

Can Councils Override Private Covenants?

If you thought you could quarantine your property investment from the adverse effects of neighbouring development by means of covenants with neighbours, then think again.

Recent court decisions show that local councils have powers to neutralise covenants on land, or even in leases, that are designed to protect a landowner or lessee from developments which impact upon their land. Not only that, but councils can use planning laws to assist developers to do so.

In one of a number of cases that has been before the courts recently, a shopping centre owner has been able to circumvent a lease covenant requiring a lessee's consent to a redevelopment proposal.

This power comes from section 28 of the Environmental Planning and Assessment Act 1979, which states, in effect, that to enable a development to be carried out in accordance with a council's Local Environmental Plan (LEP), a

Private covenants may not be as sacrosanct as people imagine, reveals Justin Young from Clarks Lawyers.

covenant affecting the development may be held not to apply.

Various judges in recent years have described this provision thus:

"It is designed to ... overcome impediments placed on development so as to avoid sterilisation of land. In that context, private rights may be adversely affected..." (Coles Supermarkets Australia Pty Limited - v - Minister for Urban Affairs and Planning (1996) 90 EGLRA 341).

"The statutory powers to control planning of those areas are not qualified or affected by private rights..." (North Sydney Council - v - Ligon 302 (1996) 185 CLR 470).

"Even though its application may appear to constitute an invasion of traditional conveyancing and landlord principles, section 28 can, in order to enable a development to proceed, interfere with proprietary rights." (Challister Limited - v - Blacktown

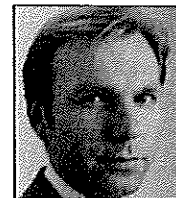
City Council (1992) 76 LGERA 10).

Perhaps one of the most wide reaching examples of the use of section 28 involved the recent redevelopment of the Sturt Mall in Wagga Wagga.

Coles and Kmart supermarkets were tenants in the mall with leases providing that "no alterations or variations to the centre shall ... significantly alter the location or configuration of the car parking facilities ... without the lessee's prior written consent."

The owner sought to do that, but Coles and Kmart refused consent. So the owner asked the court to declare that

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the lessee's consent was not required because the LEP (which stated that "any covenant, agreement or instrument imposing restrictions as to the erection or use of buildings...shall not apply") overrode the lease covenants.

The supermarkets prevented the works first time around, but only because the court held that the proposal did not relate to "buildings" (as stated in the LEP), only to a car park. In other words, the court stated that, if the LEP had been worded differently, the lessees' rights under their leases would be overridden.

According to the record of judgement, the owner then had discussions with the council as to how the LEP might be improved to enable the car park works to proceed. Shortly after, the council amended the LEP in that way. The draft LEP went through the usual

public consultation process but, other than that, the supermarkets were not consulted.

The matter came back before the court and ultimately the redevelopment went ahead, even though the supermarkets had refused the consents that the owner was required to obtain under the leases.

It is therefore crucial to ensure not only that appropriate covenants, easements and other agreements with adjoining owners and other interested parties are properly in place, but to research carefully the terms of any LEP and other relevant instruments having an effect on your property.

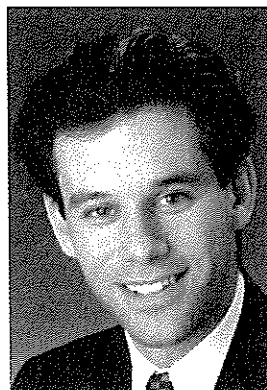
However, as the Sturt Mall case shows, there is no safety in that course of action when an LEP can be amended or altered without reference to you. ■

NEW VICE PRESIDENT

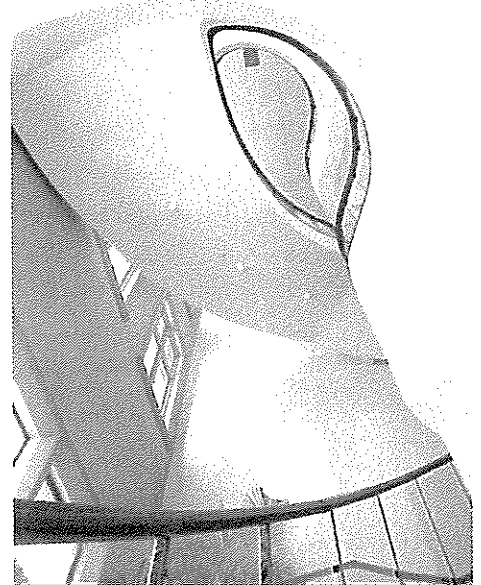
Tony Karp has been appointed as a new Vice President of the Property Council's NSW Division.

Tony is the executive vice president of corporate finance at Jones Lang LaSalle Hotels and chairs the Property Council's NSW Tourism Committee.

He joins the Division's other office bearers, Louise Joslin (President), Rod Leaver (Vice President/Treasurer) and Mark Davidson (Immediate Past President).



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