The Relationship between restrictive covenants on land and planning laws

Seminar presented to City of Sydney Law Society

by Michael Mantei, Lawyer Director, Planning Law Solutions

September 2013

Introduction

1. One of the purposes of town planning law is to control and restrict private property rights, in the public interest. The extent of control varies across jurisdictions and Local Government Areas. In most Australian States, town planning legislation provides that private property rights in the form of restrictive covenants may be set aside if those rights are inconsistency with the applicable town planning law. In NSW that provision is section 28 of the Environmental Planning and Assessment Act 1979 (“EP&A Act”).

2. Leasehold and restrictive covenants are frequently used as a form of private land use control. Often restrictive covenants are used in new residential estates to control the colour of buildings, type of construction materials and building design and density. Restrictive covenants are also used to limit the height or location of buildings to protect views from neighboring land. Developers like use restrictive covenants of this nature in order to establish a minimum standard of development. In NSW restrictive covenants are created under section 88B of the Conveyancing Act 1919.

3. Section 28 of the EP&A Act is a curious provision. Although it resides in a town planning statute, it has more to do about property law than planning law. It sits in the background of every property and business transaction where the use of land is concerned. Yet, I suspect, most legal practitioners do not appreciate the significance or reach of section 28 of the EP&A Act.

---

1 Subdivision Act 1988 and Planning and Environment Act 1987 (Vic), s60(2); Housing Act 2003 (Qld), s148; Housing Improvement Act 1940 (SA), ss36(1) & 39; Environmental Planning and Assessment Act 1979 (NSW) s28.
4. At the time of writing the NSW Department of Planning had released for public comment the Planning Bill 2013 – exposure draft. The Planning Bill 2013, will, when enacted, superseded the EP&A Act. The Planning Bill 2013 exposure draft contains a similar, but not identical, provision to section 28 of the EP&A Act.²

**Key features of section 28 of the EP&A Act**

5. Section 28 of the EP&A Act provides that certain “regulatory instruments”, including covenants on land, may be set aside to enable development to occur in accordance with a local environmental plan and a development consent. The underlying purpose of section 28 is to “nullify and remove all obstacles to the planning principles decided on by the Council or the Minister”³ so that the “ultimate regulatory provisions in relation to the carrying out of development lie in the Environmental Planning and Assessment Act.”⁴ Section 28 has been a part of the EP&A Act since the Act commenced in 1980. Indeed it replaced a similar provision contained in the legislation that preceded the EP&A Act.⁵

6. Section 28 of the EP&A Act does not have effect by itself. Rather, it authorises a planning authority to include in an environmental planning instrument a clause, referred to in this paper as a “covenants clause”, that provides for the matters described in section 28.⁶ It is the environmental planning instrument that enlivens section 28. The decision whether or not to include a covenants clause in a particular environmental planning instrument is a matter for the planning authority responsible for preparing that instrument. Most planning instruments contain a covenants clause.

7. Of the ten local environmental plans⁷ and state environmental planning policies⁸ reviewed for this paper all except one state policy contained a covenants clause. Some instruments, such as the Woollahra LEP 1995, limited the operation of the clause by specifying particular parcels to which it applies. Other instruments limit the operation of the covenants clause to land within particular zones. The Seniors Housing SEPP contains a covenants clause. However, surprisingly, the Codes SEPP does not contain a covenants clause.

8. All local environmental plans prepared after June 2008 must largely conform to a standard format as prescribed in Standard Instrument (Local Environmental Plan) Order 2006 (“standard instrument”). The standard instrument does not prescribe a covenants clause. However, individual councils are

---

² Clause 3.26 of the Planning Bill 2013
⁴ Coles v Minister for Planning (1996) 90 LGERA 341
⁵ Section 342G(2) of the Local Government Act 1919
⁶ The expression "environmental planning instrument" is defined in section 4(1) of the EP & A Act as “an environmental planning instrument (including a state environmental planning policy or local environmental plan but not including a development control plan) made, or taken to have been made, under Part 3 [of the EP & A Act] and in force.”
⁸ State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (“Codes SEPP”) and State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (“Seniors Housing SEPP”).
not prevented from adding such a clause to their local environmental plan, provided the additional clause is not inconsistent with the standard instrument. A quick look at environmental planning instruments based on the standard instrument reveals that may councils have chosen to include the standard covenants clause in their local instrument.

9. The other key feature of section 28 of the EP&A Act is sub-section (6). Subsection 28(6) governs the relationship between section 28 and private property rights. It provides that in circumstances where section 28 operates, section 28 “... has effect despite anything contained in section 42 of the Real Property Act 1900”. As all property law practitioners would appreciate, section 42 of the Real Property Act 1900 provides that the title of the registered proprietor is paramount and subject only to such estates and interests as are recorded on the folio of the register or registered dealing evidencing title to the land.\(^9\) Section 28, where it operates, nullifies the primacy of the title register.

**Meaning of the expression “regulatory instrument” in section 28(2)**

10. Section 28(2) of the EP&A Act allows a covenants clause in an environmental planning instrument to apply to a “regulatory instrument”. The expression "regulatory instrument" is defined in section 28(1) as “any Act (other than the EP&A Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.” The following instruments have been held by the courts to be regulatory instruments for the purposes of section 28(2) of the EP&A Act:

- a restrictive covenant under section 88B of the Conveyancing Act 1919;\(^{10}\)

- a management plan under a community titles scheme and a related contract for the sale of land;\(^{11}\)

- a clause in a lease agreement for a shopping centre.\(^{12}\)

11. The following instruments have been held by the courts to not be regulatory instruments for the purposes of section 28(2) of the EP&A Act:

- an easement granting a right of carriageway;\(^{13}\)

- a plan of management under the Crown Lands Act 1989;\(^{14}\) and

- a development consent issued under the EP&A Act.\(^{15}\)

---

\(^{9}\) Bradbrook, MacCallum and Moore, "Australian Real Property Law", 4th edition, Thompson Lawbook Co. p.132

\(^{10}\) Lennard v Jessica Estates Pty Ltd [2008] NSWCA 121

\(^{11}\) Horizons Corporations Law Pty Ltd v Rizons Pty Ltd [1999] NSWCA 691

\(^{12}\) Marjen Pty Ltd v Coles Supermarkets Australia Pty Ltd [1996] NSWLEC 134

\(^{13}\) Cracknell and Lonergan Pty Limited v Council of the City of Sydney [2007] NSWLEC 392

\(^{14}\) Street v Luna Park (2009) 223 FLR 245

\(^{15}\) Challister Limited v Blacktown City Council (1992) 76 LGRA 10.
12. A covenants clause need not incorporate all of the types of regulatory instruments referred to in section 28(1). Clause 1.9A of the North Sydney LEP 2013 for example only incorporates “agreement, covenant or other similar instrument” leaving “any other Act, rule, regulation, by-law, ordinance, proclamation” untouched by the clause.

13. The Planning Bill 2013, clause 3.26, omits the words “any Act (other than the EP&A Act), rule, regulation, by-law, ordinance, proclamation” from the current section 28(2). The only type of instrument that can be nullified under the Planning Bill 2013, as presently drafted, is any “agreement, covenant or similar instrument”. This is unlikely to have any real effect on the operation of the provision in the majority of circumstances.

A regulatory instrument must be “restrictive” in nature

14. Most covenants clauses made under section 28 of the EP&A Act require the regulatory instrument to which it applies to contain, either expressly or by necessary implication, a restriction on the carrying out of development. As the following case demonstrates, a regulatory instrument that does not restrict development in terms is not set aside by section 28 of the EP&A Act.

15. In Cracknell and Lonergan Pty Limited v Sydney City Council\textsuperscript{16} the Land and Environment Court considered the effect of section 28 of the EP&A Act on a development application for construction of an in-ground pool, associated fencing and minor landscape works at a property in the Sydney suburb of Redfern. The land on which the development was proposed was burdened by a right of way. The location of the proposed pool encroached on the right of way. The terms of the right of way granted the owner of the benefited land:

“...full and free right and liberty of way and passage for himself and themselves and his and their tenants and servants and others authorised by him or them without horses carts and carriages of all description over and along a road or right of way ….”

16. The issue for the Court was whether the right of way “… purported to impose restrictions on the carrying out of development on the land” within the meaning of clause 44 of South Sydney Local Environmental Plan 1998. Cracknell and Lonergan argued that the right of way did impose restrictions on development of the land burdened, because the right of way:

a. would restrict development in accordance with any development consent granted because the swimming pool would substantially interfere with the use of the right of way; and

b. impliedly restricted development of the land within the right of way for any purpose that would substantially interfere with the right of way.

17. The Court rejected Cracknell and Lonergan’s submission. It held that an agreement or instrument does not “impose” a restriction on development, for the purposes of section 28 of the EP&A Act, unless the restriction is “expressly stated or necessarily implied” in the agreement or instrument. It

\textsuperscript{16} [2007] NSWLEC 392
is not sufficient that the **incidental effect** of a right of way or similar easement is to inhibit or prevent development inconsistent with the dominant owner’s rights.

18. The Court held that the environmental planning instrument there under consideration (clause 44 of the *South Sydney Local Environmental Plan 1998*) was confined to restrictions of a negative nature arising from the language of the agreement or instrument. It had no application where the agreement or instrument confers positive rights of ownership or use which would be interfered with by the development.

19. In reaching its decision in Cracknell and Lonergan, the Court held that its earlier decision in *Doe v Cogente*\(^{17}\) was wrongly decided. In that case the Court held that any restriction (including a right of way) which might stand in the way of a development, even if created for the benefit of an adjoining owner or other person having an interest in the development site, may be suspended or neutralised by section 28 of the EP&A Act

**The Governor’s approval must first be obtained**

20. A covenants clause in an environmental planning instrument does not “have effect” unless the Governor approved the clause before the instrument was made.\(^{18}\) A formal process for the Governor’s approval is prescribed, which requires the responsible Minister to advise the Governor to give the approval, and the approval must be given formally in a meeting of the Executive Council.\(^{19}\) I note that clause 3.26 of the Planning Bill 2013 exposure draft **does not** require the Governor’s approval to the making of a covenants clause.

21. The purpose of requiring the Governor to approve the making of a covenants clause is to provide “... **some protection for persons having the benefit, inter alia, of restrictive covenants which can be an important and valuable proprietary right**”.\(^{20}\) That the Governor must approve the making of a section 28 clause is recognition by Parliament of the potentially significant impact of section 28 of the EP&A Act on private property rights.\(^{21}\)

22. A number of covenants clauses have been declared invalid on the basis that the Governor’s approval had not been obtained. As the following decision demonstrates, the mere making and gazettal of a covenants clause in the usual way does not guarantee the Governor’s approval was obtained.

23. In *Challister Limited v Blacktown City Council*\(^{22}\) the Land and Environment Court considered clause 26(1) of the *Blacktown Local Environmental Plan 1988*. That clause provided that “... **the operation of any covenant, agreement or instrument imposing restrictions on development**” did not apply to

---

17 (1997) 94 LGERA 305
18 section 28(3) of the EP&A Act
19 Section 14 of the Interpretation Act 1987
20 Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd [2010] NSWCA 214 at [64]
21 Challister Ltd v Blacktown City Council (1992) 76 LGRA 10.
the carrying out of development in accordance with a development consent. The clause then contained the following subclauses:

a. subclause (2), which provided that “nothing in subclause (1) shall affect the rights or interests of the council under any registered instrument”; and

b. subclause (3), which provided that “pursuant to section 28 of the Act, before the making of this plan, the Governor approved of subclause (1).”

24. An instrument made pursuant to section 88(B) of the _Conveyancing Act 1919_ (NSW) applied to Challister’s land which prohibited vehicular access from the land to one of two adjoining public roads. Blacktown City Council was the authority named in the instrument empowered to release, vary or modify the restriction. Challister proposed to develop a service station on its land with vehicular access contrary to the prohibition in the section 88B restriction. The Council refused the application. Challister appealed the decision to the Land and Environment Court.

25. The Court held that the absence of any reference in clause 26(3) of Blacktown LEP 1988 to subclause (2) was significant and proved fatal to the Council’s interests. There was no evidence before the Court that the Governor had approved the making of clause 26(2) Blacktown LEP 1988. Mindful of the significant power of section 28 of the EP&A Act, and the significant curtailment of private property rights it occasions, the Court held that on the face of the instrument the Governor did not give his approval to subclause (2) and held that clause 26(2) was void and of no effect.

Another Governor’s approval case

26. The High Court’s decision in _Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd_ demonstrates that the Governor’s approval is not only necessary prior to the making of a planning instrument that contains a covenants clause, but also prior to the making of any other amendment to a planning instrument that, in substance, has the effect of invoking the power in section 28 of the EP&A Act. In other words, if an amendment to an environmental planning instrument results in land being affected by an existing covenants clause in that instrument (in circumstances where it was not affected before the amendment), the Governor’s approval is required prior to the making of that amending instrument.

27. The High Court’s decision in _Cumerlong Holdings_ is an example of an invalid amendment to an environmental planning instrument (in this case the _Ku-ring-gai Planning Scheme Ordinance_) by reason of the failure to obtain the Governor’s approval under section 28(3) of the EP&A Act.

28. Cumerlong was the registered proprietor of residential property at Werona Avenue, in the Sydney suburb of Killara. Dalcross was the registered proprietor of a number of adjoining allotments, part of which was used for residential purposes and partly for the purposes of a private hospital. Dalcross proposed to expand the hospital onto the residential lots.

---

23 [2011] HCA 27
29. The land on which the hospital expansion was proposed was affected by a restriction on use created in 1993 pursuant to section 88B(3) of the Conveyancing Act 1919. The terms of the restriction provided that no part of the land was to be used, among other things, for the purpose of a hospital. The restriction benefited the Cumerlong land.

30. In August 2008 Ku-ring-gai Municipal Council granted a deferred commencement development consent for the proposed hospital expansion on the land burdened by the restriction. The consent was granted under the EP&A Act and the Ku-ring-gai Planning Scheme Ordinance (“KPSO”). At the time the development consent was granted KPSO contained a covenants clause in the following terms (my emphasis):

“In respect of any land which is comprised within any zone, other than within Zone No 2(a), 2(b), 2(c), 2(d), 2(e), 2(f) or 2(g) the operation of any covenant, agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder.”

31. Prior to May 2004 the land burdened by the restriction was within zone 2(b) under the KPSO. Accordingly any covenants affecting the land were not suspended by KPSO. In May 2004 a large portion of land zoned 2(b) in the Ku-ring-gai Local Government Area, including the land burdened by the restriction, was rezoned to zone 2(d3). The effect of this change in zoning was that any covenants that applied to the rezoned land were now suspended by KPSO. It was conceded by the parties, and accepted by the Court, that the amending instrument that effected this rezoning was not approved by the Governor as required by section 28(3) of the EP&A Act.

32. Cumerlong filed a summons in the Equity Division of the Supreme Court seeking an order that Dalcross be restrained from acting on the deferred development consent in contravention of the covenant. The Judge at first instance dismissed the summons. Cumerlong appeal to the NSW Court of Appeal, and lost.24 Cumerlong then successfully appealed to the High Court.

33. The issue in dispute before the High Court was whether or not the Governor’s approval was required to the amending instrument that rezoned the land burdened by the restriction from 2(b) to 2(d3). This turned on whether the change in zoning “provided” for the suspension of any covenant, agreement or instrument even though the amending instrument did not contain, in terms, such a provision.

34. Cumerlong’s case was that the amending instrument, in substance, suspended the regulatory instruments referred to in clause 68(2) of KPSO with respect to land in the 2(d3) zone and therefore provided for the suspension of the restriction affecting the Dalcross land. Cumerlong submitted that the amending instrument was void and of no effect because the Governor’s approval was required, but was not obtained prior to the making of the amending instrument.

24 Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd & Ors [2010] NSWCA 214
35. The High Court upheld the appeal. In doing so it relied on the common law principle of statutory interpretation that a provision which operates to mitigate the extent of interference with private rights should be construed with all the generality that the words of the provision permit.\textsuperscript{25} The restrictive covenant benefiting the Cumerlong land was a proprietary right. The Court held that the amending planning instrument effected a “serious inroad” upon that right and should be construed accordingly.

36. The Court held that the requirement in section 28(3) of the EP&A Act that the Governor approve the making of a covenants clause was a protection, albeit limited, against the operation of planning instruments that interfere with private property rights. A narrow interpretation of section 28(2), that it applies only to planning instruments that contain a statement in terms that a category of regulatory instrument is suspend, would:

“Our... afford relatively little protection to those enjoying covenants. The more widely section 28(2) is read, the fuller the protection afforded by section 28(3).”

37. It was enough, the Court said, that the result of the amending instrument was to suspend the restrictive covenant. As the amendment to KPSO “provided and specified” that the restrictive covenant benefiting the Cumerlong land was suspended, the Governor’s prior approval was required. That approval was not obtained and the covenant was not suspended. Clause 68(2) of KPSO applied to the land burdened by the restriction as if it remained in zone 2(b).

38. In order for Dalcross to develop its land pursuant to the development consent, Cumerlong’s consent to the modification of the restrictive covenant was necessary.

**Interpretation of regulatory instruments**

39. The NSW Court of Appeal’s decision in *Lennard v Jessica Estates Pty Limited*\textsuperscript{26} demonstrates that the terms of a restriction in instrument must be construed according to their town planning purpose. A summary of that case is set out below.

40. Jessica Estates Pty Ltd was the developer of a residential estate comprising 121 lots in regional NSW. Mr and Mrs Lennard purchased one of those lots, which was then vacant. All 121 lots were subject to an instrument lodged with the Deposited Plan under section 88B of the *Conveyancing Act 1919*. That instrument created a restriction on use prohibiting, among other things, the construction of “any building of the nature known as semi-detached duplex” or the subdivision of the lot burdened, without the prior written consent of Jessica Estates Pty Ltd.

41. The Lennards obtained development consents from Singleton Council for the construction of an attached dual occupancy (otherwise described as a semi-detached duplex) and a two-lot strata subdivision of that building. Construction commenced, the written consent of Jessica Estates was not obtained.

\textsuperscript{25} Heydon J, at [33] to [36]

\textsuperscript{26} [2008] NSWCA 121
42. Jessica Estates commence proceedings in the Supreme Court for declaratory and injunctive relief claiming a breach of the restriction on use. The Lennards raised as a defense clause 6(1) of Singleton Local Environmental Plan 1996, which provided that (my emphasis):

“If any agreement, covenant or similar instrument prohibits a land use allowed by this plan, then it shall not apply to that land use (to the extent necessary to allow that land use).”

43. The dispute between the parties centered on the meaning of the expression "land use" in clause 6(1) of Singleton LEP 1996 and whether or not the building and subdivision referred to in the restrictive covenant were land uses contemplated by clause 6(1) of Singleton LEP 1996. If they were contemplated by clause 6(1) then the restrictive covenant was set aside by the development consent.

44. The Supreme Court construed the expression “land use” as a use of land rather than the construction of a building or the subdivision of land. Hence none of the activities identified in restrictive covenant was “a land use” within the meaning of clause 6(1) of Singleton LEP 1996. Accordingly the clause was not enlivened and the restrictive covenant precluded the Lennards from proceeding with their development in the absence of Jessica Estates’ consent. The Lennards appealed the decision to the NSW Court of Appeal.

45. The Court of Appeal found the expression “a land use” was ambiguous and should be construed purposively. The Court held that as a matter of logic the expression “land use” in clause 6(1) of Singleton LEP 1996 extended not only to the use of land for a particular purpose but also to the erection of buildings to enable that use to be carried out. The Court held that clause 6(1) of Singleton LEP 1996 applied to the prohibition contained in the restrictive covenant on the construction of a semi-detached duplex.

46. In relation to the prohibition in the restrictive covenant on subdivision, the Court held that a land use was capable of including subdivision of land for the purpose of a use permitted by Singleton LEP 1996. Generally speaking, the Court said, in the context of planning law, land is not subdivided except for a particular purpose. Accordingly, the Court held that clause 6(1) of Singleton LEP 1996 also extended to the prohibition contained in the restriction on subdivision in the covenant.

47. The Court was influenced in its analysis by the “planning context” of the clause and the “implementation of the aims and objectives of the LEP”. To construe the term otherwise was “irrational” in the relevant sense. The fact that the draftsperson of clause 6(1) of the Singleton LEP 1996 used the expression “land use”, rather than “development”, did not require the expression land use in that clause to be read down so as to exclude the other forms of development as defined in section 4(1) of the EP&A Act.
The reach of section 28 – restrictions contained in agreements

48. The Land and Environment Court’s decision in *Marjen Pty Ltd v Coles Supermarkets Australia Pty Ltd*\(^{27}\) and the Supreme Court’s decision in *Horizons Corporations Law Pty Limited v Rizons Pty Limited*\(^{28}\) demonstrate the extensive reach of section 28 of the EP&A Act. In those cases the Courts held, respectively, that a covenants clause applied to a lease agreement that contained a restriction on the development of land and to a management statement under the *Community Land Management Act 1989*. Summaries of Marjen and Horizons Corporation are set out below.

*Marjen Pty Ltd v Coles Supermarkets Australia Pty Ltd*

49. Marjen was the registered proprietor of a shopping centre in Wagga Wagga. Coles Supermarkets Australia Pty Ltd and K-Mart Australia Ltd both leased premises in the centre. Marjen proposed to redevelop the shopping centre which included changes to the location and configuration of car parking facilities. Development consent was obtained for the redevelopment.

50. *Wagga Wagga Local Environmental Plan 1985* applied to the development site. That plan contained a covenants clause which restricted “the operation of any covenant, agreement or instrument imposing restrictions on development.”

51. The leases to Coles and K-Mart each contained an identical clause that prevented any redevelopment of the shopping centre that significantly altered the location or configuration of car parking facilities “without the Lessee’s prior written consent.” Marjen’s proposed redevelopment involved a significant alteration to the location and configuration of car parking facilities. Neither Coles nor K-Mart gave consent to the proposed alteration.

52. Marjen sought a declaration in the Land and Environment Court that it was entitled to carry out the development without the consent of the Coles or K-Mart by reason of the provisions of the Wagga Wagga LEP 1985.

53. Coles and K-Mart resisted the declaration on grounds that:

   a. the word "specified" in section 28(2) should be construed in such a way to require a clause in a planning instrument made under s 28(2) to specify expressly each and every regulatory instrument to which it was intended that clause would apply;

   b. where such a clause intended that private covenants should be suspended, then those private covenants should be expressly identified;

   c. the leases did not contain a "restriction" on development in the terms of that clause.

\(^{27}\) [1996] NSWLEC 134
\(^{28}\) [1999] NSWSC 691
54. The Court rejected the submissions put by Coles and K-Mart. The Court applied the Court of Appeal’s decision in *Ludwig v Coshott* where it was held that a regulatory instrument was adequately “specified” in a covenants clause if the clause refers to an instrument “in a way which enables it to be identified with certainty, in terms which are descriptive and which indicate a class of instrument.” The Court held that the leases were agreements specified in the covenants clause in Wagga Wagga LEP 1985.

55. The Court also held that the requirement in the leases that Marjen obtain the lessee’s prior approval was a restriction on Marjen’s development. Absent that requirement, the development could proceed. The Court drew an analogy with provisions in planning ordinances which require council consent to be obtained for the carrying out of development. Those provisions had been held in other cases decided in the Land and Environment Court to be a restriction on the carrying out of that development.

56. Clause 23A of the Wagga Wagga LEP had effect such that the operation of the leases did not apply to Marjen’s development to the extent necessary to enable that development to be carried out. This meant that the requirement in the lease that Marjen obtain the lessees' written consent before carrying out the development did not apply.

*Horizons Corporations Law Pty Limited v Rizons Pty Limited*

57. In *Horizons Corporations Law Pty Limited v Rizons Pty Limited* the Supreme Court considered the relationship between a development consent for the construction of 9 villa units at Salamander Bay in the Port Stephens Local Government Area, and a management statement and agreement for sale of the land. The land to which the consent applied was a lot in a community title subdivision created under the *Community Land Development Act 1989* and the *Community Land Management Act 1989*. The lot was affected by a management statement created under the *Community Land Development Act 1989*.

58. The issue between the parties was whether the implementation of the development consent was precluded by covenant and by agreement, such covenant arising under the management statement and agreement for sale of the land. Horizons asserted that there was an agreement between itself and Rizons contained in the management statement, which was incorporated in the agreement for sale. The agreement required the construction of 16 villa units on the relevant parcel of land. However, the terms of the development consent granted to Rizons allowed for the construction of 9 villa units. Horisons sought to enforce the agreement for sale.

59. Risons defence was that neither the management statement nor any purported agreement to the effect that Horisons asserted could stand in the way of the implementation of the development in accordance with the development consent. The effect of the development consent was to override

---

30 *Strathfield Council v State Rail Authority of NSW* (Waddell AJ, 29 July 1994, unreported)
31 [1999] NSWSC 691
the agreement for sale by reason of clause 31 of the Port Stephens Local Environmental Plan. That clause was in the form of a clause permitted under section 28 of the EP&A Act.

60. The Court held that Horisons was “absolutely precluded” from obtaining the relief that it sought in the proceedings, to the extent that the relief was inconsistent with the development consent. Relying on the Court of Appeal’s decision in Coshott v Ludwig the Court held that the development consent “can in no way be impeded, neither can the implementation of that consent be prevented, by any agreement which the parties to the sale might have concluded between themselves or under any agreement arising out of the management statement”.

Conclusion

61. Section 28 of the EP&A Act is the manifestation of a policy that is designed to ensure town planning law prevails over private agreements relating to the development of land, to the extent of any inconsistency between the two. This has been the position at law in NSW since at least the commencement of the EP&A Act in 1980. It is proposed to continue under new planning legislation designed to supersede the EP&A Act.

62. As well as its long legislative history, section 28 of the EP&A Act is the subject of a line of judicial authority in the Land and Environment Court and Supreme Court, Court of Appeal and High Court. The case law on section 28 is continuing to evolve, as the High Court’s decision in Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd demonstrates. Further disputes are sure to arise.

63. Section 28 of the EP&A Act must be considered in every transaction where the use of land is involved, and in every application for development consent. Its potential cannot be underestimated. Whether section 28 of the EP&A Act does affect a covenant or agreement will depend on a careful analysis of the planning controls applying to the land the subject of the covenant or agreement (do they contain a valid covenants clause?), a careful analysis of the nature of the covenant or agreement (is it restrictive in nature?) and a careful analysis of any development consent applying to the land. It will not be practical to undertake that degree of research in every transaction, and practitioners should consider disclosing to their clients the potential risks of not doing so.

Michael Mantei
Lawyer Director – Planning Law Solutions
Accredited Specialist Local Government and Planning Law

---