



Southern Grampians
SHIRE COUNCIL

Planning Committee

Minutes

15 April 2020

Held at 1.00pm
via video conference

Contents

1. MEMBERSHIP.....	3
2. WELCOME – CHAIR	3
3. APOLOGIES	3
4. CONFIRMATION OF MINUTES.....	3
5. DECLARATION OF INTEREST	3
6. MATTERS FOR DECISION.....	4
6.1 TP/114/2019 Variation to Covenant PS709028D (building envelope Lot 3), 1 Edradour View HAMILTON; Lot: 3 PS: 709028 Par: HAMILTON SOUTH	4
7. CLOSE OF BUSINESS.....	12

1. PRESENT

Cr Colin Dunkley (Chair)
Cr Mary Ann Brown
Mr Andrew Goodsell, Director Planning and Development, via video
Mr David Moloney, Director, Shire Infrastructure, via video
Ms Ros Snaauw, Coordinator Planning

Andrew Lacey, via video
Mark Osbourne, via video
Kim Fitzgerald, via video
Tim O'Brien, via telephone
Lynne O'Brien, via telephone

Minutes

Mrs Sharon Clutterbuck, Executive Assistant – Director, Planning and Development

2. WELCOME – CHAIR

Introductions were made by those present

3. APOLOGIES

4. CONFIRMATION OF MINUTES

Minutes of the Meeting held on 7 November 2019 have been circulated

RECOMMENDATION

That the Minutes of the Planning Committee meeting held on 7 November 2019 be confirmed as a correct record.

Moved: Cr Colin Dunkley

Seconded: Cr Mary-Ann Brown

Carried

5. DECLARATION OF INTEREST

Nil

6. MATTERS FOR DECISION

6.1 TP/114/2019 Variation to Covenant PS709028D (building envelope Lot 3), 1 Edradour View HAMILTON; Lot: 3 PS: 709028 Par: HAMILTON SOUTH

Author: Roslyn Snaauw, Coordinator Planning

Attachments:

1. Application package & Certificates of Title
2. Copy of Clause 52.02 Easements, Restrictions and Reserves of the Planning Scheme
3. Copy of Section 60(5) of the *Planning and Environment Act 1987*
4. Copy of objections (x3)
5. Copy of response from Applicant to objection
6. Copy of response from Objector to applicant response
7. Copy of Wannan Water response

Executive Summary

Council has received a planning permit application for the *Variation to Covenant PS709028D (building envelope Lot 3)* at 1 Edradour View in Hamilton.

A restrictive covenant is a private treaty or written agreement between land owners that limits the way land can be used and developed. Restrictions are customised to the needs of an area or development. Covenants are designed to either benefit or protect other land.

A Planning Permit is required pursuant to Clause 52.02 Easements, Restriction and Reserves under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.

Council officers are recommending to Refuse to Grant a Permit as three (3) beneficiaries (owners benefitted by the restriction) to the Covenant have objected to the proposal as pursuant to Section 60(5) of the *Planning and Environment Act 1987* (Act) which states:

*60(5) The responsible authority **must not grant a permit** which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that –*

- (a) the owner of any land benefitted by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and*
- (b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.*

Council's Instrument of Delegation requires that the application be referred to the Planning Committee for a decision.

The first section of the report outlines the proposal and introduces the subject land. The report contains an assessment section that measures the proposal against planning policy and provisions. The application has been assessed against the purpose and relevant decision guidelines of Clause 52.02 of the Planning Scheme and Clause 65 with the recommendation that the Planning Committee Refuse to Grant a Permit for the proposal pursuant to the requirements of Section 60(5) of the Act.

Proposal

An application was lodged 28 November 2019 with the Southern Grampians Shire Council for a *Variation to Covenant PS709028D (building envelope Lot 3)*. The applicant placed the application on hold on 7 January 2020, after the public notification period, until Council were asked to resume on the 13 March 2020.

The variation to this Covenant is to enlarge the existing building envelope, as registered on title, toward the southern boundary by a further 201.287 square metres as shown below on the plan highlighted in red.

Legal advice received states that the beneficiaries to this Covenant are every lot on the Plan of Subdivision which are lots 1, 2, 3, 4 & 5. While Lot 2 is not burdened by a building envelope, it still benefits from the Restriction affecting the other lots because the land having the benefit of the Restriction is every lot on the Plan of Subdivision.

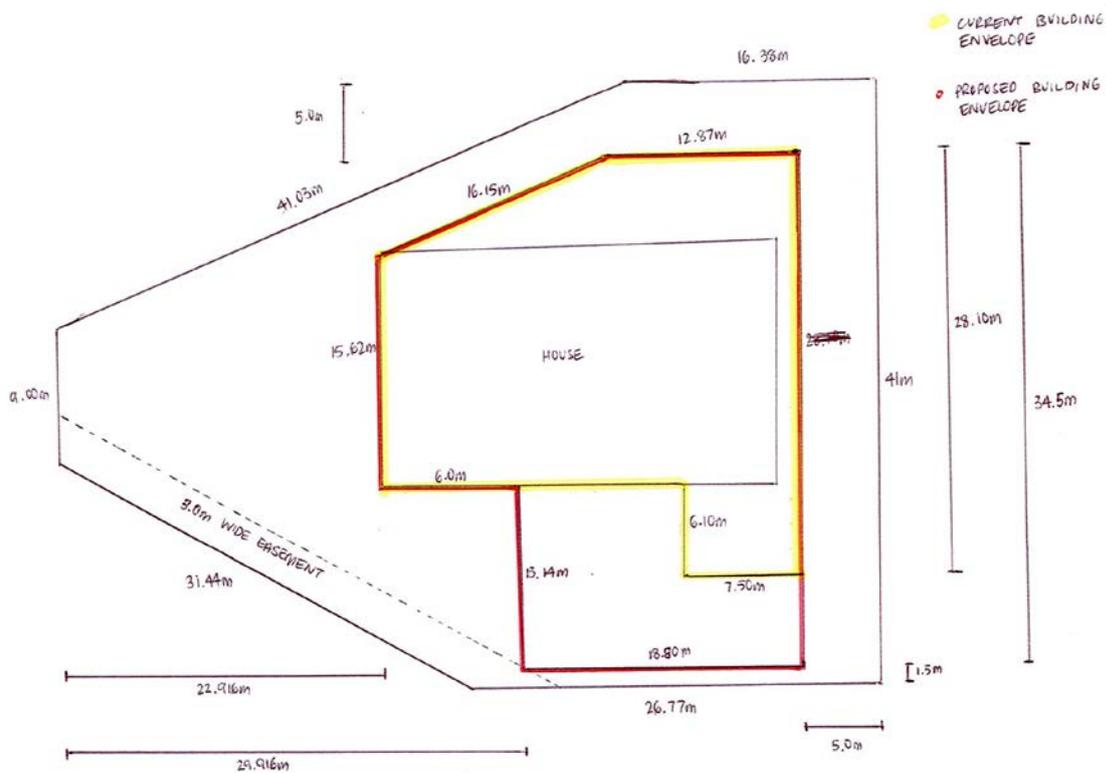


Figure 1 above – proposed amended building envelope

Subject site and locality

An inspection of the site and the surrounding area has been undertaken.

The subject site has an irregular configuration with a total lot area of 1,695 square metres and contains a single storey dwelling with an established tree located toward the south boundary of the lot. A 3.0 metre wide easement E-2, in favour of Wannan Water for sewerage purposes, is located along the southern and south western boundary of this lot.

The land is located within the General Residential Zone (GRZ1) and forms part of a five (5) lot subdivision approved in 2012 with lots having an average of 1,527 square metres in area. Lots in this subdivision contain Covenants that provide restrictions such as building envelopes to restrict development within a designated area.

Surrounding land is located within the GRZ1 with Lot 2, located to the south west of the subject site, affected by a Heritage Overlay and is commonly known as “Edradour” which is significant within the Hamilton Conservation Study.

A common driveway leads from Ballarat Road (also known as Hamilton Highway) to the south, to the rear lots 3, 4 & 5 of PS709028B (which includes the subject site).

The area is predominantly used for residential purposes with the residential estate Lakeside Mede to the east and conventional residences to the west and south. Lots within this area range in sizes from 1013 square metres up to over 3000 square metres.

Permit/Site History

A search of Council’s electronic records show the following previous planning approvals for the subject site:

- Planning Permit TP/86/2011 issued on 20 January 2012 for a *five (5) lot subdivision; buildings and works for alterations to existing Heritage Building*

Planning Controls

The Planning Policy Framework (PPF) of the Southern Grampians Planning Scheme includes a number of policies that apply to this proposal as follows:

Clause 11 Settlement

Planning is to anticipate and respond to the needs of existing and future communities through provision of zoned and serviced land for housing, employment, recreation and open space, commercial and community facilities and infrastructure.

Clause 16 Housing

Planning should provide for housing diversity, and ensure the efficient provision of supporting infrastructure.

Clause 19 Infrastructure

To sustainably manage water supply, water resources, wastewater, drainage and stormwater through an integrated water management approach (Clause 19.03-3S).

Local Planning Policy Framework including the Municipal Strategic Statement

The following components of the Southern Grampians Planning Scheme Local Planning Policy Framework are relevant to this proposal:

Clause 21.00 Municipal Strategic Statement

Clause 21.02-2 Urban Growth

Planning for urban growth in the Shire must take account of various opportunities and constraints, and seek to provide effective and efficient development outcomes.

Zone

The subject land is located within the *General Residential Zone* (GRZ1) of the Planning Scheme. Variation to a registered Covenant does not require assessment under this clause.

Relevant Particular Provision

Pursuant to Clause 52.02 Easements, Restrictions and Reserves of the Planning Scheme. The purpose of this clause is to enable the variation of a restriction to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

A permit is required before a person proceeds under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.

Relevant General Provisions

The decision guidelines of Clause 65

Clause 65 states that, *'because a permit can be granted does not imply a permit should be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of the clause'*. The decision guidelines of this clause include section 60 of the *Planning and Environment Act 1987*, planning policy and decision guidelines among other matters.

Clause 65.01 Approval of an application or a plan

Before deciding on an application or approval of a plan, the responsible authority must consider, as appropriate:

- The matters set out in Section 60 of the Act.
- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The purpose of the zone, overlay or other provision.
- Any matter required to be considered in the zone, overlay or other provision.
- The orderly planning of the area.
- The effect on the amenity of the area.

Relevant Planning Scheme amendments

- VC71 Restructured SPPF which introduced a new objective and decision guideline to Clause 52.02 of the Planning Scheme as a consequential change to the State Planning Policy Framework review.

Summary of Key Issues

- Will the proposal impact on any beneficiaries on title?
- Is the proposed variation likely to change the purpose of the original restriction?

Assessment

This application is for the *Variation to Covenant PS709028D (building envelope on Lot 3)*.

The subject site has three (3) restrictions on title.

1. Covenant PS709028E which details the area allocated to common property, easement, lots and the restriction of building envelopes located on lots 1, 3, 4 & 5.
2. Covenant AK320630W relates to the Creation and/or Reservation of Easement and/or Restrictive Covenant which further restricts all the land within the covenant including restriction on height, materials, the number of dwellings, fencing height etc including the location of a dwelling or garage or outbuilding within the building envelope on the land.
3. Section 173 Agreement AK175553T which restricts the location and height of building on the Subdivision in consideration of the Heritage Building "Edradour" and new lines from Lakeside Mead. This Agreement further emphasises the building envelopes for Lots 1, 3, 4 & 5 and height restrictions to Lots 3, 4 & 5.

Planning Permit TP/086/2011 was issued on 20 January 2012 for a *five (5) lot subdivision; buildings and works for alterations to existing Heritage Building*. Lot 3 is described as being part of this subdivision. The original application for subdivision received objections to the proposal which related to, amongst other things, *loss of views onto Lake Hamilton and its surrounds*.

Due to the objections received with the original subdivision application, building envelopes were required to be provided and subsequently registered with restrictions on title. The building envelopes were provided to ensure future security for appropriate siting and construction of future dwellings providing for certainty of setbacks, height restrictions, and layout of future dwellings including the retention of any trees within these lots. These envelopes took into account the layout of the land and to help protect the “sharing of the views” of the lake from future dwellings on these lots and from the adjoining properties to the east. It is noted that an established position of the Victorian Civil and Administrative Tribunal (VCAT) is that one does not own the right to a view, but “view sharing” is considered as an important aspect when weighing up the approval of an application.

Pursuant to Section 52 of the *Planning and Environment Act 1987*, this application was required to be advertised by:

- Sending notices to the owners and occupiers of adjacent and proximate land.
- Sending notices to the beneficiaries of Covenant PS709028B
- Placing one sign on site.
- SGSC website
- By publishing a notice in The Hamilton Spectator which is generally circulated in the area in which the land is situated

At the conclusion of the public notification process three (3) objections were received by beneficiaries to the Covenant.

Section 60(5) of the *Planning and Environment Act 1987*, requires that the responsible authority must not grant a permit which allows the removal or variation of a restriction unless it is satisfied that:

- a. the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and
- b. if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

As objections have been received by owners (beneficiaries) of any land benefited by the restriction, Council cannot be satisfied that no detriment, as a consequence of the variation of the restriction, will occur, and as such must Refuse to Grant a Permit pursuant to Section 60(5) of the *Planning and Environment Act 1987*.

From the objections received, Council cannot be satisfied that the owner of any land benefited by the restriction will not be impacted by the variation to the building envelope which will provide for any buildings and works to be constructed regardless of what is being suggested by the owner of the said land that could restrict the sharing of the views, provide for uncertainty to location of any proposed buildings and works and retention of vegetation.

Financial and Resource Implications

Nil

Legislation, Council Plan and Policy Impacts

Planning and Environment Act 1987 (Act) -Section 60(5).

To support this application would be counter to the direction of this section in the Act.

Environmental and Sustainability Considerations

None.

Community Consultation and Communication

Public Notification

The application has been advertised pursuant to Section 52 of the *Planning and Environment Act 1987*, by:

- Sending notices to the owners and occupiers of adjacent and proximate land.
- Sending notices to the beneficiaries of Covenant PS709028B
- Placing one sign on site.
- SGSC website
- By publishing a notice in The Hamilton Spectator which is generally circulated in the area in which the land is situated

Notification has been carried out correctly and three (3) objections have been received.

A summary of the objections received by the Beneficiaries to the Covenant raise the following objection:

- not keeping with the original development ideals (covenant) for which the property was purchased
- blocks large but envelopes would ensure that there would be quite a bit of separation between the houses for privacy purposes
- view of the lake would be decreased (shared views)
- detrimental effect on overall outlook
- removal of an established tree
- any proposed development could be unsightly
- impact on property values

One (1) of the objectors is willing to withdraw their objection if the building envelope is amended (reduced) after having discussions with the applicant, however, as no amendment is proposed to the objection stands.

External Referrals/Notices Required by the Planning Scheme:

Referrals/Notice	Comments
Section 52 Referrals	Wannon Water requires a proposed variation to the building envelope so that it does not protrude into a sewerage easement E-2.

Disclosure of Interests

All Council Officers involved in preparing this Report affirm that no direct or indirect interests are held in relation to this application.

MEETING PROCESS

The meeting was held in accordance with standard meeting procedures.

The Planning Consultant was invited to speak first on behalf of the applicant. Objectors were then to have an opportunity to speak, followed by the presentation of the report by Planning Coordinator. Following this a decision is to be made in camera and notification made following that decision.

Applicant

The application relates to a Variation to Covenant PS709028D (building envelope Lot 3) at 1 Edradour View in Hamilton. The variation to the Covenant is to enlarge the existing building envelope, as registered on title, toward the southern boundary by a further 201.287 square metres.

Original submission made on 13 March in relation to objection has a slight error, which doesn't change the submission regarding an incorrect reference to a section of the *Planning and Environment Act*. Section 60(2) of the *Planning and Environment Act* should have read Section 60(5). An amended submission has been sent to Council and does not change the content of the original submission.

Planning Officer's report has been received.

Requested that Planning Committee consider the application based on planning merits and this was confirmed by the Chair. Committee is keen to hear applicant's view. Decision will be based on planning requirements.

Lot 3 is the largest lot in the 5 lot subdivision but has the smallest building envelope.

Proposal to enlarge the building envelope is to facilitate the building of a shed separate to the house.

Proposed shed is set back beyond the tree on site and doesn't impede view of objectors to the north and northwest.

Doesn't believe there is an impediment to any of the objectors.

The proposed change is to also facilitate the possible future installation of a swimming pool, in addition to the shed. Applicant stated they would be willing to reduce the size of the building envelope to just encompass the shed size.

Kim Fitzgerald – Objector

Objector disagrees with representation that proposal will not impinge on view and that property only has a limited view.

Objector has significant view and a 40% increase on envelope will significantly push into line of sight, which will impact on view and amenities and affect property value into the future.

Understanding was that the application was for a shed.

Double garage is already allowed for in the house plans.

Purchase of property was made with the understanding that increases to building envelopes would not happen.

Tim and Lynne O'Brien – Objector

Applicant stated that trees along driveway are on common property. This is incorrect as they have been planted on private property.

When block was purchased, objectors were told building envelopes were set and couldn't be changed.

Objectors were previously willing to negotiate with applicant over a reduced increase.

Concerned about property values.

The increase in the size of the building envelope is of most concern.

Planning Officer

Original application in 2012 for a 5 lot subdivision resulted in a number of objections which lead to the building envelopes being created.

They were created to provide and ensure future security for appropriate siting of dwellings and certainty of setbacks, height restrictions and layout of future dwellings.

Application for variation to building envelope allows for anything to be constructed within that increase.

Legal advice states that beneficiaries to covenant are every lot on the plan. Council was required to place application for variation on public notification and three objections were received. Final assessment on application required Officer to take into account the Planning and Environment Act Section 60(5) regarding detriment suffered of any kind including perceived detriment. Because 3 objections have been received from 3 beneficiaries to the covenant Council cannot be satisfied that there will be no detriment.

Committee discussion

Permit cannot be issued if there will be any suffering or detriment to objectors

Applicant hasn't proved that there will be no detriment

Purchase of block was made with awareness of covenant.

RECOMMENDATION

That Council having caused notice of Planning Application No. TP/114/2019 to be given under Section 52 of the *Planning and Environment Act 1987* and having considered all the matters required under Section 60 of the *Planning and Environment Act 1987* decides to Refuse to Grant a Permit under the provisions of the Southern Grampians Planning Scheme in respect of the land known as 1 Edradour View, Hamilton and described as Lot 3: PS:709028 Par: HAMILTON SOUTH, for a *Variation to Covenant PS709028D (building envelope Lot 3)*, subject to the following reason for refusal

- The proposal to vary a restriction registered on title will cause detriment to owners of land benefited by this restriction

Moved: Cr Brown

Seconded: David Moloney

Carried

7. CLOSE OF BUSINESS