

**11 GOTEMBA ROAD
BELL POST HILL**

**RFI RESPONSE – LEGAL
REPORT – S60(2)
PP-1075-2025**

9 APRIL 2026

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1. INTRODUCTION

This report is prepared in support of an application for a planning permit in accordance with the *Planning and Environment Act 1987 (Act)*, and pursuant to the Greater Geelong Planning Scheme (**Scheme**), for the land at 11 Gotemba Road, Bell Post Hill (**Subject Land** or **Land**).

The Land is more particularly known as Lot 27 on Plan of Subdivision 348452W. We act on behalf of [REDACTED] being both the registered proprietor of the Land and the permit applicant. The permit application PP-1075-2025 (**Application**) proposes the construction of two dwellings on the Land and the corresponding variation of the single-dwelling restriction contained in Covenant U370026L (**the Covenant**).

This statement has been prepared in response to the amended Request for Further Information letter (**RFI letter**) prepared by City of Greater Geelong (**Council**), dated 4 March 2026.

Item 6 of the RFI letter requires:

6. A written statement outlining the reason for the removal or variation of the covenant and whether the removal or variation is likely to have a detrimental impact on the surrounding area. The statement must address the decision guidelines to vary a covenant under Section 60(2) of the *Planning and Environment Act* that require an assessment in regard to whether any beneficiaries are likely to suffer the following in relation to the variation:

- a. Financial loss
- b. Loss of amenity;
- c. Loss arising from change to the character of the neighbourhood;
- d. Or any other material detriment.

This statement will also provide the information requested by Council in items 2 – 4 of the RFI letter, namely:

2. A letter from a suitably qualified professional in the field of property law (such as a Property Lawyer or Solicitor). The letter must confirm the covenant exists and include a list of benefiting land.
3. A map of the beneficiaries of the Covenant.
4. A copy of the original 'parent' title from which the subdivision was created and a copy of the plan of subdivision.

1.1 APPLICATION SUMMARY

The technical detail of the proposed development is comprehensively explained in the documents that accompanied the Application. This report will not repeat at any great length what is stated in Application materials already provided to Council. Rather, it will focus on the history and context of the Covenant, identification of the Covenant's beneficiaries, and the elements of the applicable statutory test for the Covenant's variation as they interact with relevant particulars from the Application.

In broad terms, our client seeks to construct two dwellings for owner occupation. This will require the variation of the restrictive covenant currently registered on the title of the Land. The element of the

Application seeking variation of the Covenant relates to the permit 'trigger' under clause 52.02 of the Scheme, which provides that:

A permit is required before a person proceeds:

- Under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction, or vary or remove a condition in the nature of an easement in a Crown grant.

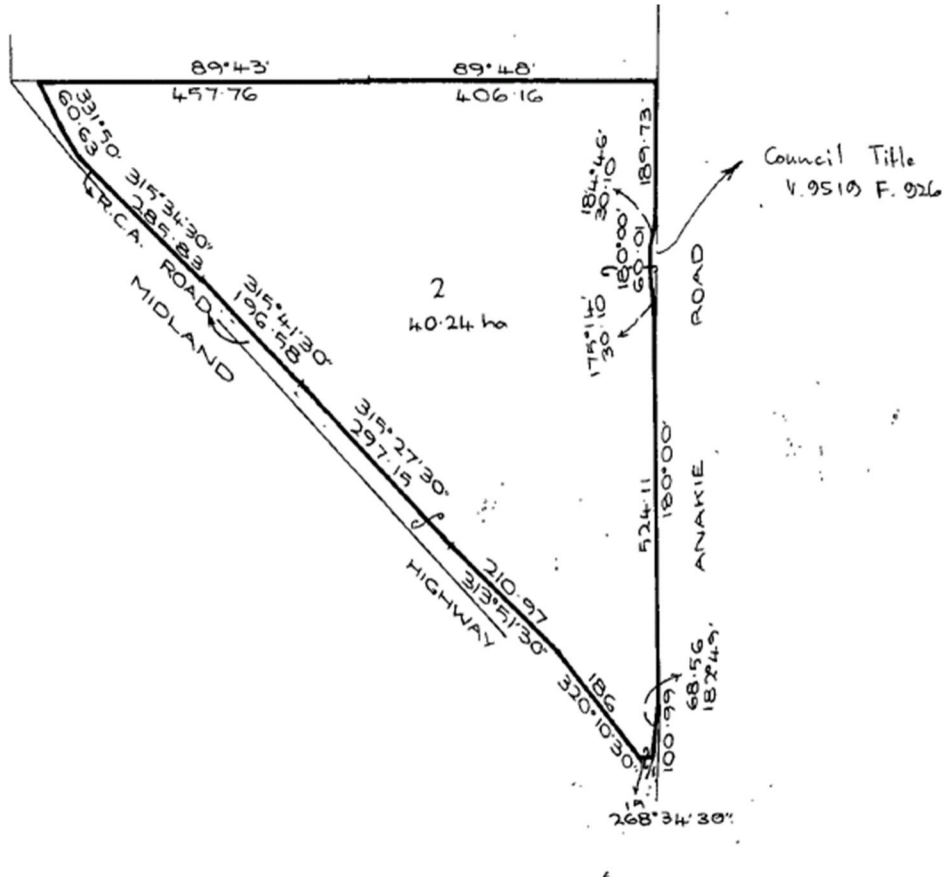
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The dwellings are intended to be occupied by two generations of our client's family. The Land is currently vacant. To the extent that this report engages with the planning merits of the Application, it will only do so in a manner relevant to the statutory determination Council must make under the Act in relation to that element of the Application that concerns the variation of the Covenant.

2. CONTEXT

2.1 SUBDIVISION HISTORY

The parcel of land that eventually became Plan of Subdivision 348452W was jointly owned from 1985 by three registered proprietors. The parcel was known as Lot 2 on Plan of Subdivision 66821 or Volume 9657, Folio 181. The land was later sold to the Uniting Church in Australia Property Trust, with the transfer registered on 30 January 1990.



The land known as Lot 2 on PS 66821.

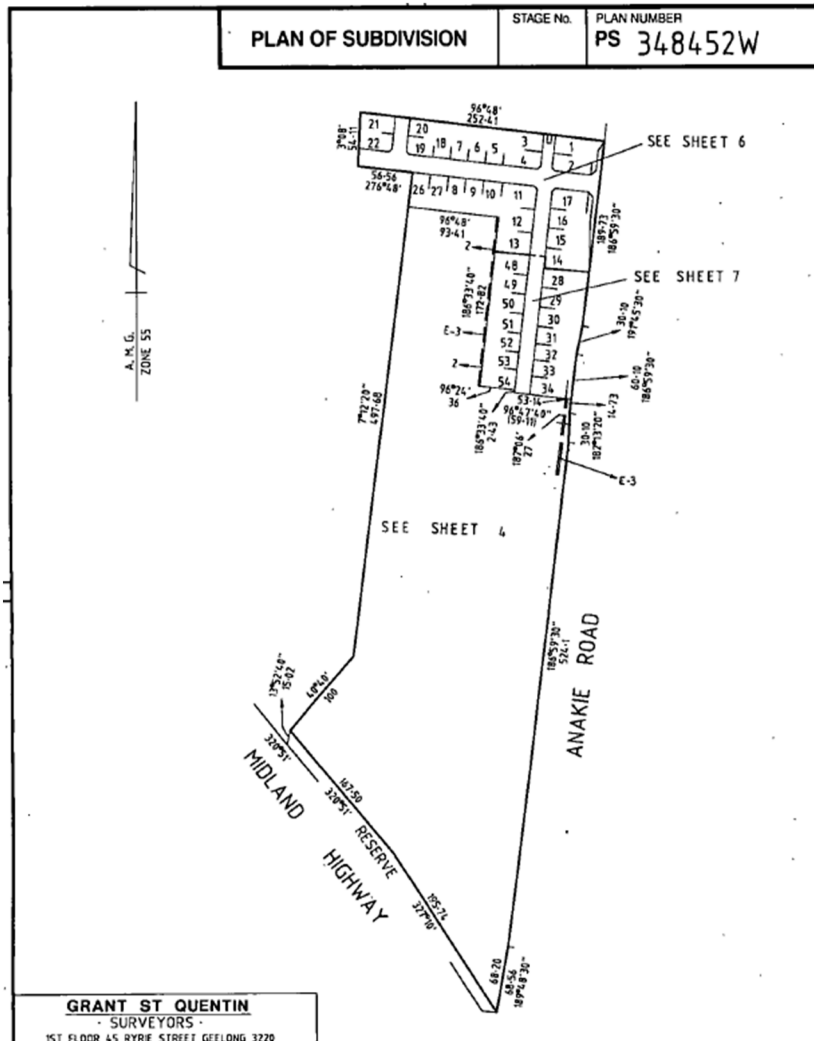


On 11 June 1993, the title was cancelled by Plan of Subdivision 316307M. A portion of the land became Lot A on the new plan of subdivision, more particularly known as Volume 10119 Folio 033, before being further subdivided in 1995 and becoming Lots 1 and 2 on Plan of Subdivision 337793F, or Volume 10236 Folio 201. On 4 August 1995, both lots were transferred to the proprietorship of Y [REDACTED]

On 15 February 1996, Lots 1 and 2 on PS 337793F were cancelled by the registration of a new Plan of Subdivision, becoming Lots 1 and 2 on PS PS346821C (Volume 10271 Folio 022 and Volume 10271 Folio 023 respectively). Volume 10271 Folio 022 was ultimately cancelled on 1 August 1996 by Plan of Subdivision 400001U, which remains the subdivision containing Kardinia International College.

Volume 10271 Folio 023, being Lot 2 on PS346821C, was purchased by corporate land developer Tarongo Land. The transfer was registered on title on 18 March 1996. On 11 July 1996, title 10271/023 was cancelled by current plan of subdivision, 348452W. A copy of the parent title of the subdivision, being Volume 10271 Folio 023, is attached at **Appendix A**, per Council's RFI request.

Plan of Subdivision 348452W (**Plan of Subdivision**) was developed in five stages, with lots transferred out of the Plan parent title at semi-regular intervals between late 1996 and early 2000. An extract of the current Plan of Subdivision is contained below, and a copy of the full Plan is attached at **Appendix B**.



Excerpt from current PS348452W.

2.2 COVENANT U370026L

The Covenant was registered alongside the original transfer of the Land out of the Plan of Subdivision. It was executed on 13 August 1996, affixed with the common seal of [REDACTED] and signed by each of the original transferees.

The terms of the Covenant are extracted as follows:

Creation and/or Reservation and/or Covenant:

The Transferee with the intent that the benefit of this Covenant shall be attached to and run at law and in equity with each and every lot of Plan of Subdivision number 348452W other than the lot hereby transferred and that the burden of this Covenant shall be annexed to and run at law and in equity with the said lot DOES HEREBY for himself, his Transferees, Executors, Administrators and assigns and as a separate covenant COVENANTS with the said Transferor and its transferees, successors and assigns and other registered proprietor or proprietors for the time being of each and every Lot on the said Plan of Subdivision other than the lot hereby transferred that the said Transferee, his Transferees, Executors, Administrators and assigns

Continued on Page 2

- (a) that they shall not at any time erect, construct or cause to be erected or constructed on the said lot hereby transferred or any part thereof a dwelling of which the construction does not have less than 75% of the external walls (excluding glass) of rendered masonry, brick or brick veneer PROVIDED HOWEVER that with the prior written approval of the Transferor the external walls of a dwelling may be constructed of other materials;
- (b) that at no time shall more than one dwelling be constructed on the subject land.

With regard to the Covenant's wording, properly construed, the Covenant:

- burdens the Land (the Land the subject of the Application);
- provides that the burdened Land must not be developed with a dwelling with less than 75% of external walls being constructed of masonry, brick or brick veneer; however
- provides that the burdened Land may be developed contrary to this 'building materials' restriction with the prior written approval of the Transferor, being Tarongo Land Pty Ltd; and
- provides that the burdened Land must not be developed with more than one dwelling.

Relevantly, the Covenant does **not**:

- impose any restrictions on the size, envelope or location of a dwelling on the Land; or
- restrict the construction of any outbuildings on the Land.

2.3 IDENTIFICATION OF BENEFICIARIES

As a preliminary step (ahead of any inquiry as to whether any beneficiaries to the Covenant would suffer material detriment consequential on the variation of the Covenant), it is necessary to first confirm the *identity* of the Covenant's beneficiaries.

Previous material submitted to Council in relation to this Covenant posited that the benefitted land was 'each and every lot of Plan of Subdivision 348452W', as per the Covenant's express wording.

However, subsequent research and careful analysis of title and transfer histories within the subdivision have revealed that this is not the case.

Importantly, not every lot within the Plan of Subdivision is a beneficiary of this particular Covenant. Further analysis follows.

No Building Scheme identified

The Covenant arises in the context of a plan of subdivision. The words of the Covenant purport that the Covenant benefits 'each and every lot'.

This is not, in fact, the case.

To outline why this is not the case it is first necessary to explain how different forms of restrictive covenants operate.

According to principles of property law applying to the interpretation of restrictive covenants, however, the Covenant would only benefit every lot in the subdivision **if** the Covenant (properly construed) forms part of a type of network of covenants, known in property law as a 'building scheme'.

Building schemes circumvent difficulties that arise from the intersection of the 'privity of contract' doctrine with the operation of restrictive covenants, which are essentially private agreements. If a restrictive covenant is attached to land forming part of a building scheme, the effect is that the covenant's benefit can pass to beneficiaries whose land has **already been transferred** out of the original plan of subdivision but **are not parties** to the original covenant.

The building scheme, in other words, allows a restrictive covenant's benefit to 'attach' to each and every lot in the subdivision – regardless of when it was transferred out of the parent title.

As succinctly explained in *Vrakas v Mills*:

Where the lots in a subdivision of land are all sold subject to a restrictive covenant, the Court may find that there has been a scheme of development, often called a building scheme. Where a scheme of development is established, **all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.**¹

Emphasis added

What a building scheme form of restrictive covenant achieves in legal terms is to set aside the doctrine of privity of contract.

The legal analysis undertaken in the preparation of this report indicates the Covenant is not a building scheme form of restrictive covenant.

In this case, the parties to the Covenant are the original transferees of the Land, the transferor (Tarongo Land Pty Ltd), and their respective successors in title. Purchasers who had already become registered proprietors of individual lots within the subdivision by the time the Covenant was executed are not entitled to the benefit of the Covenant.

This principle is explained in *Xu v Natarelli* as follows:

[105] However, contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the covenant was made. Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their

¹ [2006] VSC 463.



successors in title) of the lots transferred out of the parent title, that is subdivided and sold, after the restrictive covenant was made.²

The elements of a building scheme are summarised in *Elliston v Reacher* as follows:

1. All lots in the Plan derive title under a common vendor;
2. The vendor originally laid out the subdivision for sale in lots subject to restrictions that were intended to be imposed on all the lots, and while the restrictions may vary in detail between lots, the restrictions are broadly uniform and consistent only with a building scheme;
3. These restrictions were intended by the vendor to be for the benefit of all the lots; and
4. Original transferees purchased their lots from the vendor on the understanding that the restrictions would endure for the benefit of the other lots included in the building scheme.³

In this case, critically, not all of the *Elliston* elements are satisfied.

Extensive title searches were undertaken in the preparation of this report. These reveal the presence of many restrictive covenants within the Plan of Subdivision. These wording of the prohibitions in these restrictive covenants vary greatly (different restrictions have imposed for different lots that once formed part of the parent title).

Some lots within the subdivision are subject to a 'single-dwelling' restriction in terms that are identical to the Subject Land. However, some are subject to a 'maximum height' restriction. Some lots are subject to both a 'single-dwelling' and 'height' restriction, while others are subject to neither.

The proper conclusion to be drawn from this is that the common vendor did not intend to impose identical restrictions on all the lots, and the restrictions cannot be said to be broadly uniform. This is contrary to *Ellison* element two.

As to the intention of the vendor (element three), there is nothing identifiable in the Plan of Subdivision, or its associated instruments, that notifies potential purchasers of the existence of a building scheme. In *Vrakas v Mills*, it was said that in order to bind a transferee to the terms of a building scheme restrictive covenant, the register must contain notice of the scheme's existence.

For these reasons, no building scheme exists in relation to the Plan of Subdivision.

As such, the doctrine of privity of contract applies, and the beneficiaries of the covenant are only those lots that **remained in the ownership of the covenantee**, being Tarongo Land Pty Ltd, at the time the covenant was executed on 13 August 1996.

As explained in *Randell v Uhl*:

[57] It is common ground between the parties that if there is no building scheme, then certain lots in the subdivision do have the benefit of the Covenants, **namely those lots that remained untransferred out of the Head Title at the time of the execution** of the transfers of Lots 12 and 13, respectively; **but that those that were transferred out of the Head Title before Lots 12 and 13, respectively, do not have the benefit of the Covenants**. This is because it is well established that the original covenantee and his successors cannot enforce a restrictive covenant against a successor in title of the covenantor unless they retain land which is benefited by the covenant. Thus, a vendor of land in respect of which he takes the benefit of a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own at the time of the covenant, unless the covenant is given as part of a building scheme. If the existence of a building scheme is established, the defendants do not have to prove that the benefit of the Covenants was

² [2018] VSC 759.

³ (1908) 2 Ch. 305.



annexed to their land. **The date of the execution of the transfer is selected as the relevant date** because it is only in equity that the burden and benefit of the Covenants run with the Land, and in equity the date on which the transfers were executed is the relevant date, not registration.⁴

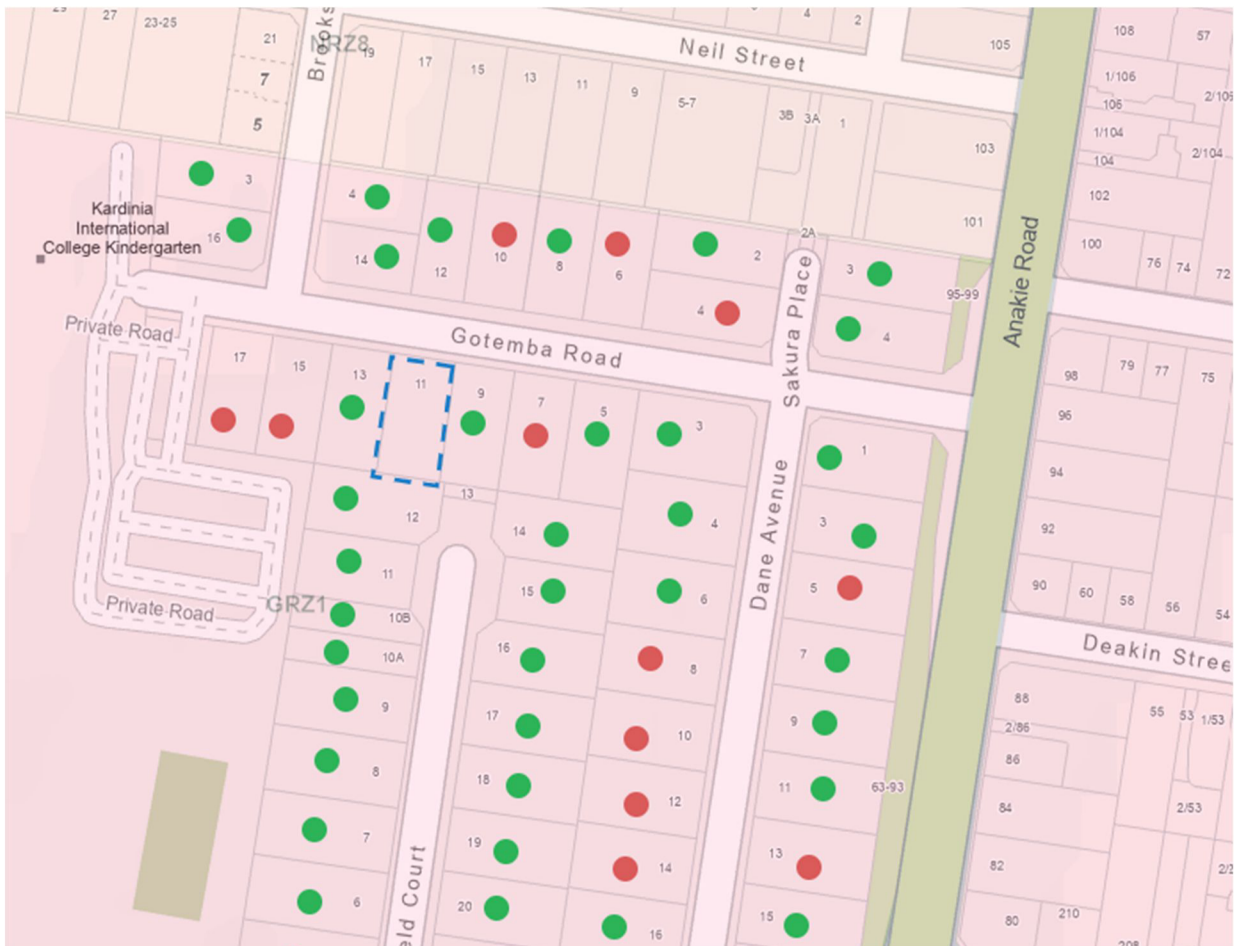
emphasis added

Map of beneficiaries

Having excluded the possibility of a building scheme, a title history search was conducted for every lot within the plan of subdivision to ascertain which lots remained in the ownership of ██████████ Ltd at the time the Covenant was executed. The cadastral maps of the subdivision that follow indicate which lots benefit from the restrictions in the Covenant, and which lots do not.

For ease of reference, all lots marked with a 'green dot' are beneficiaries of the Covenant. All lots marked with a 'red dot' are not beneficiaries of the Covenant. The Land is marked with a blue dashed outline.

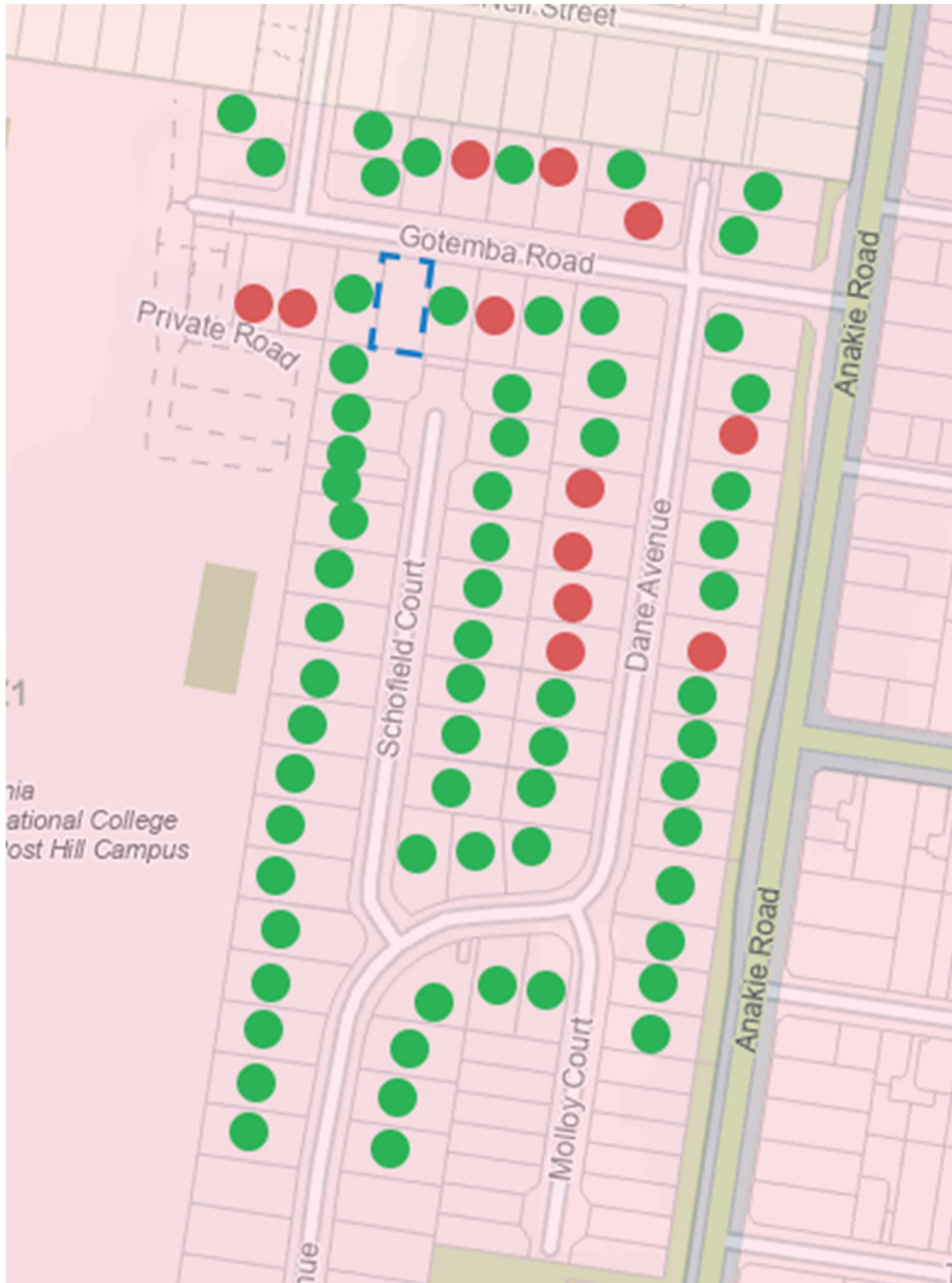
For completeness, included at **Appendix C** is a full table containing all the property addresses within the subdivision and their status as a beneficiary (or otherwise).



Land and immediate surrounds.

⁴ [2019] VSC 668.





Entire subdivision (including area shown in plan on page 8).

3. STATUTORY TEST

Section 60 of the Act contains two tests for the variation or removal of a restrictive covenant. Where the covenant was created on or after 25 June 1991, the 'threshold' test contained at section 60(2) of the Act applies. This is a less restrictive test than is contained at section 60(5), which applies to covenants created before 25 June 1991.

Notably, the more strenuous test at section 60(5) draws specific attention to objections made by any beneficiaries of the covenant. The test at section 60(2) does not do this – a beneficiary's objection is



not elevated to the same status as in section 60(5), but merely goes 'into the mix' of the material before the decision-maker.⁵

Section 60(2) of the Act applies to this Covenant (as described earlier, this Covenant was created in 1996). Section 60(2) provides the following:

60 What matters must a responsible authority consider?

...

(2) The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer—

- (a) financial loss; or
- (b) loss of amenity; or
- (c) loss arising from change to the character of the neighbourhood; or
- (d) any other material detriment—

as a consequence of the removal or variation of the restriction.

No definitions are provided in the Act for the terms used in sections 60(2)(a) to (d). Therefore, the ordinary meanings of these terms apply.

This report will address each element in turn.

This report concludes that Council should approve our client's permit application for the Covenant's variation because doing so will not fall foul of the section 60(2) threshold test. The outcome of the variation is sufficiently certain. As a permit application is concurrently being lodged for development of the Land, a meaningful analysis of potential material loss by any beneficiaries can be undertaken.

Council's attention is drawn to Tribunal Member Whitney's summary of the section 60(2) test provided in the decision of *Strathcona Baptist Girls Grammar School Ltd v Boroondara CC* [2024] VCAT 1162 (**Strathcona**) as follows:

- (a) the starting point in interpreting the threshold statutory test is the wording in s 60(2), considered in the context of the Act;
- (b) the identified losses or detriments suffered by the benefitting landowners are losses or detriment to the land that benefits from the Restrictive Covenant as opposed to the individual property owners in their personal capacity;
- (c) I need to be satisfied that the proposed removal of the Restrictive Covenant is not statute barred by s 60(2) on the balance of probabilities, mindful that what might be required to satisfy me on the balance of probabilities will be relative to the consequence/importance of the decision but also mindful that the high bar set by the test in s 60(2) of the Act, in effect, goes some way to *addressing* the consequence/importance of the decision;

⁵ *Strathcona* at 166



- (d) the making of an objection by a benefitting landowner is not, in and of itself, determinative of the threshold statutory test even if the objection is made in good faith. Rather, any objection made by a benefitting landowner goes 'into the mix' of material before the decision-maker and contributes to the determination that is made 'on the balance of probabilities';
- (e) the specified losses in s 60(2)(a), (b) and (c) of the Act must be 'material' losses in the sense that they are objectively real as compared with fanciful, trivial or inconsequential;
- (f) the assessment of the consequence of the removal of the Restrictive Covenant is properly to compare what is permitted to occur on the Land with the Restrictive Covenant in place and the identified losses or detriment that might occur if the Restrictive Covenant is removed. That is, a comparison of the situation 'as is' compared with 'after' the Restrictive Covenant is removed;
- (g) the 'as is' and 'after' analysis is to be done on the basis of the Scheme as it presently stands;
- (h) the absence of an associated permit application for use or development of the Land is not a bar to a permit being issued for removal of the Restrictive Covenant. Rather, whether the threshold statutory test is met turns on the facts and circumstances of the Restrictive Covenant, the physical and planning context of the Land and the physical and planning context of the benefitting lots; and
- (i) the subjective intention behind the creation of the Restrictive Covenant beyond what is disclosed by the wording of the Restrictive Covenant is not relevant, nor is the fact that it is a private agreement entered into by persons to give effect to their own private interests.⁶

3.1 FINANCIAL LOSS

For the purposes of section 60(2), any material financial losses suffered by beneficiaries must be attached to the *land* benefitting from the Covenant, as opposed to the landowners in their personal capacity.

This point was emphasised by Member Whitney in *Strathcona*. The Tribunal found that, because 'removal of the Restrictive Covenant would not change the internal characteristics of the benefitting properties', the 'individual market valuations' of the benefitting properties was **irrelevant**.

As explained by Member Whitney:

[271] Whilst at first blush it might seem unusual that a valuation was not undertaken of each beneficiary property, when one considers that the purpose of the evidence was not for market valuation purposes of the benefitting properties but to ascertain whether beneficiaries will be unlikely to suffer material financial loss, Mr Leech's approach is not unreasonable. This is because I accept that no matter what the starting point, or value, of each benefitting property, the exercise was to determine whether a benefitting property will be unlikely to suffer a material financial loss as a consequence of the removal of the Restrictive Covenant. This exercise does not require a market valuation to be undertaken of the benefitting property; it just requires an understanding of whether there will be a material financial loss to the value of the benefitting property (whatever it may be to begin with).

[272] I accept that in the circumstances, the driver of such material financial loss will be external factors such as a material loss of amenity or a material loss arising from a change to the character of the neighbourhood. If either of those things were present (or any other material detriment), that might negatively impact upon the value of a benefitting property. It would then need to be determined whether such financial loss would be 'material'.

⁶ Ibid at 253



With regard to the above, a market valuation of each lot benefitting from the Covenant is at best unnecessary and at worst could lead the responsible authority into considering an irrelevant consideration in the course of applying the section 60(2) test.

In the discussion to follow in this report, there is a focus on what is relevant: what it is that could be said to *change* for the benefitting land by reason of the Covenant's variation – namely, potential amenity impacts, traffic, and town planning. Our discussion follows.

3.2 AMENITY

Preliminary comments

When considering the possibility of any material loss to amenity, it is important to first note, per *Strathcona*, that merely being able to 'see a change' does not mean a loss of amenity.⁷ Change will certainly be observable on the Land because of the proposed development, but this does not in itself constitute a material loss of amenity.

Additionally, it is important to note the following comments in *Strathcona*:

[156] Because the losses or detriments are anchored to the benefitting lots, there is a spatial component to where the losses or detriments are experienced; that is, what is relevant is whether the loss or detriment is suffered at the benefitting land rather than in the area at large.

[157] So, for instance, I need to ask whether the apprehended loss of amenity will be experienced at a benefitted lot rather than at the Land. Similarly in relation to loss arising from a change to the character of the neighbourhood; this will be primarily assessed from the location of the benefitting lot, with lesser weight given to what might be experienced at the location of the Land.

[158] Where the burdened and benefitting lots are adjoining or in close proximity, these assessments might effectively be one and the same.

[159] However, where the burdened and benefitting lots are separated by some distance or by significant intervening features, these assessments might be quite different.

Many lots within the Plan of Subdivision are beneficiaries of the Covenant, notwithstanding that there are several lots within Gotemba Road which are **not** beneficiaries of the Covenant (refer cadastral maps provided at page 8 and 9).

The spatial context of the benefitted lots varies greatly. As explained in *Strathcona*, any loss of amenity must be experienced at the benefitted land, rather than at the Subject Land. Therefore, the assessment of amenity impacts will be 'quite different' depending on the benefitted lot.

For example, the lot known as number 38 Dane Avenue is a beneficiary of the Covenant. It is difficult to foresee any possible material detriment to the amenity of this lot, as evaluated *at the benefitted lot*, in circumstances where it is geographically remote from the Subject Land. The majority of benefitted lots under this Covenant exist in a similar context to one another – they are located on different streets or blocks, and there is no 'desire line' or logical requirement for the owners to 'pass by' the Land. The closest arterial road for these benefitted lots is Anakie Road to the east.

That said, the lot known as number 9 Gotemba Road immediately adjoins the Subject Land. It is appropriate to scrutinise any potential amenity impact to this lot quite carefully.

⁷ Ibid at 118

For these reasons, this statement focuses on amenity impacts as they relate primarily to benefitted lots located within Gotemba Road itself. In our view, this puts any potential amenity repercussions stemming from the Covenant variation at their 'highest', as any consequences of the variation will only diminish as one moves further away from the Subject Land.

'As is' and 'after' analysis

Strathcona establishes that any evaluation of material detriment, including to amenity, must be mindful of the Scheme as it presently exists.⁸ This is dubbed the 'as is' and 'after' approach.

The Land is zoned General Residential per the Scheme. 'As is', with a total lot area of approximately 680 square metres, no permit would be required under the Scheme to construct one dwelling on the lot provided the requirements of Clause 54 and minimum garden area are satisfied. Such a development, provided it is of a single dwelling only, would not offend the Covenant if at least 75% of the external walls (excluding glass) were constructed of rendered masonry, brick or brick veneer.

It is accepted that this approach would not be favoured in relation to the assessment of the planning merits for the purposes of the permit trigger created by the zone, but it is an appropriate approach in relation to the permit trigger created by Clause 52.02.

By reference to aerial and street photography of Gotemba Road, it is clear that the area is characterised by large dwellings that cover a substantial portion of their lots. These dwellings are not uniform in their construction or design, but one unifying characteristic is almost all are built close to the title boundary (at least in part). Car parking is consistently provided by driveways and garages on individual lots, with untimed street parking also available.



Aerial image of Gotemba Road.

⁸ At [267].



Street view image of 9 Gotemba Road.



Street view image of 13 Gotemba Road.





Street view image of 12 Gotemba Road.

Therefore, the 'as is' status quo of Gotemba Road is that a very large dwelling could be constructed on the Land, without necessarily a need for a permit under the Scheme, with a built form to title boundary virtually indistinguishable from what is currently proposed under the Application— notwithstanding the built form would contain only one dwelling, rather than two.

With parking for vehicles to be accommodated on site, there is no basis to conclude that a material loss of amenity will occur through the variation of the Covenant as compared to development that could occur with its retention in its current form. What is currently permitted on the Land, per the Scheme, is not materially different from an amenity perspective from what will be permitted under the proposed variation of the Covenant.

This conclusion is substantiated by analogous case law. Returning to *Strathcona*, Member Whitney commented on the usefulness of case law comparisons when dealing with restrictions drafted in similar terms:

[254] Clearly, every case turns on the wording of the particular restrictive covenant. However, if the restrictive covenant in question is of a broadly standard form, dealing with a commonly restricted type of use or development, then parallels can be drawn between the interpretation of different covenants. For instance, if the particular restrictive covenant prevents the use and development of a lot for more than one dwelling, or, the development of a lot with a dwelling of less than 75% brick construction, a decision-maker might be assisted by a comparison with various other cases that have dealt with restrictions of this nature.

With this in mind, we draw Council's attention to Senior Member Baird's recent decision in *Kennedy v Banyule CC*.⁹ This case also concerned the variation of a single-dwelling covenant, with Senior Member Baird ultimately forming the view that benefiting owners were unlikely to 'suffer financial loss, loss of

⁹ *Kennedy v Banyule CC (Corrected)* [2025] VCAT 851.

amenity, loss arising from change to the character of the neighbourhood or any other material detriment as a consequence of the variation of the covenant'¹⁰. Amenity was analysed as follows:

[71] I do not consider there to be any material amenity impacts arising from traffic associated with a second dwelling. In addition to the fact that there is sufficient room on the subject land to accommodate multiple vehicles to serve both dwellings, increased traffic would be insignificant and would not affect the operation of the surrounding road network. Further, the subject land is close to the intersection between the two legs of Chappell Drive. These legs are no-through roads. Hence, residents of a second dwelling will not pass the majority of benefitted lots to exit and enter Lot 224.

[72] The adequacy of on-street parking for existing and future residents is referred to in objections. While there are limitations associated with the court setting, more parking demand for on-street spaces could occur today when any existing dwelling has an increased number of occupants who have a vehicle and/or when there are visitors to houses in the area.

[73] Noise for the adjacent lot owner to the east from a driveway to a rear dwelling would be limited. This side access could be used at any time for one dwelling on the land for parking of vehicles or other activities. It may be noticeable to a neighbour but that does not equate to material detriment.

[74] Noise associated with people living in a second dwelling on the land will be residential noise as 'part and parcel' of living in a residential suburban area. Neighbours can create varying levels of noise, which is regulated under other legislation. Further, a second dwelling facing internally to courtyard with rear open space abutting the northern road reserve (as shown in the dwelling plans for the building that is intended to be developed) would limit noise transmission from the land if that design is pursued.

NEIGHBOURHOOD CHARACTER

As explained in *Strathcona*, it is the external presentation of a building that has the most effect on neighbourhood character.¹¹ This Covenant does not itself prevent development or construction on the Land. Arguably, the component of the Covenant that most protects neighbourhood character is the clause about building materials, which is not proposed to be varied under the current Application.

Overall, the character of this neighbourhood is similar to that described in *Kennedy v Banyule CC*:

[43] The objective purpose of the covenant is to maintain a single dwelling character by limiting each lot to one dwelling. Its effect has been to prevent multi-dwelling development and further subdivision. One objector describes 'the spacious, single-dwelling character of the area, which has long been an important feature of this area'.

[44] This character is evident from the public realm of Chappell Drive and Tevlin Court where there are one and two storey single detached homes. **Many homes are substantial in scale and extent. I find that the presence and impression of built form and the neighbourhood character are influenced by a range of factors including the slope and variable lot sizes. Dwellings do not present uniformly to the public realm in terms of front and side building setbacks, nor how front setbacks are treated. There are few front fences and an open presentation of built form to the street.** The streets have some large street trees while the south side of Chappell Drive has a wide grassed reserve, with two benefitted lots to the south of that reserve.

[45] **There is not a uniform or consistent 'backyard' character. Often benefitted lots have outbuildings and structures; some are seen from the public realm because of the slope**

¹⁰ At [81].

¹¹ 268.

and gaps between dwellings. Those outbuilding are, however, generally modest in form and scale, such as those on lots immediately abutting the rear of the subject land. The landform, fencing, houses and sometimes vegetation influence how much built form can be seen from adjacent rear yards.

[46] Some dwellings have a large footprint and extend deep into their lots. Evidence of these observations can be appreciated in the aerial image below (Figure 3). An example is the dwelling at No. 3 Tevlin Court (Lot 217) as it presents to No. 8 Healy Court (Lot 209). Generally, larger lots contain dwellings with more spacing around them, and to their rear, compared with the smaller lots and some corner lots. There is also a presence of side and rear planting which can mask what could otherwise be seen alongside lot boundaries. There is no evidence of lots with two dwellings.

...

[53] I have referred to elements of the existing neighbourhood character both as appreciated from the public realm and observed in a rear yard context.

[54] I appreciate how the objections have referred to the locality, however it is also relevant on an objective analysis that:

- there is an appreciable variation in lot sizes, as the applicant's submission shows, and is seen in photographs and on inspection.
- there is an appreciable character involving large dwellings that often extend deep into their lots, with varied outcomes given the range of lot sizes.
- with respect to building site coverage:
 - there is building site coverage of more than 45% on seven of the benefitted lots (being Lots 205, 208, 211, 213, 214, 221, 222, 223 and 226).
 - based on a figure of 40% cited in the local policy^[22] the number of lots with existing site coverage over 40% is close to one half of the benefitted lots (being Lots 201&202, 204, 205, 208, 211, 212, 213, 214, 215, 216, 217, 221, 222, 223 and 226).
 - the existing building site coverage of the subject land at Lot 224 is 17.19% and, with the proposed plans, 31.8%.

[55] The size and orientation of Lot 224 can accommodate a tandem two dwelling development that respects the neighbourhood features and character. It can retain a spacious built form character with sufficient area for planting and growing new vegetation, albeit on one existing larger lot. This would not be the case with a rear two storey house – a single storey restriction in a varied covenant is, in this case, important.

[56] I do not consider that there will be appreciable impact on the broad pattern of buildings and dwellings, nor the expectation of quiet and private surroundings as is said to result from the restriction of one dwelling per lot.

As shown in the image that follows, the immediate neighbourhood contains some vacant lots and developed lots, with the developed lots occupied mostly (but by no means exclusively) with single dwellings with substantial footprints, often constructed close to title boundary. Most dwellings in the neighbourhood have a likewise large footprint extending deep into the lots. Although the lots sizes are broadly consistent, there is little uniformity in how dwellings present to Gotemba Road.

The physical footprint and built form of our client's proposed development, despite internally constituting two dwellings rather than one, would not be out of place or contrary to the character of this area.

The development proposal generally performs well against the core purposes of the General Residential Zone, which include (as Council will be aware):

To encourage development that is responsive to the neighbourhood character of the area.

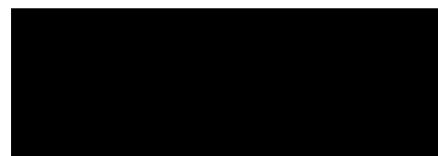
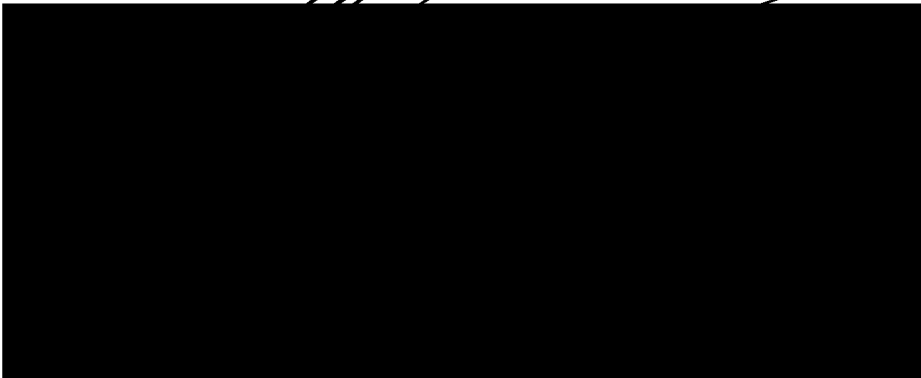
To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.



Aerial image of neighbourhood.

6. CONCLUSION

The Application performs well against the threshold test contained in section 60(2) of the Act, with no basis for considering there is a likelihood of material detriment to any beneficiary of the Covenant. Therefore, the Application to vary the Covenant should be approved by Council.



Not Benefitted	Benefitted
4 Gotemba Road, Bell Post Hill Vic 3215	2 Sakura Place, Bell Post Hill Vic 3215
6 Gotemba Road, Bell Post Hill Vic 3215	3 Sakura Place, Bell Post Hill Vic 3215
10 Gotemba Road, Bell Post Hill Vic 3215	4 Sakura Place, Bell Post Hill Vic 3215
7 Gotemba Road, Bell Post Hill Vic 3215	8 Gotemba Road, Bell Post Hill Vic 3215
5 Dane Avenue, Bell Post Hill Vic 3215	9 Gotemba Road, Bell Post Hill Vic 3215
13 Dane Avenue, Bell Post Hill Vic 3215	5 Gotemba Road, Bell Post Hill Vic 3215
8 Dane Avenue, Bell Post Hill Vic 3215	3 Gotemba Road, Bell Post Hill Vic 3215
10 Dane Avenue, Bell Post Hill Vic 3215	4 Dane Avenue, Bell Post Hill Vic 3215
12 Dane Avenue, Bell Post Hill Vic 3215	6 Dane Avenue, Bell Post Hill Vic 3215
14 Dane Avenue, Bell Post Hill Vic 3215	7 Dane Avenue, Bell Post Hill Vic 3215
	3 Dane Avenue, Bell Post Hill Vic 3215
	1 Gotemba Road, Bell Post Hill Vic 3215
	12 Gotemba Road, Bell Post Hill Vic 3215
	14 Gotemba Road, Bell Post Hill Vic 3215
	4 Brookshaw Street, Bell Post Hill Vic 3215
	3 Brookshaw Street, Bell Post Hill Vic 3215
	16 Gotemba Road, Bell Post Hill Vic 3215
	13 Gotemba Road, Bell Post Hill Vic 3215



	9 Dane Avenue, Bell Post Hill Vic 3215
	11 Dane Avenue, Bell Post Hill Vic 3215
	15 Dane Avenue, Bell Post Hill Vic 3215
	17 Dane Avenue, Bell Post Hill Vic 3215
	19 Dane Avenue, Bell Post Hill Vic 3215
	21 Dane Avenue, Bell Post Hill Vic 3215
	23 Dane Avenue, Bell Post Hill Vic 3215
	2 Molloy Court, Bell Post Hill Vic 3215
	3 Molloy Court, Bell Post Hill Vic 3215
	4 Molloy Court, Bell Post Hill Vic 3215
	16 Dane Avenue, Bell Post Hill Vic 3215
	18 Dane Avenue, Bell Post Hill Vic 3215
	20 Dane Avenue, Bell Post Hill Vic 3215
	22-24 Dane Avenue, Bell Post Hill Vic 3215
	26 Dane Avenue, Bell Post Hill Vic 3215
	28 Dane Avenue, Bell Post Hill Vic 3215
	22 Schofield Court, Bell Post Hill Vic 3215
	21 Schofield Court, Bell Post Hill Vic 3215
	20 Schofield Court, Bell Post Hill Vic 3215



	19 Schofield Court, Bell Post Hill Vic 3215
	18 Schofield Court, Bell Post Hill Vic 3215
	17 Schofield Court, Bell Post Hill Vic 3215
	16 Schofield Court, Bell Post Hill Vic 3215
	15 Schofield Court, Bell Post Hill Vic 3215
	14 Schofield Court, Bell Post Hill Vic 3215
	12 Schofield Court, Bell Post Hill Vic 3215
	11 Schofield Court, Bell Post Hill Vic 3215
	10A and 10B Schofield Court, Bell Post Hill Vic 3215
	9 Schofield Court, Bell Post Hill Vic 3215
	8 Schofield Court, Bell Post Hill Vic 3215
	7 Schofield Court, Bell Post Hill Vic 3215
	6 Schofield Court, Bell Post Hill Vic 3215
	5 Schofield Court, Bell Post Hill Vic 3215
	4 Schofield Court, Bell Post Hill Vic 3215
	3 Schofield Court, Bell Post Hill Vic 3215
	2 Schofield Court, Bell Post Hill Vic 3215
	30 Dane Avenue, Bell Post Hill Vic 3215
	32 Dane Avenue, Bell Post Hill Vic 3215

	34 Dane Avenue, Bell Post Hill Vic 3215
	36 Dane Avenue, Bell Post Hill Vic 3215
	38 Dane Avenue, Bell Post Hill Vic 3215
	39 Dane Avenue, Bell Post Hill Vic 3215
	37 Dane Avenue, Bell Post Hill Vic 3215
	35 Dane Avenue, Bell Post Hill Vic 3215
	31-33 Dane Avenue, Bell Post Hill Vic 3215
	29 Dane Avenue, Bell Post Hill Vic 3215
	27 Dane Avenue, Bell Post Hill Vic 3215

