

Restrictive Covenants

A restrictive covenant is an agreement between two parties that restricts the use or enjoyment of land (often referred to as the ‘burdened land’) owned by one of those parties, for the benefit of another party. A restrictive covenant is noted on a Certificate of Title for the land.

Restrictive Covenants and the City’s Local Planning Scheme No. 3 (LPS3)

Although restrictive covenants provide a private means of controlling the use of land, in certain circumstances their existence can result in a conflict with the provisions of a local government’s planning scheme. For example, a restrictive covenant may limit the use of a residential lot to a single dwelling whereas the local planning scheme and the Residential Design Codes (R-Codes) may permit the development of two or more dwellings on that lot.

The City of Joondalup’s *Local Planning Scheme No. 3* (LPS3) contains provisions which allow a restrictive covenant that limits the number of dwellings on the land to be extinguished or varied. LPS3 incorporates the following clauses:

“35. RESTRICTIVE COVENANTS

- (1) A restrictive covenant affecting land in the Scheme area that would have the effect of limiting the number of residential dwellings which may be constructed on the land is extinguished or varied to the extent that the number of residential dwellings that may be constructed is less than the number that could be constructed on the land under this Scheme.
- (2) If subclause (1) operates to extinguish or vary a restrictive covenant:
 - (a) development approval is required to construct a residential dwelling that would result in the number of residential dwellings on the land exceeding the number that would have been allowed under the restrictive covenant; and
 - (b) the local government must not grant development approval for the construction of the residential dwelling unless it gives notice of the application for development approval in accordance with clause 64 of the deemed provisions.”

The above clause only relates to residential density and can be applied where there is an inconsistency in the R-Code of the land. For example, in areas coded R20, land greater than 900m² has the potential to be developed with two

grouped dwellings. A restrictive covenant, however, may limit the number of dwellings that may be constructed on the land to one, thereby resulting in an inconsistency with the R-Code.

In such cases, the LPS3 clause operates to extinguish or vary any restrictive covenant that limits the number of residential dwellings to a number less than the R-Codes allows. Landowners can request a letter from the City addressed to Landgate to this effect. Prior to preparing the letter to Landgate, the City must be satisfied that there is an inconsistency between the restrictive covenant and the R-Code applying to the land.

Varying a Restrictive Covenant for lots within a Housing Opportunity Area utilising the higher density code (dual-coded areas)

Clause 26(4) of LPS3 specifies that within areas where a dual code applies (such as R20/40), the base R20 density code shall apply until such time as it has been demonstrated through the approval of either a development application or subdivision that the site is capable of development at the higher density.

“26(4) Within areas where a dual code applies as depicted on the Scheme Map, the base R20 density code shall apply, unless it is determined that the higher code is acceptable having regard to clause 26(5).”

If an inconsistency is generated at the higher density code, the City is unable to confirm that inconsistency until either development or subdivision approval is granted which verifies the ability to develop or subdivide at the higher density. The City cannot confirm an inconsistency on the ‘potential’ of the higher density code.

Applying for a variation or extinguishment of a Restrictive Covenant

An application to vary or remove a restrictive covenant may be lodged with the City by email to info@joondalup.wa.gov.au

The application will need to include:

- A completed Application for Written Advice form;
- A copy of the latest Certificate of Title. This can be obtained from Landgate;
- A copy of the restrictive covenant documentation (the registration number is on the certificate of title). This can be obtained from Landgate;

- Confirmation of the land size. If the land size is not shown on the Certificate of Title a copy of the diagram, deposited/strata plan is required. This can be obtained from Landgate; and
- The fee for written planning advice, as set out in the Planning Services Fees and Charges.

Application process

On receiving an application, the City will assess this information. If there is a clear inconsistency between the restrictive covenant and how many houses can be developed on your lot, the City will issue you a letter addressed to Landgate to this effect.

You will then need to apply to Landgate to remove or amend the restrictive covenant.

Further information

For further information on Landgate's processes, please contact **9273 7373** or **landgate.wa.gov.au**

For further information on the City's processes, please contact **9400 4100** or email **info@joondalup.wa.gov.au**