

## NOTICE TO SURVEYORS T3/99

### RESTRICTIVE COVENANTS – TLA SECTION 136D

Several cases of incorrect or ambiguous restrictive covenant statements on Transfer of Land Act plans indicate that some surveyors do not understand them. This notice gives some guidelines for preparation of those statements, concentrating on those matters which have been incorrect or ambiguous on plans recently.

An incorrect or ambiguous statement may not be detected during plan audit. But after the covenant document is lodged and the plan is dealt on, the inconsistency between document and plan will cause a requisition and a delay to the dealing. Worse, not all documents are correct when lodged; and a combination of multiple mistakes on the plan statement and a mistake in the covenant document increases the risk of a mistake escaping detection and seriously disadvantaging a purchaser or the developer.

So it is vital that the surveyor communicates well with the developer and/or the conveyancer before the 136D statement is placed on the plan; and the surveyor must contribute their expertise to the consultations, for example as in the eighth and ninth of the following guidelines.

#### **GUIDELINES**

- ❑ Don't accept any words or expressions in the 136D statement that you don't know the exact meaning of. Don't blindly follow a pro forma because others have used it. Don't think that its probably an accepted legal term so it must be right.
- ❑ Use more words, and repetition if necessary, to make the intention clear and unambiguous.
- ❑ Don't use the term "the said lots" if you can possibly avoid it. It can be ambiguous.
- ❑ Never use the term "the said lots" if the term "except" has been used earlier in the statement. In most such statements "the said lots" can be interpreted as those burdened and it can be interpreted as the stated exceptions which are not burdened.
- ❑ The use of a table to format the 136D statement(s) is acceptable. But in that case do not use the term "the said lots" anywhere.
- ❑ If there are two or more documents for the covenants on the plan, and if they are lodged before the plan is dealt on, make sure that your draftsperson understands enough to match the right document number to each covenant statement. Transpositions have occurred; and this reduces the statements to nonsense or worse. Make sure that you get a copy of the lodged documents and the plan annotations and check the annotations yourself.

- ❑ Whenever practical, use the positive sense in defining the burdened lots. ie, say “lots 1, 4 and 5” rather than “all of the lots hereon except lots 2 and 3”.
- ❑ Lots to vest in the Crown under section 20A of the T P and D Act must not be burdened or benefitted. This is an inexcusable but common mistake (on both plans and documents) which invariably delays dealings.
- ❑ Lots to vest in the Crown other than by Section 20A of the T P & D Act must not be burdened or benefitted by the covenants. These may include padmount sites, depending on the developer’s intention. In any case, padmounts do not normally receive the burden or benefit of covenants.
- ❑ A 136D statement on a plan can not burden lots which are not on that plan. Specifically, you can’t use a statement on a plan to burden lots on another plan of the same set, even if those plans must be dealt on concurrently.

The appendix includes several examples of acceptable 136D statement formats.

In most of the cases of mistaken 136D statements detected recently, although the 136D covenant document was registered as a part of the first dealing, the document had been prepared before the plan was certified correct.

The frequency of mistaken and ambiguous statements, and the potential for serious consequences are such that it is recommended that surveyors and solicitors co-operate to provide a covenant agreement and plan that match and meet their client’s requirements.

Any enquiries regarding this notice may be directed to Larry Heavey (phone 9273 7422, fax 9273 7669). Enquiries regarding covenant statements may be directed to Don Gray (phone 9273 7379), to Peter Joyce (9273 7381) or to Larry Heavey.

**ERIC HORLIN**  
**A/INSPECTOR OF PLANS AND SURVEYS**

**26 July 1999**

LH22-99

## APPENDIX TO T3/99

### COVENANT STATEMENT EXAMPLES

The following are acceptable expressions and formats for the “burden-benefit” components of section 136D plan statements. Each should be preceded by:-

“Restrictive Covenants under Section 136D of the TLA”,  
followed by the document number,  
followed by an expiry date statement if applicable.

- ◆ Lots ..... inclusive hereon are burdened to the benefit of lots ..... inclusive hereon.
- ◆ Lots ..... hereon are burdened to the benefit of all of the lots hereon.
- ◆ All of the lots hereon except lots ..... inclusive are burdened to the benefit of all of the lots hereon except lots ..... inclusive.
- ◆ Lots ..... hereon (“covenant lots”) are burdened to the benefit of all of the covenant lots.
- ◆ Lots ..... inclusive hereon are burdened to the benefit of all of the lots hereon (except lots ..... ) and lots ..... inclusive on plan .....

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Type of Covenant	Burdened Lot	Benefitted Lot	Instrument
Building Covenant	20,21,22,23,24,25, 26 & 27	20,21,22,23,24,25,26 & 27	G693640
Height Restriction	20, 21 & 27	20 to 27 inclusive	G693640
Wall	20	21,22,23,24,25,26 & 27	G693640

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DOCUMENT	BURDEN	BENEFIT
G944973	LOTS 441-452 INCL & LOTS 475 –481 INCL	ALL LOTS HEREON EXCEPT LOTS 602 & 603
G944974	LOT 452	ALL LOTS HEREON EXCEPT LOTS 602 & 603