

update

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Real Estate and the Law update: Is your planning permit asking too much?

Councils don't always get it right. Does your planning permit deal with matters that are more appropriately left to the building regulations or to the environment protection regime? Sometimes Councils impose inappropriate permit conditions which, if left unchallenged, can prove to be onerous and needlessly add to the cost of development.

The Victorian Civil and Administrative Tribunal (Tribunal) has increasingly been asked to consider the necessity of planning permit conditions which seek to control matters that, in the Tribunal's view, might more appropriately be regulated under legislation other than the Planning and Environment Act 1987 (Vic).

In the topical decision of *SITA Australia Pty Ltd (SITA) v Greater Dandenong City Council* earlier this month, the Tribunal held that where specific aspects of the use or development of land are controlled by an EPA licence or works approval, conditions in a planning permit for the use or development should not attempt to control the same things.

That case concerned SITA's application to amend its planning permits. A condition common to both planning permits prohibited the receipt of "hazardous wastes". However, SITA's EPA waste discharge licence allowed the receipt of "prescribed industrial wastes".

In earlier declaration proceedings relating to the alleged incompatibility between the company's environmental approvals and planning approvals, the Tribunal held that the wastes that SITA was receiving were "hazardous wastes" within the ordinary meaning of that term and that receipt of such wastes were prohibited by the company's

planning permits. (SITA has appealed the decision to the Supreme Court of Victoria. Enforcement order proceedings issued by Council at the same time have been adjourned pending the outcome of the Supreme Court appeal).

Other recent examples of planning permit conditions that have either been either struck out or significantly modified by the Tribunal include:

- conditions relating to the achievement of environmentally sustainable development. For example, conditions requiring the achievement of a 5 star energy rating and provision of a gas boosted solar hot water to service 16 dwellings were struck out by the Tribunal and in doing so observed "there is no need to apply conditions which are comprehensively dealt with by other legislation or regulation {unless there was} a highly developed statutory or strategic basis for doing so The requirements imposed by or as a result of, a condition should not exceed what is reasonable to expect of the developer." The Tribunal was of the view that energy rating of the dwellings was something better dealt with by the building regulations. (*Jolin Nominees Pty Ltd v Moreland City Council* [2006] VCAT 467 (31 March 2006) 23 VPR 50. See also *Hasan v Moreland City Council* [2005] VCAT 1931; (2005) 21

VRP 9) and *Golden Ridge v Whitehorse CC (Mitcham Towers)* [2004] VCAT 1706.)

- conditions requiring that a statement of environmental audit be carried out in circumstances where the soil contamination was relatively minor and there was no sensitive use of the site proposed (and otherwise no trigger under the Environment Protection Act 1970). In that case the applicant for review of the permit conditions opposed the requirement on the basis that it was "overkill" and would be unacceptably expensive and unfair. The Tribunal agreed and amended the permit condition. (*Heavenly Queen Temple Society Inc v Maribyrnong City Council* [2005] VCAT 875)
- condition requiring the submission and approval of an Environmental Management Plan in connection with a permit application for subdivision where the environmental circumstances of the case could not justify the requirement. The Tribunal criticised the "scattergun" approach by the responsible authority in imposing the requirement without specific regard to the circumstances of the site. The Tribunal held that the requirement was "excessive, unreasonable and ought to be deleted." (*Walsh Land Surveyors v Hepburn Shire Council* [2006] VCAT 178)

Whilst the above examples of planning permit conditions were not held to be unlawful, the Tribunal has demonstrated its willingness to strike out or modify conditions which in its view have been imposed “globally” without the requisite statutory or strategic basis for doing so or which are better left to other legislation or regulations.

Planning permit conditions should always be carefully scrutinised with a view to minimising the risk of a future dispute and its associated cost and delay.

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