharged or modified with the written consent of each person who has a registered interest in any land that is burdened by the restrictive covenant (including the registered proprietor).

8 Discharge and Modification of Covenants under the Land Administration Act 1997

A covenant created under s.15 of the Land Administration Act 1997 (LAA) may be modified by agreement between the covenanter and the covenantee or discharged by the covenantee.

The covenanter and the covenantee may apply on a Blank Application form for the covenant to be modified or discharged. The application should contain the written consent of any encumbrancer or caveator over any land that is burdened or benefited by the covenant.

9 Also see

- COV-01 Covenants