

Covenants

The subdivision within which the site is located is the subject of an 88b Instrument that contains a number of listed restrictions. A number of the submissions received in objection to the development application made reference to the restrictive covenants on the land and argued that the proposed place of public worship was in breach of the covenants.

The sections of the 88b Instrument that are specifically referenced by the objectors are detailed in the extracts below:-

3. Terms of easement, profit à prendre, restriction, or positive covenant severally referred to in the plan.

Main Building and Garage and Lots Generally

1. (a) No more than one main building shall be erected or allowed to remain on any one lot.
- (b) No main building shall have a floor area of less than 140 square metres under the main roof exclusive of any verandahs, carports or garages.
- (c) No main building or garage shall be constructed of a material other than brick, brick veneer, stone, hebel block or panels, 'weathertex' or similarly treated timber or reconstituted timber weatherboards, cement block or concrete construction with slate, tile or steel sheet roof.
- (d) No main building or garage shall be erected unless such building has a minimum floor height of 193.4 metres on the AHD datum.
- (e) No building or improvement including, but not limited to, any swimming pool or tennis court shall be erected or allowed to remain outside the building envelope for such lot.
- (f) No advertising signs or awnings shall be erected or allowed to remain on any lot other than street numbers and house names which shall not exceed 60 centimetres x 30 centimetres in size.
- (g) No main building shall be used or allowed to be used for any purpose other than as a private dwelling house and shall not nor shall any part thereof be used or allowed to be used for a residential unit, strata unit or flat.

- (h) No lot or building or any part thereof shall be used or allowed to be used for any noxious noisome or offensive trade or calling.
 - (i) No building or improvements including, but not limited, to any swimming pool or tennis court shall be constructed without the proprietor of the lot obtaining a soil test for such lot and the registered proprietor of such lot agrees to comply with any conditions emanating from such report and further agrees to release the Trustees of the Roman Catholic Church for the Diocese of Wagga Wagga for any claim arising from the use of fill as aforesaid.
2. No building (other than a main building or garage) shall:-
- (a) Be or be allowed to remain constructed of material other than brick, brick veneer or steel sheet.
 - (b) Have a roof constructed or allowed to remain construction of material other than tile, slate or steel sheet.
 - (c) Have or allowed remaining with a floor area greater than 70 square metres other than in the case of a garage.
 - (d) Exceed at any point or allow any point to remain in excess of 4.5 metres in height above ground floor level.

The 88b in this instance is one that was created by the developers (Catholic Church) at the time of subdivision. The developer has an impression of how future developments will occur across the subdivision and applies specific restrictions to suit such a viewpoint. However, these restrictions do not have the power to override planning legislation and therefore are not a consideration during the assessment of development applications.

Clause 1.9A of the Wagga Wagga Local Environmental Plan 2010 specifically deals with this matter and clarifies as follows:-

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,

As noted in part (2) any Council imposed covenants continue to apply. When Council imposes a covenant within an 88b instrument it is ordinarily to protect the environment and as such must be taken into account when assessing a development application. This may include a range of different matters such as minimum finished floor levels for buildings within flood affected areas, compliance with land and management plans, access restrictions and building envelopes.

In the subject development application the following restrictions are ones imposed by Council and these have been taken into account during the assessment. The 88b instrument

authorizes Council to release, vary or modify any of the restrictions or positive covenants noted in the section below. This is the normal practice within any 88b instrument that Council imposed covenants can be varied, modified or uplifted by Council.

2. **Terms of easement, profit à prendre, restriction, or positive covenant sixthly referred to in the plan.**

- i. The maximum height of any building or garage, including any part of the roof and excluding any service vent, chimneys and television antenna shall be no higher than 6.75 metres above natural ground level.
- ii. All buildings shall be located within the designated building envelopes.
- iii. Vehicular access to Lot 7 is from Gregadoo Road within 4m of the western boundary of Lot 6.
- iv. Vehicular access for Lots 1-6 inclusive is restricted to within 4 metres of the common boundary indicated by (AC) on the Deposited Plan.
- v. Fences on any boundaries that border a public footpath namely those linked to Lots 16, 17 and 30 shall be built of translucent material above the height of 1.2 metres.
- vi. The details of any boundary fences that border open space shall be submitted for approval with the development application for each dwelling. The boundaries shall ensure there is a positive relationship between the dwelling and the open space, solid boundaries will not be considered acceptable.