

This fact sheet explains the concept of restrictive covenants and outlines their use in the planning system. It is intended as a broad overview of the concept of restrictive covenants. Further advice should always be obtained in relation to specific circumstances.

The fact sheet addresses concerns about the use of restrictive covenants in residential estates by land developers which are inconsistent with and undermine local planning scheme provisions and State planning policy. The concerns relate primarily to covenants limiting the number of residential dwellings on a lot or potential for future subdivision which is inconsistent with the density provisions of the local planning scheme.

The fact sheet also clarifies the procedure for extinguishing or varying a restrictive covenant where the local planning scheme includes a clause which provides such a power as set out in the model provisions of the Planning and Development (Local Planning Schemes) Regulations 2015.

## What is a restrictive covenant?

A restrictive covenant is an agreement which restricts the use or enjoyment of a landowner's land ('burdened land') for the benefit of other land ('benefited land') or for the benefit of a public authority. Restrictive covenants which benefit a public authority are referred to as restrictive covenants 'in gross' where there is no benefited land. A restrictive covenant not only binds the present landowner but also subsequent owners of that land, where the burden of the covenant is intended to run with the land.

A restrictive covenant is negative in nature as it prevents the owner of the burdened land from undertaking particular activities or exercising certain rights. A restrictive covenant is different from a positive covenant which requires the owner of the burdened land to take action for the benefit of other land. Positive covenants do not generally run with the land unless there is a legislative provision.

Examples of restrictive covenants include those which:

- prohibit the construction of more than one house on the burdened land
- impose height restrictions on structures on the burdened land
- prevent the purchaser from conducting a particular business or trade on that land, particularly if the seller owns near-by land which can benefit from the restrictive covenant and
- favour a local government, government agency or authority by preventing the landowner from clearing vegetation from the burdened land (in gross).

Restrictive covenants should be distinguished from:

- easements ([Landgate website](#))
- notifications and
- caveats.

An easement is a right enjoyed by a person to the land of another person, for example, a right to travel over a neighbour's land to gain access to a roadway on the other side.

A notification is a notice on a Certificate of Title, alerting interested persons to some characteristic of the land in question, or the ability to register further dealings in relation to the land. For further information please refer to the Western Australian Planning Commission's (WAPC) [Fact Sheet: Notifications on Titles](#).

A caveat is a warning on a Certificate of Title that a person claims an interest in the land. A caveat may prohibit registration of a dealing with respect to the land absolutely or subject to the consent of the person who lodged the caveat. Often a tenant under a lease for more than five years will lodge a caveat to alert interested persons to the tenant's interest under the lease.

## How is a restrictive covenant created?

A restrictive covenant may be created:

- by a deed setting out the terms of the restrictive covenant
- on a transfer of land form containing the words creating the restrictive covenant or
- on plans of subdivision/survey-strata under part IVA of the *Transfer of Land Act 1893*.

An instrument creating a restrictive covenant is registered on the Certificate of Title for the land burdened and may be registered on the Certificate of Title of the land benefited by the restrictive covenant. Landgate is responsible for the registration of restrictive covenants and should be contacted if queries arise. ([COV-01 Covenants](#))

## Planning context

### Restrictive covenants as a condition of subdivision or development approval:

Where appropriate, the WAPC or the local government may require an applicant to enter into a restrictive covenant, either with the WAPC, the local government or another public authority, as a condition of approval.

The WAPC can impose conditions on subdivision approval under sections 138, 139, 143, 144, 148, 150, 151 and 152 of the Planning and Development Act 2005. The power to impose conditions on development approval is contained in clauses 68(2) and 77(4) of the deemed provisions of the Planning and Development

(Local Planning Schemes) Regulations 2015, clause 30(1) of the Metropolitan Region Scheme, clause 35 of the Peel Region Scheme, clause 41 of the Greater Bunbury Region Scheme and section 116 of the *Planning and Development Act 2005*.

Conditions which require a restrictive covenant to be entered into must always be within the power to impose conditions, vested in the WAPC or the local government. Such conditions should be used sparingly and preferably, where no other more transparent mechanism, such as a local planning scheme provision, is available.

An example of a condition requiring a restrictive covenant for subdivision or development approval is when the applicant is required to enter into a restrictive covenant to protect and preserve native vegetation, wetlands or other special flora or fauna of the area. Such a covenant is also known as a 'conservation covenant' and may restrict activities such as the clearing of land or allowing stock to graze on the land. The following legislation allows the creation of conservation covenants:

- *Soil and Land Conservation Act 1945*
- *National Trust of Australia (WA) Act 1964* and
- *Transfer of Land Act 1893*.

Which Act applies depends on the purpose for requiring such a conservation covenant is to be made.

An authority and landowner who enter into a conservation covenant must ensure that it does not contain terms and conditions that extend beyond the powers contained in the relevant legislation. To this

end, it should be noted that conservation covenants made under the *Transfer of Land Act 1893* and the *National Trust of Australia (WA) Act 1964* are expressed to be restrictive in nature.

On the other hand, covenants set out in section 30B of the *Soil and Land Conservation Act 1945* are not restrictive in nature, allowing owners to set aside land not only for protection but also for management of that land. This form of conservation covenant may be registered as a notification on the Certificate of Title for the land and can bind subsequent owners of the land.

Conservation of biodiversity and natural heritage: There are some instances where land use planning may require a conservation covenant as a condition of subdivision in Environmental Conservation zones or under conservation lot provisions outlined in [Development Control Policy 3.4 – Subdivision of rural land](#). A conservation lot may be created to conserve significant natural areas on advice from the State government department responsible for biodiversity conservation.

Part 8 of the *Biodiversity Conservation Act 2016* provides for a landowner to enter into a conservation covenant with the State government to improve the conservation, protection and management of natural area on private land. The conservation covenant comprises a legally binding conservation agreement with the landowner, as well as a restrictive covenant on the Certificate of Title that applies to all future owners.

## Extinguishing or varying restrictive covenants:

Subject to legislative provisions, restrictive covenants may be extinguished or varied by:

- agreement between the parties having an interest in the covenant under section 129B of the *Transfer of Land Act 1893*
- an order of the Supreme Court under section 129C of the *Transfer of Land Act 1893*
- where a restrictive covenant was created under part IVA of the *Transfer of Land Act 1893*, on the application to the Registrar of Titles by the landowner of either the burdened or the benefited land, or by the local government or public authority benefited, with the consent of all relevant persons
- an application made to Landgate in accordance with section 129BB of the *Transfer of Land Act 1893* which provides a further mechanism where restrictive covenants in gross made under section 129BA of the *Transfer of Land Act 1893* may be extinguished or varied
- the provisions of a local planning scheme (see section below – 'Extinguishing or varying a landowner applied restrictive covenant under a local planning scheme').

## Restrictive covenants and local planning schemes

### Relationship between restrictive covenants and local planning schemes:

Aside from subdivision or development conditions, restrictive covenants have been used as a form of control over private land, initially before planning controls were established under local planning schemes. More recently, private developers have applied controls to their land beyond those available under local planning schemes. For example, developers often impose restrictive covenants mandating the:

- type of building materials
- roof pitch and colour
- design of fencing
- retaining walls
- landscaping
- positioning of ancillary elements such as satellite dishes, aerials, air-conditioning units and clothes lines.

This type of restrictive covenant, and restrictive covenants applied by statutory decision-makers, are not related and provide for different forms of restriction. A restrictive covenant, of this type is a private obligation and is not linked to the planning framework.

Landowner applied controls do not arise from legislation and do not create an interest in land. Therefore, the existence of this type of restrictive covenant is not a relevant planning consideration in the determination of a development application. Conversely, the jurisdiction conferred on the Supreme

Court to vary or remove a restrictive covenant is not affected by the provisions of a local planning scheme.

### Extinguishing or varying a landowner applied restrictive covenant under a local planning scheme:

Landowner applied restrictive covenants aim to control streetscape and the character of an estate consistent with the intentions of the developer, and the expectations of the homeowner. However, problems can arise where there is conflict between the restrictive covenant and the provisions of a local planning scheme. This has most commonly occurred where a restrictive covenant limits the number of dwellings or future subdivision of a lot to less than that permitted by the local planning scheme.

Where such covenants are inconsistent with current State and local planning policy this creates confusion and uncertainty for landowners as to their development rights, and expectations from other residents that there will be no further development or development will be of a certain appearance.

The WAPC will not approve subdivisions or endorse deposited plans proposing restrictive covenants that limit the number of dwellings, restrict the maximum area occupied by the dwelling, or the future subdivision of the lot in a way which is inconsistent with the provisions of the relevant local planning scheme or applicable State planning policy.

The combined operation of section 69 and clause 11 of schedule 7 to the *Planning and Development Act 2005* affects the enforceability of restrictive covenants as it allows a local government to include in a local planning scheme a provision which extinguishes or varies any restrictive covenant affecting land. However,

in applying this power, it must be remembered that restrictive covenants are recognised property interests which should not be extinguished by a local planning scheme unless there are justifiable planning grounds.

Clause 35 of Schedule 1 to the Planning and Development (Local Planning Schemes) Regulations 2015 currently contains model provisions to extinguish or vary restrictive covenants which restrict the number of residential dwellings which may be constructed in a way which is inconsistent with the provisions of the Residential Design Codes applicable under the local planning scheme. No scheme amendment is required to extinguish the covenant if these provisions are contained in a local planning schemes.

#### **Notification on the Certificate of Title:**

When a restrictive covenant has been extinguished or varied by a local planning scheme, this will not automatically be reflected on the relevant Certificate of Title. The landowner who has been affected by a restrictive covenant being extinguished or varied in this manner must lodge the appropriate documents with Landgate before such changes will be reflected on the Certificate of Title.

Generally, a formal application is made by the registered proprietor of the land via the relevant form(s) found on the Landgate website and accompanied by a letter from the relevant local government, on letterhead addressed to the Registrar of Titles which sets out:

- a description of the land i.e. lot number, deposited plan number, Certificate of Title volume, folio number and address

- the relevant clause in the local planning scheme which provides for the variation or extinguishment of restrictive covenants and the date that the clause was inserted in the local planning scheme and was published in the Government Gazette and
- confirmation that the land is in the local planning scheme area.