

Covenants and complying development

Complying development that is carried out under *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* must comply with most kinds of restrictive covenant

Covenants are an agreement registered on the title of land

A covenant is an agreement that is registered on the title of a parcel of land. The covenant may restrict the way the land can be used or specify that the landowner must conduct a certain activity.

A covenant may be created during the sale of the land as it is transferred to the new owner, or by the registration on the land title under s88B of the *Conveyancing Act 1919*.

A covenant can be created by a developer, or between neighbours, or be required to be created by the conditions of a development consent from Council. The written terms of the covenant identify who benefits from the covenant and which landowner is burdened.

There are many different ways in which a covenant may restrict the use of land or require a landowner to conduct certain activities, including:

- restrictions on building within a certain building envelope or under a certain building height
- restrictions on using certain building materials or a requirement to use certain materials
- requirements to maintain stormwater devices, on site sewerage systems or boundary fences

Most restrictive covenants apply to complying development

Most covenants that are restrictive in nature apply to complying development under clause 1.20 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.

This means that a complying development certificate must comply with the covenant as well as the normal development standards for complying development. This includes covenants that are:

- imposed by a council, or required to be imposed by a council
- imposed by an owner or former owner of the land concerned
- specifically required by an environmental planning instrument
- imposed as a requirement of complying with another law such as *Crown Management Act 2016*, *National Parks and Wildlife Act 1974*, *Nature Conservation Trust Act 2001*, *Native Vegetation Act 2003*, *Threaten Species Conservation Act 1995*
- imposed as a requirement to comply with another planning agreement

Some complying development may not need to comply with a covenant

In some cases, complying development may be carried out under a policy other than *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. In these cases, the policy may say whether or not a covenant applies to complying development.

You should discuss your proposal with your certifier or local Council if your complying development is to be carried out under another policy.

In some cases, a Council may approve a development application that does not comply with a covenant

A covenant does not need to be complied with if:

- a development application is made to the Council for the development, and
- the Local Environmental Plan allows the Council to approve the development application without complying with the covenant, and
- the Council has development controls that deal with the subject matter of the covenant, and
- the Council has assessed the application against the development controls and grants consent to the development.

You should contact your local Council about your proposed development to discuss how it might deal with a particular covenant on your land in this way.

You can apply to extinguish an obsolete restrictive covenant

Under section 81A of the *Real Property Act 1900* you may apply to the Registrar General to extinguish a restrictive covenant where the restrictive covenant is more than 12 years old and it involves building materials, fencing or the value of structures.

Under section 81J of the *Real Property Act 1900* you may also apply to the Registrar General to extinguish another kind of restrictive covenant where:

- any time limit in the covenant as expired, or
- the land benefited and burdened by the covenant has been consolidated, or
- the covenant does not affect the land, or
- there is no specific land benefiting from the covenant, or
- the land benefiting from the covenant cannot be identified and the covenant was created before 1 July 1920, or
- the covenant has no practical value or application

https://rg-guidelines.nswlrs.com.au/land_dealings/dealing_requirements/covenants

This fact sheet is not legal advice

This fact sheet provides general information only and should not be relied upon when deciding to develop on land where a covenant is in place or in making a determination for a complying development certificate. Where in doubt, seek independent legal advice.