

# FOLEY'S | LIST

## ROLLING OUT THE PLANS

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# ROLLING OUT THE PLANS

**PLANNING PERMITS MAY BE AMENDED BY SEVERAL METHODS, ONE OF WHICH ALSO FACILITATES CANCELLATION OF PERMITS.**

BY PHILIP BARTON

In *Jolin Nominees Pty Ltd v Moreland CC*, the Victorian Civil and Administrative Tribunal (VCAT) stated: “The benefits of enabling permits to be amended are many. The process recognises that a permit holder’s plans and needs may change over time in response to matters such as changed economic conditions, changes in technology or operating procedures, more detailed site investigations . . . or simply because a permit holder has changed his mind. Being able to amend a permit avoids the need to reopen all the issues associated with the permit and focuses only on the amendment itself. It also avoids the proliferation over time of permits for different aspects of the use and development of a single site”.<sup>1</sup>

The major<sup>2</sup> *Planning and Environment Act 1987 (Vic) (PEA)*<sup>3</sup> methods of amendment are:

- alterations to a use or development by a responsible authority acting under a permit condition, that is, a “secondary consent”

which, although not permit amendment as such, raises similar issues;

- amendment by a responsible authority under Part 4 Div 1A (ss72-76D); and
- amendment by VCAT under Part 4 Div 3 (ss87-94). Part 4 Div 3 is also the main cancellation avenue.<sup>4</sup>

### Secondary consents

A typical secondary consent condition empowers a responsible authority to consent to alteration of the use and development shown on the endorsed plans. Another form of the condition enables alteration of the effect of the condition itself, for example extension of hours under a condition restricting hours of use.<sup>5</sup> The operative effect of a secondary consent condition survives while the benefit of the permit is taken<sup>6</sup> and may be used although the original development is no longer permitted.<sup>7</sup>

A secondary consent decision is reviewable chiefly by the owner, land user or developer.<sup>8</sup> VCAT<sup>9</sup> has developed four

essential criteria for grant of consent. These are that the alteration:

- does not result in a transformation of the original proposal. For example, a similar three-dimensional form<sup>10</sup> may be permissible, but when retention of the existing building shell is essential, not a new type of wall;<sup>11</sup>
- does not authorise something for which primary consent is required under the planning scheme. For example, consent will not be granted under a use permit for development which itself requires a permit;<sup>12</sup>
- is of no consequence having regard to the purpose of the planning control under which the permit was granted. This means not absolute “consequence” but contextual consequence.<sup>13</sup> Thus a 30 per cent increase in dwellings in a mixed use development, with little discernable impact on amenity and visual appearance, was permissible in *Westpoint Corporation v Moreland CC*;<sup>14</sup>



- is not contrary to a specific requirement (as distinct from authorisation) within the permit, itself unalterable by consent. Thus a permit for a five-storey building, basement car park, and demolition of the existing building will cover the mere demolition, or omission of the basement,<sup>15</sup> but further changes contrary to design changes previously imposed to comply with the planning scheme are impermissible.<sup>16</sup>

Finally, under the repealed s62(3), a responsible authority may still approve amendment to any plans, drawings or other documents approved under a permit issued before 24 August 2005.<sup>17</sup>

### Amendments under Part 4 Div 1A

Enacted in 2004, ss72-76D basically transform an amendment application to a responsible authority into a surrogate application for permit (defined widely to include plans, drawings or other documents approved under a permit),<sup>18</sup> and accordingly are unlikely to attract distinctive case law. These sections do not apply to permits issued at VCAT's direction.<sup>19</sup> Compared with seeking secondary consent the extent of possible amendment is unlimited,<sup>20</sup> but full third party rights of objection exist.

### Amendment and cancellation under Part 4 Div 3

VCAT may cancel<sup>21</sup> or amend a permit,<sup>22</sup> including one issued at its direction, on certain grounds at the request of a wide range of persons. It commonly assesses a request in seven steps,<sup>23</sup> adjusted to fit the particular facts.

#### Step 1

**VCAT may refuse a request not made as soon as practicable after the requestor had notice of the facts relied on in support of the request: s89(3)**

"Practicable" denotes not possible but feasible, and acknowledges that some groundwork such as obtaining advice may be necessary.<sup>24</sup> Notice is of the material facts establishing the ground, such as commencement without notice, not of the ground itself, for example the legal requirement for notice.<sup>25</sup> "May refuse" is likely to invoke whether other parties have suffered prejudice from failure to act promptly.<sup>26</sup> Accordingly, this step has little scope where the requestor is the owner, because prejudice from any delay is unlikely to be significant.<sup>27</sup>

#### Step 2

**Completion: s88<sup>28</sup>**

Relief is barred for building construction or other works, by completion; or for other land development, such as registration of a plan of subdivision,<sup>29</sup> by substantial carrying out. Completion is a question of fact and is not dependent on performance of all permit conditions.<sup>30</sup> In 2007 s88 was amended to exempt from this step a request under s87A (see under Step 3).

#### Step 3

**A s87(1) ground must be established<sup>31</sup>**

This step is generally applicable. However under s87A, enacted in 2007, an owner, occupier, or person entitled to use or develop the land concerned would be in substance exempted from this step where the permit was issued at VCAT's direction, the criterion simply being whether VCAT considered it appropriate to cancel or amend the permit. This enactment dovetails with the width of Part 4 Div 1A and with the recent broad approach in *Jolin Nominees Pty Ltd v Moreland CC*.<sup>32</sup> The first application of s87A was to reduce the scale of a large residential development.<sup>33</sup>

**Step 3.1****Section 87(1)(a) A material mis-statement or concealment of fact in relation to the application for the permit**

"In relation to" extends beyond the permit application to, for example, misrepresentation misleading a council employee, or by a designer to an objector (inducing withdrawal of the objection).<sup>34</sup> The statement must only be wrong – a deliberate attempt to deceive is unnecessary.<sup>35</sup> However, not exhaustively spelling out the proposal does not constitute concealment.<sup>36</sup>

**Step 3.2****Section 87(1)(b) Any substantial failure to comply with the conditions of the permit**

Whether the permit holder can use this ground is most contentious. Despite concerns about persons taking advantage of their own wrong,<sup>37</sup> the prevalent view is that this only affects the discretion whether to grant relief.<sup>38</sup> Accordingly, it is wise for a requestor to stop work when the breach becomes apparent.<sup>39</sup>

**Step 3.3****Section 87(1)(c) Any material mistake in relation to the grant of the permit**

"Mistake" has a "wide, unfettered and natural meaning".<sup>40</sup> It includes: misconception by the responsible authority about whether the application was effectively advertised,<sup>41</sup> but not its ineffectual misinterpretation of the scheme;<sup>42</sup> a permit for something prohibited;<sup>43</sup> a condition applying a non-existent standard,<sup>44</sup> or which is unworkable;<sup>45</sup> or a decision based on a central assumed untrue fact, for example that reasonable fencing could prevent golf ball escape.<sup>46</sup>

**Step 3.4****Section 87(1)(d) Any material change of circumstances since the grant of the permit**

Traditionally this ground was interpreted as requiring something non-existent at the time of the original application. Therefore it did not cover existing but unknown land characteristics,<sup>47</sup> but did cover changes in technology, changes in manner of conduct of the use, and changes in the character of the area or the scheme;<sup>48</sup> or a later related planning permit.<sup>49</sup> However, the traditional interpretation has recently been rejected by decisions stating that the ground is "most comprehensive"<sup>50</sup> and that "'circumstances' is a broad term which does not just relate to facts but may encompass many factors".<sup>51</sup> It

now covers a "guideline" VCAT decision<sup>52</sup> or one altering the accepted view of lawfulness of the use.<sup>53</sup>

**Steps 3.5, 3.6****Section 87(1)(e),(f) Any failure to give notice in accordance with this Act, or to comply with ss55, 61(2) or 62(1)**

The former ground often raises whether no notice to the requestor was justified on the ground of no material detriment from the grant of a permit.<sup>54</sup> The latter ground protects the input of referral authorities and restrictive covenants.

**Step 4****VCAT must take into account the matters set out in s84B(2) as if the request were an application for review: s90A**

Section 84B(2) contains basic planning criteria. The merits are assessed in light of past and current land use, even if in breach of condition, rather than as a hypothetical application for a new use.<sup>55</sup>

**Step 5****Could a requestor claiming lack of appropriate notice reasonably be expected to have been aware of the permit application in time to lodge an objection?: s91(3)(a)(i)**

This in effect imposes an obligation to make proper or reasonable inquiries.<sup>56</sup>

**Step 6****In a request on the grounds in s87(1)(a)-(c) and (e), is the requestor substantially disadvantaged?: s91(3)(a)(ii), (3)(b)**

Mainly controversial is whether mere exclusion from the planning process suffices. The answer is no, but rather VCAT assesses what would have been the outcome if the ground did not exist, that is, essentially a retrospective appeal.<sup>57</sup>

**Step 7****Is VCAT satisfied that the cancellation or amendment is just and fair in the circumstances?: s91(3)(c)**

This applies to a request by an objector or person entitled to object, based on s87(1)(a)-(c) and (e). A discretionary balance is struck. At one extreme the desirability of cancellation may outweigh everything else;<sup>58</sup> at the other it may be just and fair to deny any relief.<sup>59</sup> Or it may be only just and fair to amend, not to cancel.

Thus in *Kidman v Colac-Otway SC*<sup>60</sup> the responsible authority, with no notice, granted a permit for a subdivision prohib-

ited under the scheme and a dwelling sited contrary to criteria in the scheme. The subdivision was registered and the house nearly completed. Weighing the detriment of demolition against detrimental impact to the landscape and to the visual amenity of the requestor, who however had not made the request as soon as practicable, VCAT imposed a landscaping condition ameliorating the dwelling's impact.

Further, a use condition, which could not otherwise be imposed, may be imposed as the price of retention.<sup>61</sup> Most flexibly, in *Cranbourne Country Golf Club Inc v Casey CC*<sup>62</sup> a condition requiring fencing between a residential subdivision and golf club was replaced by one basically requiring the club to pay two-thirds and the developer one-third of the cost of redesigning the boundary hole and of consequential changes to nearby holes. In fixing these proportions Morris J weighed the club's tortious liability for ball escape against the benefit to the developer now not having to litigate in tort or suffer the adverse amenity impact from a huge fence.

**Orders to stop development: s93**

This is in substance an injunction provision and accordingly may necessitate an undertaking as to damages.<sup>63</sup> Most importantly, an urgent application may be necessary to forestall relief being barred under s88 by completion or substantial performance.<sup>64</sup>

**Right to compensation: s94**

Compensation may be payable where a person obtaining a stop order does not ultimately succeed, or for some expenditure or liability where cancellation or amendment occurs on the s87(c)-(f) grounds (except mistake attributable to the permit applicant).<sup>65</sup>

**Conclusion**

The history of the permissible scope of amendment and cancellation of planning permits has been, to adapt the words of the British patriotic anthem *Land of Hope and Glory*, "wider still and wider shall thy bounds be set". Nonetheless, two interesting questions are unresolved. First, despite dicta that the extent of possible amendment is unlimited, can Part 4 Div 1A be used to produce one permit which mutates to one new use or development after another? Secondly, to what new scenarios will material change of circumstances extend? ●

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The numbers in square brackets below refer to the paragraph numbers in the judgment.

1. (2006) 23 VPR 50 at [23].
2. Others are: correction of mistakes (s71); extension of expiry (s69); and amendments to permits issued by the Minister (s97I).
3. Legislative references are to the *PEA*. Case names are abbreviated.
4. "Cancellation" under s85(1)(g) is rather a form of relief in a condition appeal.
5. For example, *Pesir v Casey CC* (2006) 23 VPR 210 at [222] (child care centre).
6. *Benedetti v Moonee Valley CC* (2006) 22 VPR 221.
7. *155 Domain Road v Melbourne CC* (2005) 20 VPR 18.
8. Section 149(1)(a). Others must seek judicial review: *Ellix v Kingston CC* (2007) 26 VPR 44.
9. *Jolin*, note 1 above, at [21]. The criteria for secondary consents under s173 agreements depends on intention: *Eastbrook Hall v Boroondara CC* (2006) 23 VPR 68.
10. *155 Domain Road*, note 7 above.
11. *Pisanelli v Yarra CC* (2004) 18 VPR 176.
12. *Cope v Hobsons Bay CC* (2005) 19 VPR 96 at [51].
13. *Zuzek v Boroondara CC* [2007] VCAT 2174.
14. [2005] VCAT 1049.
15. *155 Domain Road*, note 7 above.
16. *Pisanelli*, note 11 above.
17. For criteria applied by VCAT for approval see *Ellix*, note 8 above, at [18] and *Fitzroy Rose v Yarra CC* [2004] VCAT 155 at [11].
18. Possibly unlike Part 4 Div 3 procedures, but see note 22 below.
19. Section 72(2)(a).
20. *Jolin*, note 1 above, at [22].
21. Under s149B a permit may be declared void, but similar considerations to those in Part 4 Div 3 apply: *Phillips v Greater Shepparton CC* (2005) 19 VPR 266 at [120].
22. And directly or indirectly, according to the preponderant VCAT view, the plans (*Zuzek*, note 13 above, at [22]) but not a s173 agreement (*Goodcorp v Melton CC* (2003) 15 VPR 37).
23. For example, *Australian Postal Corporation (APC) v Darebin CC* (2005) 21 VPR 69.
24. *Egan v Glenelg SC* (2006) 22 VPR 292 at [71].
25. *Phillips*, note 21 above, at [79]-[80].
26. *Jurkic v Manningham CC* [2005] VCAT 1162 at [9].
27. *Jurkic*, note 26 above.
28. Another common bar is prohibition on amendment causing breach of a restrictive covenant: s91(3A).
29. *Egan*, note 24 above, supported by s91(5).
30. *Phillips*, note 21 above, at [87].
31. Amendment is permitted under s87(2) to comply with building regulations.
32. See step 3.4.
33. *Tynan Nominees Pty Ltd v Darebin CC* [2007] VCAT 2097. Section 87A covers endorsed plans: *Zuzek*, note 13 above, at [22].
34. *Lewis v Lynch* (2006) 22 VPR 133 at [34], [50].
35. *Lewis*, note 34 above, at [35].
36. *Kennedy v Nillumbik CC* (2006) 24 VPR 261 at [27].
37. *Cull v Stonnington CC* (2003) 13 VPR 329.
38. *Desiniotis v Boroondara CC* (2004) 17 VPR 334 at [8].
39. *Vlahonasios v Banyule CC* (2003) 15 VPR 290 at [29]-[30].
40. *Shire of Marong v Bendigo Junior Moto-Cross Club* (1983) 22 APA 539.
41. *APC*, note 23 above, at [42].
42. *Lewis*, note 34 above, at [32].
43. *Egan*, note 24 above, at [64].
44. *Cull*, note 37 above, at [9].
45. *APC*, note 23 above, at [51].
46. *Cranbourne Country Golf Club Inc v Casey CC* (2005) 21 VPR 48 at [20].
47. *Vlahonasios*, note 39 above, at [16].
48. *Jolin*, note 1 above, at [17].
49. *Brighton Secondary College v Bayside CC* (2005) 21 VPR 34.
50. *Jolin*, note 1 above, at [27].
51. *SITA Australia v Greater Dandenong CC* (2007) 26 VPR 62 at [68].
52. *Jolin*, note 1 above.
53. *SITA*, note 51 above.
54. Section 52(1)(a), e.g. *Kennedy*, note 36 above, at [16].
55. *SITA*, note 51 above, at [72].
56. *Phillips*, note 21 above, at [81].
57. *Lewis*, note 34 above, at [52]-[54].
58. *Egan*, note 24 above.
59. *Phillips*, note 21 above.
60. (2004) VCAT 1485.
61. *Lewis*, note 34 above.
62. (2005) 21 VPR 48.
63. For example, *Kidman v Colac-Otway SC* [2004] VCAT 1161.
64. Section 93(1A), e.g. *Kidman*, note 63 above.
65. For example, *Brimbank CC v Keilor Homes* (2006) 24 VPR 86.