DA 2017/0175 - 555 Lyons Road West, Canada Bay NSW 2046

Introduction

This is an objection to DA 2017/0175 for the property at 555 Lyons Road West, Canada Bay NSW 2046. The proposed two/three-storey development is prohibited because the property is burdened by a Council covenant that restricts the building to no more than one storey ('the 555 covenant').

Our primary concern is that Council may vary or suspend the operation of the 555 covenant. We will explain why that would be inadvisable.

Background

The 555 covenant was created on 15 October 1968 pursuant to the *Conveyancing Act 1919* (NSW), s 88. The 555 covenant is recorded in the Torrens register as LP374476, and both burdens and benefits other lots in the subdivision DP237206. As recited in the covenant, Council is empowered to 'release, vary or modify' the restriction as to user.

Canada Bay Local Environment Plan

Previous correspondence with Council indicates that Council believes it can rely upon Clause 1.9A of the *Canada Bay Local Environment Plan 2013* (NSW) ('the LEP') to suspend or vary the 555 covenant. We submit that Clause 1.9A LEP does not give Council that option.

1.9A Suspension of covenants, agreements and instruments

(1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

(2) This clause does not apply:

(a) to a covenant imposed by the Council or that the Council requires to be imposed, or

(b) to any prescribed instrument within the meaning of section 183A of the *Crown Lands Act 1989*, or

(c) to any conservation agreement within the meaning of the *National Parks and Wildlife Act 1974*, or

(d) to any Trust agreement within the meaning of the *Nature Conservation Trust Act 2001*, or

(e) to any property vegetation plan within the meaning of the *Native Vegetation Act 2003*, or

(f) to any biobanking agreement within the meaning of Part 7A of the *Threatened Species Conservation Act 1995*, or

(g) to any planning agreement within the meaning of Division 6 of Part 4 of the Act.

(3) This clause does not affect the rights or interests of any public authority under any registered instrument.

(4) Under section 28 of the Act, the Governor, before the making of this clause, approved of subclauses (1)–(3).

As shown above, Clause 1.9A(1) suspends the application of a covenant for developments that are to be carried out in accordance with the LEP (which includes the present DA). However, Clause 1.9A(2)(a) preserves the applicability of a covenant that is either 'imposed by the Council', or, 'that the Council requires to be imposed'.

The recitation of 'or' in Clause 1.9A(2)(a) plainly indicates alternatives, whereby the satisfaction of either alternative will preserve the operation of the covenant. The first alternative is a 'covenant imposed by the Council' and is satisfied by the 555 covenant being a Council covenant. Hence, the applicability of the 555 covenant is preserved.

The second alternative is a 'covenant … that the Council requires to be imposed' and would be satisfied by a covenant, that is not imposed by the Council but which the Council nevertheless requires to be imposed. Importantly, only one of the two alternatives needs to be satisfied to preserve the operation of the covenant. In the case of doubt, we direct Council's attention to the fact that the High Court recognises a covenant as a property right.[1] Accordingly, the High Court has also held that when interpreting statues, an interpretation that least interferes with property rights will always be preferred.[2]

The Chehab decision

Previous correspondence with Council also indicates that Council believes the decision of *Chehab v City of Canada Bay Council* [2002] NSWLEC 220 is authority that Council should or must vary the covenant in favour of the DA applicant. We submit that Council is not authorised by *Chehab* to so act.

[1] See *Cumberlong Holdings Pty Ltd v Dalcross Properties Pty Ltd and Others* (2011) 243 CLR 492, 503.
[2] Scott Nash, 'Interpreting legislation that adversely interferes with property rights' (2012) 27 *Australian Environment Review* 142, 143–4, quoting *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492 and *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

Chehab was an appeal to the Land and Environment Court ('the Court') where the question was whether the Court had the power to review a Council's decision to enforce a Council covenant. Ultimately, the Court found that it did have authority to adjudicate on Council covenant decisions (and we note as the Court has authority to adjudicate on many other kinds of Council decisions).

Importantly, the *Chehab* decision does not authorise Council to ignore the normal principles of equity that are at the core of covenant law. In fact, as far as the *Chehab* Court was concerned, if it were ever actually asked to adjudicate on a Council covenant decision, it would be taking evidence from those who are actually benefiting from the covenant as 'a relevant consideration'.[3] Hence, *Chehab* does not authorise Council to collapse planning law with principles of equity, and thus favour the burdened lot owner as if the covenant did not exist.[4] To be sure, *Chehab* confirmed that the legal efficacy of the Council covenant does not arise from the LEP, but from the covenant itself that is an instrument made under the Conveyancing Act.[5]

Finally, the Court confirmed that the weight to be given to a covenant in the context of a planning assessment is not a legal question, but rather a factual question.[6] In other words, the amount of weight given to the existence of a covenant depends on the specific circumstances and evidence that is shown to be relevant on a case by case basis.

We will now turn to the principles of equity as applicable to the specific circumstances and evidence that is relevant to the 555 covenant.

The relevance of property and trustee duties

The 555 covenant prohibits the building of more than one storey. The reality of this specific case is that the 555 covenant has, in fact, been functioning for decades to protect a valuable water view corridor for at least the following benefiting lot owners:

- 98 Regatta Road, Canada Bay
- 100 Regatta Road, Canada Bay
- 102A Regatta Road, Canada Bay
- 102B Regatta Road, Canada Bay
- 104 Regatta Road, Canada Bay
- 106 Regatta Road, Canada Bay
- 108 Regatta Road, Canada Bay

The positon of the above benefiting lot owners is that Council holds the 555 covenant, as a property right, on trust for those surrounding land owners who are beneficiaries of that property right.

Over the years, the continued preservation of the special view corridor as protected by the recording of the covenant on the Torrens register, has meant increased buy-in costs for

[3] *Chehab v Canada Bay Council* (2002) 123 LGERA 431, 441.
[4] See for example, Council's comments in *Agenda for Canada Bay Council meeting on 7 Nov 2006,* page 15 where there is a discussing DA314/2006 in the name of Chehab.
[5] *Chehab v Canada Bay Council* (2002) 123 LGERA 431, 440.
[6] *Chehab v Canada Bay Council* (2002) 123 LGERA 431, 441–2.

benefiting lot owners. Therefore, it would be unconscionable for Council to now decide to favour the burdened lot owner and vary the covenant.

Although the covenant also burdens other lots in the subdivision, the 555 covenant is exceptional because it uniquely protects a shared water view corridor, unlike other lots. A small number of other lots in the subdivision have built a second storey contrary to the restrictive covenant, but those buildings have not adversely impacted the view or property values of other benefiting lots, or at least nowhere to the same extent as the proposal to build two or three storeys on the 555 property. Also, to our knowledge the relevant benefiting lot owners may have consented in some cases.

The benefiting lot owners submit that in the absence of a consent or other reasons recognised in equity for varying a covenant, there is a legitimate expectation Council would enforce the 555 covenant.

Over the last few years, the benefiting lot owners have repeatedly petitioned Council to enforce 555 covenant as earlier DAs have been assessed by Council. By varying the 555 covenant to permit the building of more than one storey, the benefiting lot owners would suffer substantial damage to the amenity and financial value of their properties. Such damage to a large number of properties is disproportionate and unjust, compared to the financial enrichment that stands to be gained by the corporate owner of the 555 property and who already has a wholly uninterrupted water view, and who has had notice of the covenant.

If Council elects to vary the covenant in favour of the 555 corporate owner instead of the numerous citizens who in many cases have invested their life savings into their property, then those citizens' life savings will be suddenly depreciated by large amounts given the significance attached to water views in Sydney property valuations.

The benefiting lot owners have continued to hold a reasonable expectation that Council, as trustee of the 555 covenant, could be relied upon to enforce the covenant. In reliance of this reasonable expectation, the benefiting lot owners have made major decisions such as purchasing their benefiting lot in the first place, or electing to stay and invest their money and livelihood in their benefiting lot. It would be unfair and unconscionable for Council to actively vary the covenant and allow the construction of more than one storey at the 555 property, given the significant degree of detriment that will be suffered by each of the benefiting lot owners.

As a matter of conscience, Council should not vary the 555 to allow the buildings having more than one storey. A decision by Council to vary the covenant will eventually result in extinguishment of property rights without any statutory authority, and Council should always be reluctant to do so in accordance with long-standing principles against government resumption of property without just compensation.

The question of an 'engineering covenant'

Previous correspondence with Council indicates that Council believes the 555 covenant should be given a singular purposive construction, namely that that it is 'an engineering covenant'. We submit that such an approach is improper and will explain why.

The 555 covenant provides six separately listed restrictions, roughly being: (a) single storey dwelling, (b) brick exterior or similar if approved, (c) tiles or other if approved, (d) reinforced concrete raft foundations using approved design, (e) no paling fences; height of any other kind of fence must be approved, and (f) fence to be approved if no expense to Vendor.

Council previously reported for DA2014/0175 that it believes, at least insofar as the 555 covenant concerns a single storey dwelling restriction, that it is: 'due to the land being reclaimed from the foreshore, given the construction method specified in the terms of the Covenant.'[7] Although not stated in particularly clear language, it seems that Council is saying that since the 555 covenant includes construction method restrictions, and because the 555 covenant was created for properties on reclaimed land, then that must automatically mean the single storey restriction is no longer relevant.

Council should understand that the covenant was created in 1968 for a new subdivision that happened to be directly adjacent a newly established golf course along its entire length, and almost directly adjacent to Kings Bay along its entire width. So within this context, and also taking into account the restrictions around fence height and type, there is every reason to suppose a purpose of the 555 covenant would be to protect views and amenity.

Moreover, if the 555 covenant was solely an 'engineering covenant', then Council is effectively saying that the benefit to be enjoyed by benefiting lot owners, is solely in the protection against their neighbours building unstable foundations. This would seem to be more of a benefit to the burdened lot owner than the benefiting lot owner. A covenant is something that, by virtue of burdening one lot owner, benefits another lot owner. It is really hard to see why a covenant, taken as a whole, would serve the interests of the burdened lot owner more than the interests of the benefiting lot owners. The conclusion is that Council cannot be correct when it asserts the 555 covenant is solely an 'engineering covenant'.

In any event, Council should be aware of recent judicial authority that instructs 'a reluctance to look beyond the fact of the register when construing the scope of a registered interest' such as a restrictive covenant.[8] Council's behaviour is further problematic because it cannot provide any real substantiating evidence about what those intentions may have been.[9]

We turn to another aspect of the Council's assessment of the 555 covenant where Council states:

> 'there are now many examples of two storey dwellings in close proximity to the site and also three and four storey residential flat buildings further up the hill along the western side of Regatta Road. Given the Council's current planning controls which allow for two-storey development within the designated R2 Low Density Residential zone, the historical covenant in the current planning context is considered to be overly restrictive and inequitable'.[10]

[7] Council Agenda for meeting held on 7 October 2014 (reproducing page 38-9 of Council Agenda for meeting held on 5 August 2014), 70–1 where the 555 covenant is discussed for DA 2014/0175.
[8] Peter Butt, 'The Inappropriateness of Going Beyond the Text of Restrictive Covenants' (2011) 85 *Australian Law Journal* 11, 11, quoting *Miller v Evans* [2010] WASC 127 and *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528.
[9] See email from Tony McNamara (Director of Planning, Canada Bay Council) dated 2 May 2017 to Stella Axiak.
[10] See page 70-1 of *Council Agenda for meeting held on 7 October 2014* (reproducing page 38-9 of Council Agenda for meeting held on 5 August 2014).

The fact there may be a small number of two storey dwellings in the same subdivision has already been discussed. The fact that there are two storey dwellings and residential flat buildings outside the subdivision is not relevant because the 555 covenant continues to add value to the benefiting lot owners.[11] There is no implied release due to a change in the neighbourhood, and Council should refer to the principles of equity when exercising its discretion in this area. Council has at its disposal far greater legal resources than we have, and is expected to deliver legally sound and fair decisions based on their duties of due care and diligence.

Conclusion

While we recognise that Council has the power to vary the 555 covenant, we expect Council will exercise its discretion with propriety, transparency and accountability. If not, then Council should anticipate the possibility of further action being taken.

In the context of the present, and any future DA that becomes potentially approvable under planning legislation, we submit Council is obliged to enforce the restrictive covenant under the general law including principles of equity, and having regard to its duty as trustee of a property right. We also submit the covenant for DA 87/2014 has not been validly varied or suspended.

Alternatively, if the building design for the present or any future DA becomes potentially approvable under planning legislation, then Council must not withhold relevant legal and factual information from voting Councillors, nor should Council fail to correct any misconceived views held by any individual Councillor. Otherwise, Council exposes itself to accusations of improperly influencing the outcome of the proceedings. In summary, the relevant legal and factual information includes:

(a) *Chehab* is not authority for Council to prefer modifying or releasing the covenant in favour of the burdened lot owner,

(b) Council's planning assessment is not to be conflated with Council's discretion to modify or release the covenant,

(c) Clause 1.9A of the LEP does not apply,

(d) the entire covenant does not automatically collapse because of a unsubstantiated presumption about geotechnical engineering improvements since 1968,

(e) the covenant is a recorded property right that has in fact been protecting a view for decades for the benefit of various neighbouring lot owners,

(f) Council is holding the covenant as a property right on trust for at least seven benefiting lot owners, and those beneficiaries have been and are hereby repeating that Council should enforce the covenant at least insofar as the one storey restriction is concerned, and

[11] See *Chatswoth Estates Co v Fewell* [1931] 1 Ch 224 and *Westripp v Baldock* [1939] 1 All ER 279.

(g) Council is obliged to consider the fact that in equity, reduction of property values may be relevant for whether the Council decides to enforce or vary the covenant.

Stella Axiak and Jayne Andrews
on behalf of the benefiting lot owners at 98, 100, 102A, 102B, 104, 106 and 108 Regatta Road, Canada Bay

6 July 2017