CONFIRMED MINUTES

FOR THE

GREATER SHEPPARTON CITY COUNCIL

DEVELOPMENT HEARINGS PANEL

Meeting No. 2/2012

HELD ON

THURSDAY 26 APRIL 2012

AT 10.00AM

AT THE COUNCIL BOARD ROOM

90 WELSFORD STREET

CHAIR

DEAN ROCHFORT

COMMITTEE MEMBERS PRESENT: Dean Rochfort, Colin Kalms, Braydon Aitken, Claire Tarelli ,

Jonathan Griffin

OFFICERS: **Andrew Dainton – Senior Statutory Planner**

Tim Watson - Planner

Steve Bugoss – Timer and Minute Taker

1. ACKNOWLEDGEMENT

"We the Greater Shepparton City Council, begin today's meeting by acknowledging the traditional owners of the land which now comprises Greater Shepparton. We pay respect to their tribal elders, we celebrate their continuing culture, and we acknowledge the memory of their ancestors".

2. APOLOGIES

None

3. CONFIRMATION OF MINUTES OF PREVIOUS MEETINGS

Moved by Braydon Aitken and seconded by Claire Tarelli that the minutes of previous meeting held on 8 March 2012 be adopted.

Carried.

4. DECLARATIONS OF CONFLICTS OF INTEREST

Colin Kalms declared a conflict of interest on the first item scheduled for consideration (planning application no. 2011-383 – 600 Archer Road, KIALLA).

Colin left the Board Room whilst this item was considered.

5. MATTERS FOR CONSIDERATION

Three items listed for consideration.

6. LATE REPORTS

None

7. NEXT MEETING

10 May 2012.

I N D E X

Application Details:

Responsible Officer:	Andrew Dainton

Application Number:	2011-383
Applicants Name:	Bruce Trotter for owner Wilgarnie Pty Ltd
Date Application Received:	5 December 2011
Statutory Days:	96

Land/Address:	600 Archer Road KIALLA VIC 3631
Zoning and Overlays:	Residential 1 Zone Design and Development Overlay 2 Development Plan Overlay - Schedule 11 Land Subject to Inundation Overlay
Why is a permit required (include Permit Triggers):	A planning permit is required to remove easements and covenants under clause 52.02
Are there any Restrictive Covenants on the title?	Yes

Proposal

The application proposes to remove covenants and easements from the land which the applicant now considers unnecessary due to the residential subdivision of the land which was allowed by permit 2011-11.

The land is within the Kialla growth corridor and is zoned for residential purposes. Development plans have been established within the corridor as have section 173 agreements that establish developer contributions to upgrade public infrastructure such as roads.

Covenant G001244 – created in 1976 and Gas easement (Covenant 1)

This covenant and easement protects an existing high pressure gas main that is within the land. The easement protects a 4.6m wide piece of land that contains the gas main. The covenant informs the owner of the land of the existence of the gas main and prevents excavation that could disturb the gas main.

The application was notified to the APA, who did not object to the removal of the covenant or easement. The covenant becomes unnecessary as Archer Street road reserve will be widened by 8m to include the location of the gas main.

Covenant G001244 – created in 1976 (Covenant 2)

Covenant G672022 – created in 1977 (Covenant 3)

Covenant G993899 – created in 1978 (Covenant 4)

The three covenants all include the same clauses being:

1. *That any main buildings being a dwelling house or dwelling houses erected on the said land (other than the dwelling presently standing on the said land) shall contain a floor area of not less than 1000 square feet within the outer walls thereof such area*

being calculated by excluding the area of car port, terraces, pergola and or verandahs and garage

2. *That such main buildings shall be constructed of new materials and shall not be an already wholly or partly completed house moved onto the said land*

3. *That the said land shall not be used for carrying on any noxious or offensive trade or for mining operations or excavations for the recovery of sand, gravel, ore or other materials or the treatment of same*

4. *The not more the four adult dogs shall be kept on the said land*

Removal of electricity supply easement

The application seeks to remove parts of E-5 on LP112600 on lots 7, 8 and 9 and shown blue on TP480496W. The easement currently contains overhead powerlines. As part of the residential subdivision of the land these powerlines are being relocated into the Archer Road reserve, which will remove the need for the easement on private land.

Removal of water supply easement

The application seeks to remove a water supply easement on lot 9 on LP112600. The easement was created to be in favour of all lots in the LP; however lot 8 which is part of the residential subdivision is a lot that received the benefit of the rural water supply.

Objection to Application 2011-383

The application was advertised in accordance with the Act and one objection received from the land owner (Mrs Bolzonello) at 3 Marlboro Drive, Kialla (Lot 5 LP127594), who is a beneficiary to the covenant. The objector in an email to the Council stated their grounds of objection as:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*

- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land (2011-11) as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped.*

Summary of Key Issues

- The application seeks to remove easements and two covenants from the land

- The application was widely advertised and one objection received, which opposed the removal of the easements and covenants. This objector was a beneficiary to the covenant but is not affected by either easement to be removed.

- The covenants were registered on title before 1991, therefore section 60(5) of the Act applies. This section prevents the removal of the covenant unless the responsible authority is satisfied that (in summary):

    - Any owner who the covenant benefits will be unlikely to suffer any detriment of any kind (including any perceived detriment), and

    - If any owner has objected, that the objection is vexatious or not made in good faith.

  These tests must be met or the application must be refused.

- Numerous discussions, including a mediation meeting have been held with the objector (Mrs Bolzonello) and the developer (Bruce Trotter), however these discussions failed to resolve the issues and the objection was maintained. The objector disclosed ulterior motives for the objection being to try and get a road link to assist early development of the objector land. The objector did not expand their objection to relate to the permissions applied for, or to specify any detriment or perceived detriment that the granting of the permit might cause.

- The removal of all covenants is supported by the planning officer by reference to all decision guidelines except one of the tests of section 60(5) of the Act.

- The planning officer reports that the responsible authority can be satisfied that the objection has been made for an ulterior motive that does not relate to the permission sought and therefore is vexatious or has not been made in good faith.

- Even though the objector has not stated how the covenant removal causes real or perceived detriment it is still difficult for the responsible authority to be satisfied that the covenant removal would be unlikely to cause real or perceived detriment to any person for reasons that are expanded in discussion within this report.

- It is arguable that the application fails one of the tests of Section 60 (5). While there is objection by a third party then either decision (granting or refusing) is likely to result in a review by VCAT and for this reason it is a safer decision that a permit cannot be granted by virtue of Section 60 (5) of the Act.

- The application to remove the gas covenant has not been supported by a letter of consent from the gas authority, however the authority was notified and did not object. As the gas main will be within the road reserve and not private land the covenant becomes redundant and has no purpose, therefore no detriment could be caused by its removal.

- The removal of both easements is supported by the planning officer as they are no longer required or relevant.

Recommendation

Refusal to Grant a Permit

That the Council having caused notice of Planning Application No. 2011-383 to be given under Section 52 of the *Planning and Environment Act 1987* and having considered all the matters required under Section 60 of the *Planning and Environment Act 1987* decides to Refuse to Grant a Permit under the provisions of 52.02 of the Greater Shepparton Planning Scheme in respect of the land known and described as 600 Archer Road Kialla, for the removal of restrictive covenants created by instruments G001244, G672022, G579815 and G993899 from the land in Certificates of Title Vol.0955, Fol.584 (Lot 7 on TP 480496W), Vol. 09055, Fol.585 (Lot 8 on LP 112600) & Vol.0955, Fol. 586 (Lot 9 on LP 112600), and; the removal of easement E-5 created on LP 112600 and coloured blue on TP 480496W from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600, the removal of the easement E-3 on LP 112600 from Lot 9 on LP 112699 and the removal of the gas conveyance easement created by instrument G001244 from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600.

The reason of refusal is that the responsible authority is not satisfied that the removal of the covenants would be unlikely to cause a detriment or perceived detriment to any person and consequently a permit cannot be granted due to Section 60 (5) of the Act.

Moved by Braydon Aitken and Seconded by Claire Tarelli

that this item be withdrawn from the agenda to allow further negotiations by the parties.

CARRIED

Subject Site & Locality

An inspection of the site and the surrounding area has been undertaken.

Date: 13 December 2011 Time: 4.20pm

The site has a total area of 24ha and currently contains:

- disused agricultural land
- a dwelling

The main site/locality characteristics are:

- the land is within the southern growth corridor and is experiencing residential development.
- to the west and north west of the land is the Kialla Lakes estate which is continuing to develop and consists of over 1000 developed lots
- to the north is the land in the Marlboro Drive precinct in which three permits have been issued for residential development

- to the south and east of the land is land in the RLZ which is affected by flooding and is in an investigation area to determine if the land is suitable for residential development

The Photos below show the existing site:

Access to subject property from Archer Road

Subject land, existing power line easement

Looking North down Archer Road across frontage of subject land

Subject land with existing power line

Permit/Site History

The history of the site includes:

- Planning permit 2011-11 allowed 600 Archer Road, Kialla to be developed for a staged residential subdivision of the land.
- Condition three of the permit requires that before the issue of SOC for the first stage the restrictive covenants be removed from the land.

Further Information

Was further information requested for this application? No

Public Notification

The application has been advertised pursuant to Section 52 (1AA) of the *Planning and Environment Act 1987*, by:

- Sending notices to the owners and occupiers of adjoining land.
- Placing a sign on site.
- Notice in Newspaper.

The public notice appeared in the Shepparton News on 6 January 2012.

The applicant provided a signed declaration stating the sign was displayed on the land between 6 January to 20 January 2012.

Objections

The Council has received one objection to date. The objection stated:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*
- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped*

The officer considers that the objection has not stated how material loss would be caused or perceived to be caused by the granting of the permit to remove covenants or easements and the second point made relates to an earlier subdivision permit granted, not the current application under consideration. The objection is further discussed under the consultation section.

Title Details

The title contains both restrictive covenants and easements which this application seeks to remove.

The title also contains a Section 173 Agreement which requires developer contributions as part of the residential subdivision of the land.

Consultation

Consultation was undertaken. Relevant aspects of consultation, included:

- A mediation meeting was held between the applicant, objector and planning officers Braydon Aitken and Andrew Dainton on 7 March 2012. This mediation explored if there was a compromise position that would allow the objection to the withdrawn.

Positions

Objector

- The objector informed that she has lived on the land for many years and does not wish to leave her home but wants the opportunity to subdivide the existing dwelling from the land and create a developable lot to the rear of the dwelling.
- The objector is concerned that this developable lot will be without access until the De Palma subdivision is developed, which provides an east west connection to the objectors land.
- The objector seeks to gain vehicular access from the Trotter land to the south so that the objectors land can develop.
- The objector informed that this road connection should be entirely at Trotter's cost.

- The objector informed the removal of easements and covenants from the land would devalue her land as access could not be gained until DePalma developed.
- The objector confirmed that their objection related to the easement and covenant removal.

Applicant

- The applicant was informed of the objectors position
- The applicant did not agree to provide road access to the objectors land

Planning officers

- The officers explained that the removal of the gas and electricity easements were inconsequential as the infrastructure was being relocated to the road reserve and the water supply easement did not provide water supply to the objectors land
- The officers explained the purpose of the gas covenant was to protect the pipeline whilst it was in private land. As the gas line will be within the widened road reserve the easement and covenant have no purpose and should be removed.
- The officers explained the removal of the covenant relating to size of dwellings and number of dogs was to ensure titles within the residential subdivision were not burdened by the covenants. It was suggested to the objector that when it comes time for their development it is likely they will also seek to remove the covenants.
- Officers offered to seek that the applicant amends their application to include removal of the covenant from the objectors land. The objector did not agree to this.
- Officers explained this was not the time to revisit the road layout and road connections to the objectors land. Officers informed that new road connections to the land are proposed through the DePalma development plan and directly from Marlboro Drive.
- Officers explained that as the objector is a beneficiary to the covenant, it is possible that the objection will require the officers to recommend that the application be refused.

In summary the mediation was not successful in the objection being withdrawn, however the objector did gain a greater understanding of the application and relevant considerations. Council officers gained an understanding that the objector feels aggrieved that the current Development Plan and subdivision to the south allowed by permit 2011-11 should have provided a road access through the objector's property as was understood by a plan viewed in 2005.

The history of events as understood by Council is that a proposed Development Plan prepared for the Marlboro Estate in 2005 and including the Mrs Bolzonello land and DePalma land and O'Callaghan land but not the Trotter land was exhibited as part of Amendment C57 to rezone land to Res1 and DPO. That plan showed two road links to Trotters land from the objectors land and from O'Callaghan land.

In 2007 an Amendment C71 and a proposed development plan was prepared for the rezoning of Trotters land to R1Z and DPO11. That plan did not include a road link to Mrs

Bolzonello land and was exhibited to Mrs Bolzonello and no objection was received. At a later time an application for Development Plan 2007—9 was formally received by Council and again did not include the road link to Mrs Bolzonello land. Council's Planning Branch did not advertise the submitted development plan because it decided the plan should be refused for a variety of reasons of non-compliance with other requirements primarily about development contributions and a future road link to GV Highway south of the airport, but at a subsequent review hearing VCAT approved the Development Plan 2007-9 and directed that it did not require advertising.

Consequently permit 2011-11 that permitted subdivision of the subject land (Trotter Land) was approved without advertising as it was in accordance with the approved Development Plan 2007-9. Condition 3 of Permit 2011-11 required removal of the covenants before Statement of Compliance and lead to the current application 2011-383.

Unfortunately the Mrs Bolzonello sees application 2011-383 is her last chance to force a road connection by the developer to the south and is persisting with this objection despite the reason for their objection not being relevant to the current application to remove covenants and easements.

In relation to consideration of application 2011-383 the mediation was an important opportunity for the objector to relate the objection to the permission sought rather than the previous subdivision permit and to state some way in which the removal of easements or covenants could cause a detriment either real or perceived, however this did not happen. The objector disclosed the true motive for the objection being an attempt to force the adjoining landowner to grant a road access to the objectors property where no rights previously existed and to pay for construction of such access.

The objector Mrs Bolzonello land is approximately 4.5 ha in area and abuts part of the subject land on the north side. Mrs Bolzonello's lot has a road frontage of about 33m to Marlboro Drive but this section of the lot has a large two storey brick dwelling which prevents an access road being created to the balance of the lot which might otherwise be developed for additional residential lots in future.

Development Plan 2007-9 shows the required additional access to be achieved through both of the two titles of land to the east (DePalma and O'Callaghan land) at some time in future in accordance with the approved Development Plan. The likely delay in timing of development of either of these lots may not suit Mrs Bolzonello.

A second mediation meeting was held on 12 April 2012 and also subsequent phone communications during which conditions were explored under which the objection could be withdrawn. Council planners were hopeful that the development plan could be amended to show a possible future road link replacing one residential lot with notation that the abutting owner was to have first right of refusal to purchase the lot and would be required to construct the road link. Ultimately the developer was not agreeable to creating two potential corner lots and having additional traffic from the northern land until such time as more direct road links were created. The developer wanted to maintain his land as a separate estate. Council planners would have supported the greater permeability of more links between adjacent subdivisions.

Referrals

External Referrals/Notices Required by the Planning Scheme:

Referrals/Notice	Advice/Response/Conditions
Section 55 Referrals	Clause 66 of the scheme did not require referral of the application.
Section 52 Notices	The application was notified to Powercor and APA, neither of which responded to the notice. The application was notified to GMW who consented to the grant of a planning permit.

Internal Council Notices	Advice/Response/Conditions
	The application was not internally referred to any Council branches.

Assessment

The zoning of the land

The land is within the R1Z.

The R1Z does not trigger a permit and is not relevant to the consideration of the application.

Relevant overlay provisions

The land is within the DDO2, LSIO and DPO11. The overlays do not trigger a permit and are not relevant to the consideration of the application.

The State Planning Policy Framework (SPPF)

19.03-6 Pipe Line Infrastructure

Objective

To plan for the development of pipeline infrastructure subject to the *Pipelines Act 2005* to ensure that gas, oil and other substances are safely delivered to users and to and from port terminals at minimal risk to people, other critical infrastructure and the environment.

Strategies

Recognise existing transmission-pressure gas pipelines in planning schemes and protect from further encroachment by residential development or other sensitive land uses, unless suitable additional protection of pipelines is provided.

Plan new pipelines along routes with adequate buffers to residences, zoned residential land and other sensitive land uses and with minimal impacts on waterways, wetlands, flora and fauna, erosion prone areas and other environmentally sensitive sites.

Provide for environmental management during construction and on-going operation of pipeline easements.

As part of planning permit 2011-11 it is a requirement that the Archer Road reserve be widened to allow the existing high pressure gas pipeline to be within the road reserve and not located in private land.

The Local Planning Policy Framework (LPPF)- including the Municipal Strategic Statement (MSS), local planning policies and Structure Plans

There is no relevant local policy regarding the removal of easements or covenants.

Relevant Particular Provisions
52.02 – Easements, Restrictions and Reserves

Purpose
To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

Permit requirement
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.
- Under Section 24A of the *Subdivision Act 1988*.
- Under Section 36 of the *Subdivision Act 1988* to acquire or remove an easement or remove a right of way.

This does not apply:

- If the action is required or authorised by the schedule to this clause.
- In the circumstances set out in Section 6A(3) of the *Planning and Environment Act 1987*.
- If the person proceeds under Section 362A of the *Land Act 1958*.
- In the case of a person proceeding under Section 36 of the *Subdivision Act 1988*, if the council or a referral authority gives a written statement in accordance with Section 36(1)(a) or (b) of the *Subdivision Act 1988*.

In this clause, **restriction** has the same meaning as in the *Subdivision Act 1988*.

Decision guidelines
Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

A planning permit is required to remove easements and restriction (covenant) under Section 23 of the *Subdivision Act, 1988*.

Officer's consideration

Covenants

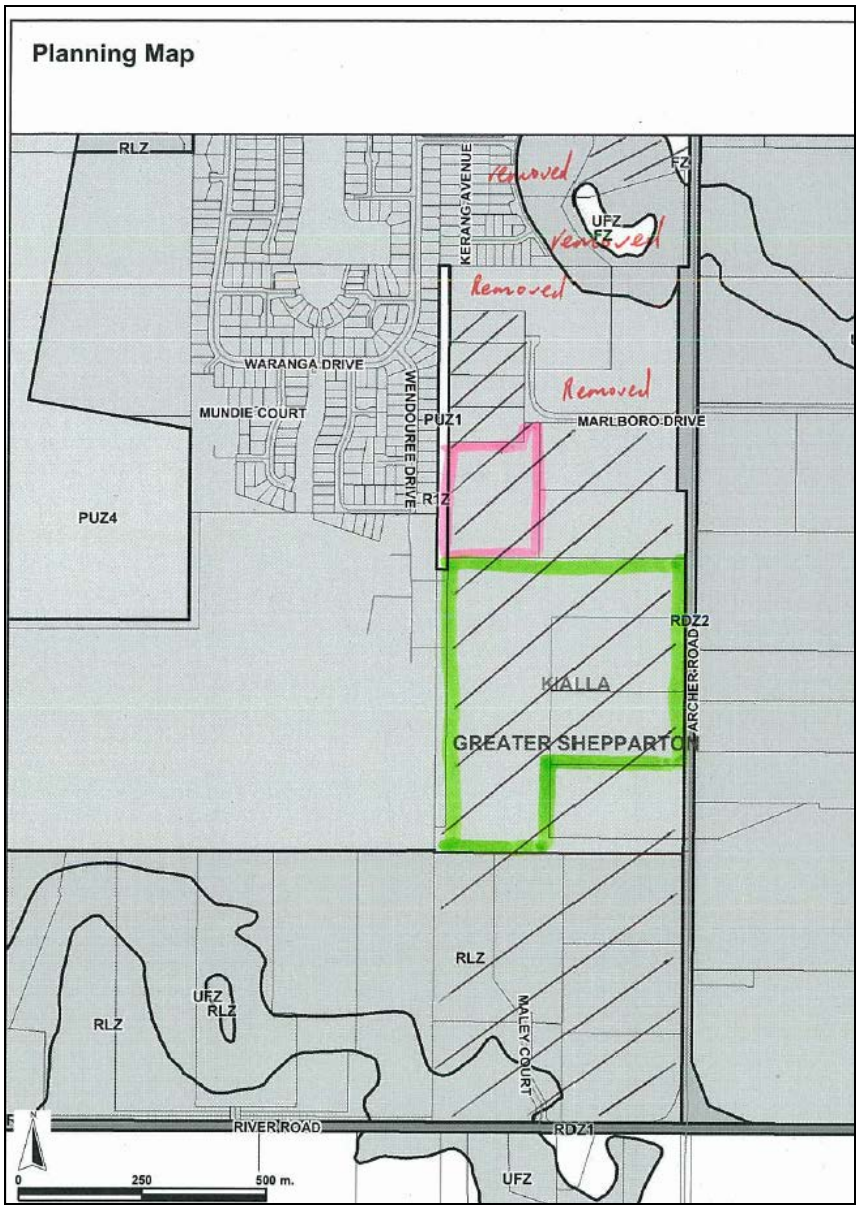
The application seeks to remove four covenants, three of which relate to size of dwellings, number of dogs and noxious uses and one of which relates to the protection of the gas main.

The gas covenant beneficiary is the Gas and Fuel Corporation of Victoria and its successors and transferees.

These covenants have been removed from nearby properties by numerous developers in the growth corridor so as to avoid the newly created lots being burdened by the covenants.

The plan below shows as cross-hatched all land that is still burdened by covenants 2-4. The land seeking to remove the covenant is highlighted in green and the objector highlighted in

pink. The plan also shows the four lots which have had the covenants 2 – 4 removed and are now either developed or being developed.



The clauses of the covenant are:

1. *That any main buildings being a dwelling house or dwelling houses erected on the said land (other than the dwelling presently standing on the said land) shall contain a floor area of not less than 1000 square feet within the outer walls thereof such area being calculated by excluding the area of car port, terraces, pergola and or verandahs and garage*

2. *That such main buildings shall be constructed of new materials and shall not be an already wholly or partly completed house moved onto the said land*

3. *That the said land shall not be used for carrying on any noxious or offensive trade or for mining operations or excavations for the recovery of sand, gravel, ore or other materials or the treatment of same*

4. *The not more the four adult dogs shall be kept on the said land*

The purpose of the covenant was to ensure dwellings were greater than 10 imperial squares in size and constructed of new materials and the number of dogs is limited on what would have been rural residential type lots. The covenant also prevents industrial uses and mining. Importantly the covenant did not restrict the number of dwellings on the land.

As development has and continues to occur in the corridor, developers have sought and obtained planning permits to remove the covenant, which has occurred until now without objection. Generally these old covenants have been replaced with more modern covenants which also stipulate minimum standards of size and construction for new dwellings on the estates.

Section 60 (5) of the Act states the following:

The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in sub-section (4) unless it is satisfied that—

a) *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 any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and*

b) *if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.*

The objector has informed that their grounds of objection are:

- *The removal of covenants and easements on Mr Trotter's land due to it consequentially resulting in material loss of land belonging to Mrs Bolzonello; and*

- *The permit granted by the Council for the planning of subdivision on Mr Trotter's land as it does not give road access on the rear south of Mrs Bolzonello's land, therefore making her land less valuable and entrapped*

<u>Consideration of Section 60(5)(a) Detriment including perceived detriment</u>

In considering whether the removal of the covenant is unlikely to result in detriment or perceived detriment to beneficiaries the following matters are relevant:

- The covenant is about minimum dwelling size and using new materials, but does not restrict the number of dwellings to one which would have been an impediment to use of subdivided lots. Modern dwellings are unlikely to be below 95m^2 in floor area even

without a covenant and the developer intends to replace the covenant with updated requirements to uphold standards for dwellings in the subdivision.

- Given the subdivision seeks to create conventional residential lots it is highly unlikely these lots will be used for mining or recovery of sand, gravel or the like.

- The R1Z prohibits the use of land for noxious or offensive trades, and the home occupation guidelines state that the 'occupation must not adversely affect the amenity of the neighbourhood in any way'

- The removal of the covenant could allow an increase in the number of the dogs on the land to be considered, however the Council's local law restricts residential lots to two dogs without a local law permit to protect the residential amenity of the locality

- Whether the covenant is removed or retained on title, the covenant does not prevent the residential subdivision of the land

- The Trotter land is some distance away from the lots in Marlboro Drive so that the standard of development on these new lots is unlikely to have any effect on the beneficiaries in Marlboro Drive.

The objector has stated a concern that the removal of the covenant will result in financial loss and prevent the development of their land in a timely manner. This detriment in the objector's mind has been expressed as loss of opportunity to force an adjoining owner to grant access and is unrelated to the permission sought. It is considered that there must be some allowance in interpreting section 60(5)(a) that the perceived detriment must at least relate to the permission sought.

VCAT has held that the detriment must relate to the operation of the covenant or flow from a breach of covenant. In *Dukovski v Banyule CC [2003] VCAT 190 (13/2/2003)* the detriment claimed was increased traffic, loss of view and neighbourhood character, but was held not to flow from a variation of a covenant which regulated only the frontage of dwellings, i.e., the way they face. Likewise in *Summerby v Hume CC [2003] VCAT 1968 (22/12/2003)* the construction of a second dwelling was held not to be a relevant detriment under a covenant regulating building materials and minimum floor area.

The matter of perceived detriment was considered by VCAT in Hill v Campaspe 2011, where Deputy President Gibson made the following comments:

The provisions of section 60(5)(a) require the Tribunal to be satisfied that the owner of any land benefiting by the covenant would be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the variation of the covenant.

The Tribunal has emphasised in various cases that this does not necessitate a finding that detriment would occur as a probability; rather it is sufficient that there be a possibility, which is neither fanciful or remote, that a detriment may occur. The concept of "any detriment" in the context of section 60(5)(a) is a very wide one. It is not a matter of there being some minor detriments outweighed by countervailing benefits, whether to the benefiting owner or

to the community in general. If there is any detriment, whether or not outweighed by other considerations, then a permit can only be granted if such detriment is thought to be "unlikely".

For the current application the objector's perceived detriment is 'fanciful or remote' because the loss of opportunity to obtain road access at no cost may be a real or perceived detriment to the objector but it relates to the granting of permit 2011-11 for the subdivision to the south that did not include a road connection, and not in any way to this application to remove covenants or easements. In practical terms the subdivision to the south can take place without the removal of the covenants or the easements.

It is not necessary for a person to object for section 60(5)(a) to prevent the granting of a permit. The responsible authority must itself be satisfied that it is unlikely that any detriment whether small or perceived would be caused, and it does not satisfy the test that benefits might outweigh the detriment. This was considered in McFarlane v Greater Dandenong CC [2002] VCAT 469 (26/6/2002) which has been consistently followed:

1. *It is for the Tribunal to determine whether it is satisfied on the balance of probabilities that any covenant beneficiary "will be unlikely to suffer any detriment of any kind if the variation is permitted." In other words it is not a question of whether the Tribunal is satisfied there will be detriment: the Tribunal must be affirmatively satisfied that there will be none.*
2. *Compliance with planning controls does not, of itself, and without more, establish that a covenant beneficiary will be unlikely to suffer any detriment of any kind. Consideration of a proposal from a planning perspective often requires a balancing of competing interests. There is no such balancing exercise involved in the consideration of the issue which arises under paragraph (a). The nature of the enquiry is fundamentally different.*
3. *The mere assertion of the existence of a detriment is not sufficient to demonstrate its existence. On the other hand, loss of amenity will constitute a detriment, and in this regard amenity includes "an appeal to aesthetic judgement, which is difficult to measure, however the notion of 'perceived detriment' specifically contemplates that this consideration is relevant to the enquiry.*
4. *The determination must be made on the evidence before the Tribunal "including the appeal site and its environs".*
5. *It is not necessary for an affected person to assert detriment. This is so for two reasons: first, because the Tribunal must be affirmatively satisfied of a negative, namely that there will probably be no detriment of any kind; secondly, the Tribunal is entitled to form its own views from the evidence.*

The important point to make from the above is that the responsible authority must form its own opinion on the likelihood of any detriment including perceived detriment being caused by granting this permit independent of whether any objection has been received. A relevant objection virtually proves some degree of at least perceived detriment is likely or possible but the absence of objection does not prove it is not likely.

In this case of the objector asserting perceived detriment for a reason not related to the operation of the covenants or easement, the objection should not make any difference to the decision the responsible authority must make. The assertion by the objector that removing the covenants or easements may cause detriment by altering any road access possibilities to the objector's land simply is not true, it has no relationship or bearing to that matter.

It is a consideration that the beneficiaries in Marlboro Drive are remote from the lots in the estate to the south from which the covenant would be removed. A useful reference is Ingberg v Bayside CC [2000] VCAT 2407 (30/11/2000). In this case the question whether the owner of the land benefited will be unlikely to suffer any detriment of any kind (including any perceived detriment) was treated objectively, and the Deputy President found that construction of 2 dwellings was unlikely to have a detrimental effect on a beneficiary who lived some distance away in a different street.

Is the objection vexatious or not made in good faith?

In Castles v Bayside 2004 Senior Member Byard made the following comments regarding detriment and about a vexatious objection:

> *38 Section 60(5) in fact imposes a high and strict test which severely restricts the ability of the Tribunal (on review) to modify a covenant. It severely restricts that possibility, but does not prevent it altogether.*
>
> *39 The sub-section provides that the permit for modification cannot be granted unless the responsible authority (or Tribunal) is satisfied in relation to paragraph (a) and (b) of sub-section 5.*
>
> *40 Paragraph (a) requires satisfaction that the owner of land benefited by the covenant will be unlikely to suffer any detriment of any kind as a consequence of the variation of the restriction.*
>
> *41 This is a severe test in that any detriment, even a minor one more than counter-balance by positive considerations, will be sufficient to bar the granting of a permit. However, the test is not whether it is possible for detriment to be suffered. It is sufficient for the Tribunal to be satisfied that the owner of the land benefiting is "unlikely" to suffer any detriment.*
>
> *53 So far as s.60(5)(b) is concerned, I am satisfied that the objections are vexatious. I do not mean that they are not made in good faith in the sense of being dishonest. I do not mean that they are vexatious in the sense of being raised to annoy or embarrass the applicant, or anyone else. They may amount to a very weak case against the proposal, but I do not need to decide whether they are vexatious in the sense of being so unarguable as to be utterly hopeless. I am satisfied that they are vexatious in the sense that they are designed to achieve an ulterior purpose. The objections by the owners with benefit are designed not to uphold the covenant and its purposes in terms of urban design, but to seek to achieve the defeat of the development proposal for reasons under-related to the covenant and because the Objectors do not like the proposal for such other reasons. I have found that these other reasons are unsustainable in terms of planning merits of the proposed development. I also find that they are not relevant to the covenant properly interpreted, or the purposes behind it. I therefore find, in the rather unusual*

circumstances of this particular case, and this particular covenant, that the objections are vexatious. I think the proposed modification to allow the development is appropriate and should be granted.

A publication by Horsfall & Doyle - Restrictive Covenants in VCAT (The Last Two Years) - 2 March 2005 has studied cases involving Section 60(5)(b) that an 'objection must not be vexation or not made in good faith. A relevant extract is as follows:

22. In all the applications (except for Thompson v Greater Bendigo CC [2004] VCAT 1072 2/6/2004)) there has been no change in the application of the accepted principle that in S 60(5) (b) "vexatious" means groundless or having no merit without regard to the objector's attitude, intentions or honesty. See Ingberg v Bayside CC [2000] VCAT 2407 (30/11/2000) at [104] and Castles and Maney v Bayside CC [2004] VCAT 864 (11/5/2004) [53] in which the decision of Attorney General of NSW v Wentworth (1988) 14 NSWLR 481 as applied in Attorney General of Victoria v Kay [1999] VSC 30 and Attorney General of Victoria v Lindsay (unreported 16 July 1998) was followed. For an example of other conduct see Schock v Yarra Ranges [2003] VCAT 1733 (23/11/2003).

23. The test of vexatious stated in Wentworth by Roden J is: "1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.

3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless ..."

Following discussions with the objector, it is the officer's view that the objector is attempting to use this application as leverage to achieve road connection to the south, without incurring any cost of constructing the road to accelerate the development potential of their land.

Currently the objector is awaiting the abutting land to the east to be developed to provide for a road connection to the rear of the objector's property. The land to the east has a planning permit to develop the land in stages, and stage 3 which would construct a road adjacent to the objector land may be years away. Alternatively, the objectors land could be developed independently with direct access to Marlboro Drive, however this would involve demolishing the existing dwelling on the land, which the objector is not prepared to do.

It is considered that the objection does not relate to the permission applied for and is vexatious or has been made 'in bad faith'. It wasn't an inadvertent mistake or misunderstanding about the application or its possible effects it was a deliberate attempt to achieve a benefit of road access that in no way relates to this application.

Considering the test of 'vexation' in Wentworth, and the application of the accepted principle on the meaning of 'vexatious', it is considered relevant that the objection has been made for

collateral purpose (a different purpose than the matter under consideration). This purpose attempts to force the applicant to provide road access in exchange for withdrawing the objection.

The objection is groundless and has no merit because it is not based on any relationship to the matter under consideration.

The objection can also be found to be vexatious by the test advanced by *Byard*, that the objection is made for an ulterior purpose.

Considering the above, the planning officer recommends that the responsible authority should decide that the objection is vexatious or not made in good faith.

A recent case of Tran v Brimbank CC [2011] VCAT 1560 has also decided a situation very similar to this application and found the application satisfied the requirements of Section 60(5)(a) and (b).

> *16. The critical factor here is that whilst it is true that the single objector couple live in a property which benefits from the covenant, that property is over 300 metres away in a different side street (ie Collins Street) which is located two blocks further across to the west. Accordingly, the objectors will have no line of sight at all from their property to the subject land, with or without any potential second dwelling being built on the subject land. Indeed, I would expect that the objectors would not be able to see any such second dwelling even if the objectors stood at any point in their own street. Similarly I would not expect there to be any discernable difference to the traffic or on-street parking levels on Collins Street with or without any second dwelling being built on the subject land.*
>
> *17. Some other relevant factors in favour of the proposal are that:*
> - *the abovementioned recent decisions by Senior Members Rickards and Komesaroff approved the removal of comparable restrictions affecting those other relevant nearby properties;*
> - *the reality is that there is already the beginnings of a trend to two or three unit redevelopment of other otherwise single dwelling lots in the locality; and*
> - *we know that the nearby 22 Erica Street property was able to have its equivalent restriction removed by planning permit without any VCAT involvement because (despite the wide notification to beneficiaries) no objection to such removal was made by any beneficiary.*
>
> 18. *Relying on the various factors set out above, I have considered the objection made by Mr and Mrs Colangelo who live at 25 Collins Street but consider their objection to be vexatious.*

This case is similar to the current situation. There was one objector asserting perceived detriment and the Tribunal found that it was unlikely in the circumstances of that objector being a few streets away that detriment would be suffered. It was also relevant that the covenant had been removed from other properties after advertising to all beneficiaries and receiving no objections, and a finding that the objection was vexatious.

Following the argument of the '*Tran*' case above it is reasonable to conclude that the objector is sufficiently removed from the Trotter land so as to be unlikely to suffer detriment and that the same covenants have been removed from adjacent land without objection.

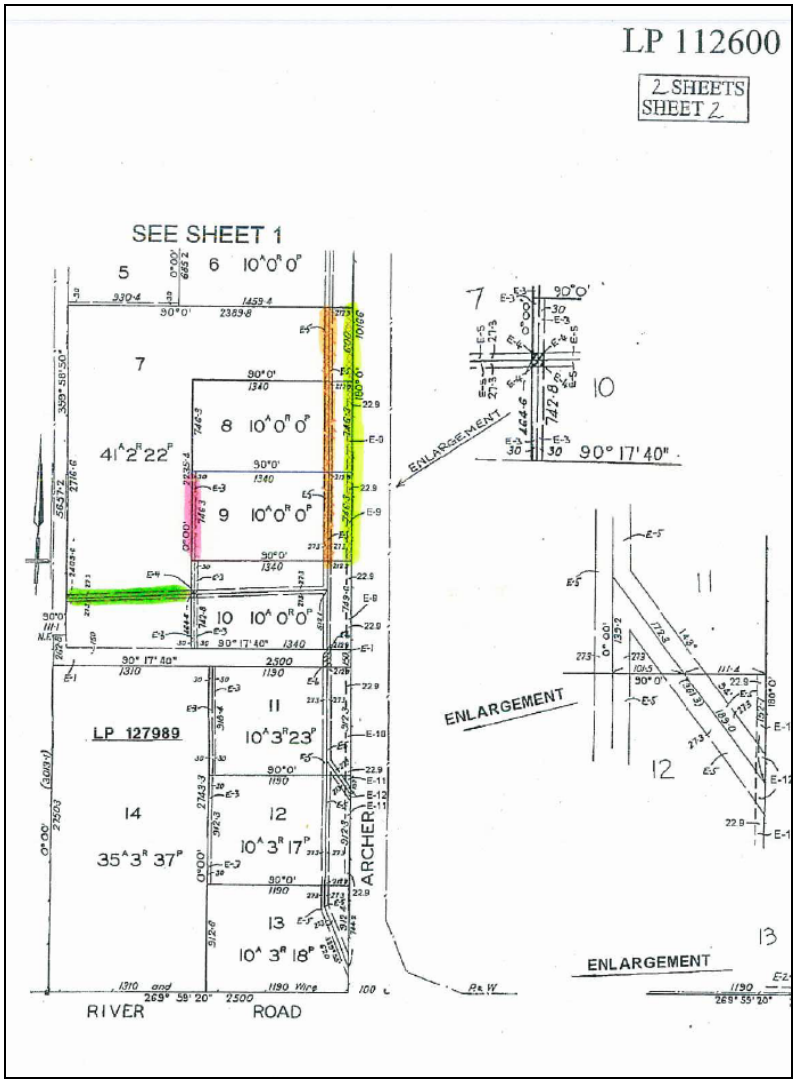
Officer's Summary regarding covenant removal

The problem with this application is the test of the responsible authority being satisfied that detriment of any kind including perceived detriment will be unlikely to be suffered by any beneficiary. In the absence of any objection it can be reasonably argued that the test is satisfied and a permit can be issued to remove the covenant.

While an objection exists, there is a possibility of successful argument at a review by VCAT that at least perceived detriment might be suffered by a beneficiary although such argument would need to be relevant to the current protection (e.g. dwelling size and materials or number of dogs allowed) afforded by the covenant and not the reasons so far advanced by the objector.

Unfortunately unless the objection is withdrawn the uncertainty regarding likelihood of perceived detriment of any kind being suffered by a beneficiary leads Council planning officers to advise that the application should be refused but only on this basis.

Plan of easements



Orange – Electricity supply easement

The application seeks to relocate the existing overhead electrical lines from the private land to within the Archer Road reserve. The relocation of the electrical lines removes the need for the land to be encumbered by an easement.

Yellow – Gas easement

The existing alignment of the high pressure gas line is within private land. As part of the development of the land the Archer Road reserve is widened by eight metres which allows the gas line to be located within the road reserve rather the private land. As the gas line will be within the road reserve the easement can be removed from the land.

Pink – Water supply easement

The existing water supply easement provides rural water to lots eight and nine on LP112600. Given the development of the land will remove the land from the irrigation district the easement will become redundant and can be removed from the land.

Green – Electricity supply easement

This easement contains an over head power line which upon the residential development of the land will be removed and relocated to the Archer Road reserve. This electricity supply easement will become redundant and can be removed from the land.

It is concluded the application to remove easements achieves acceptable planning outcomes and is not opposed to by the responsible authority.

The decision guidelines of Clause 65
Clause 65 includes the following reference:

Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.

Relevant incorporated or reference documents
There are no relevant incorporated or reference documents to this proposal.

Other relevant adopted State policies or strategies policies
There is no relevant adopted state or strategic policies to this proposal.

Relevant Planning Scheme amendments
There are no relevant planning scheme amendments to this proposal.

Are there any significant social & economic effects?
The application does not raise any significant social and economic effects.

Discuss any other relevant Acts that relate to the application?
Should a permit be granted a text plan will need to be lodged for certification under the *Subdivision Act, 1988*.

Conclusion

The application to remove covenants and easements is recommended for refusal by the planning officers only for the reason that one of the tests required by Section 60 (5) of the Act may be difficult to satisfy (being no likelihood of perceived detriment of any kind) and while there is an objection by a third party and covenant beneficiary however unrelated, it is highly likely that any decision will be subject to review by VCAT.

Otherwise the application achieves a beneficial planning outcome.

If the objection had have been withdrawn then the responsible authority could reasonably decide the application satisfies the tests of section 60(5) of the Act which would otherwise prevent the granting of a permit.

DRAFT
REFUSAL TO GRANT A PERMIT

APPLICATION NO: 2011-383

PLANNING SCHEME: GREATER SHEPPARTON PLANNING SCHEME

RESPONSIBLE AUTHORITY: GREATER SHEPPARTON CITY COUNCIL

ADDRESS OF THE LAND: 600 Archer Road KIALLA VIC 3631

WHAT HAS BEEN REFUSED: The removal of restrictive covenants created by instruments G001244, G672022, G579815 and G993899 from the land in Certificates of Title Vol.0955, Fol.584 (Lot 7 on TP 480496W), Vol. 09055, Fol.585 (Lot 8 on LP 112600) & Vol.0955, Fol. 586 (Lot 9 on LP 112600), and; the removal of easement E-5 created on LP 112600 and coloured blue on TP 480496W from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600, the removal of the easement E-3 on LP 112600 from Lot 9 on LP 112699 and the removal of the gas conveyance easement created by instrument G001244 from Lot 7 on TP 480496W and Lots 8 & 9 on LP 112600.

WHAT ARE THE REASONS FOR THE REFUSAL?

- The responsible authority is not satisfied that the beneficiaries of the covenant and particularly the objector will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the proposed removal of the restrictive covenants.

Application Details:

Responsible Officer:	Andrew Dainton

Application Number:	2011-258
Applicants Name:	R & D Waterson Pty Ltd
Date Application Received:	26 August 2011
Statutory Days:	

Land/Address:	225 Old Dookie Road GRAHAMVALE VIC 3631
Zoning and Overlays:	Low Density Residential Zone (LDRZ) Land Subject to Inundation Overlay (LSIO)
Why is a permit required (include Permit Triggers):	Subdivision in LDRZ under clause 32.03-3 Subdivision in LSIO under clause 44.04-2
Are there any Restrictive Covenants on the title?	No

Proposal

The application proposes a 12 lot residential subdivision of the land, which creates lots larger than 4000sqm. The proposed subdivision is accessed from Old Dookie Road and the internal road ends in a court bowl.

The lots that back onto the GMW channel include a 30 metre wide buffer from the channel to effluent disposal field in accordance with GMW requirements.

The proposed lots will be serviced by on site effluent disposal (septic tanks). Each lot contains an effluent envelope as required by the Council's Environmental Health Officers (EHO's).

The Council's engineers have considered the proposed drainage of the land which incorporates a bioretention basin. The engineers have consented to the proposed drainage design.

The application was advertised and two objections lodged. The objectors are largely concerned about the construction of a future road on the land abutting the GMW channel. The applicant has informed that there is no intention to construct a future road and that there is no purpose for this road. The applicant has also agreed to register a S173 on lots three to eight prohibiting the construction of a road on these lots.

Summary of Key Issues

- The application seeks a permit for a 12 lot subdivision of land within the LDRZ and LSIO

- The application was advertised and two objections were lodged. The objections related to concerns regarding the construction of a future road within the building exclusion zone on the lots backing onto the GMW drain and the lack of connection between the existing Dobsons estate and this subdivision

- The applicant agreed for a S173 to burden the lots backing onto the GMW, stating that a public road is prohibited from being constructed within the exclusion area. This S173 sole purpose is to attempt to satisfy the objectors concerns

- The Council engineers have decided the linking of the development with the existing estate to be cost prohibitive as it would involve the construction of a bridge over the GMW channel

- GVW has not required the development be connected to sewerage. The Council's health officers have consented to the use of onsite effluent disposal subject to detailed conditions

- The applicants and Council traffic engineers have agreed that the approach to the subdivision should be slightly widened to achieve safe vehicular access to the land

- The application complies with the relevant planning provisions and the development is supported by the planning officer

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Moved: Braydon Aitken
Seconded: Colin Kalms

Notice of Decision to Grant a Permit

That Council having caused notice of Planning Application No. 2011-258 to be given under Section 52 of the *Planning and Environment Act 1987* and having considered all the matters required under Section 60 of the *Planning and Environment Act 1987* and having considered the objections to the application, decides to Grant a Notice of Decision to Grant a Permit under the provisions of 32.03-3 and 44.04-2 of the Greater Shepparton Planning Scheme in respect of the land known and described as 225 Old Dookie Road Grahamvale, for the multi-lot residential subdivision in the Low Density Residential Zone and Land Subject to Inundation Overlay in accordance with the Notice of Decision and the endorsed plans.

Carried

Subject Site & Locality

An inspection of the site and the surrounding area has been undertaken.

Date: 2 April 2012 Time: 12.34pm (camera clock had not changed from day light savings)

The site has a total area of 6.3ha and currently contains:

- Two existing dwellings and sheds
- The area of the existing buildings has established vegetation
- The rear of the land is cleared land that appears unused

- Access to the land is from Old Dookie Road which crosses an open drain in the road reserve

The main site/locality characteristics are:

- The land is within the Dobson's estate residential estate, which in total is about 80ha of residential land, which is developed with lots of more than 4000sqm
- Dobson's estate is a LDRZ estate, which is developed with large dwellings, swimming pools and tennis courts
- To the north of the land is a GMW channel which provides irrigation supply to agricultural uses to the south, north, east and west of the residential estate.

The Photos below show the existing site:

Old Dookie Road looking west

Open drain next to the Old Dookie Road reserve

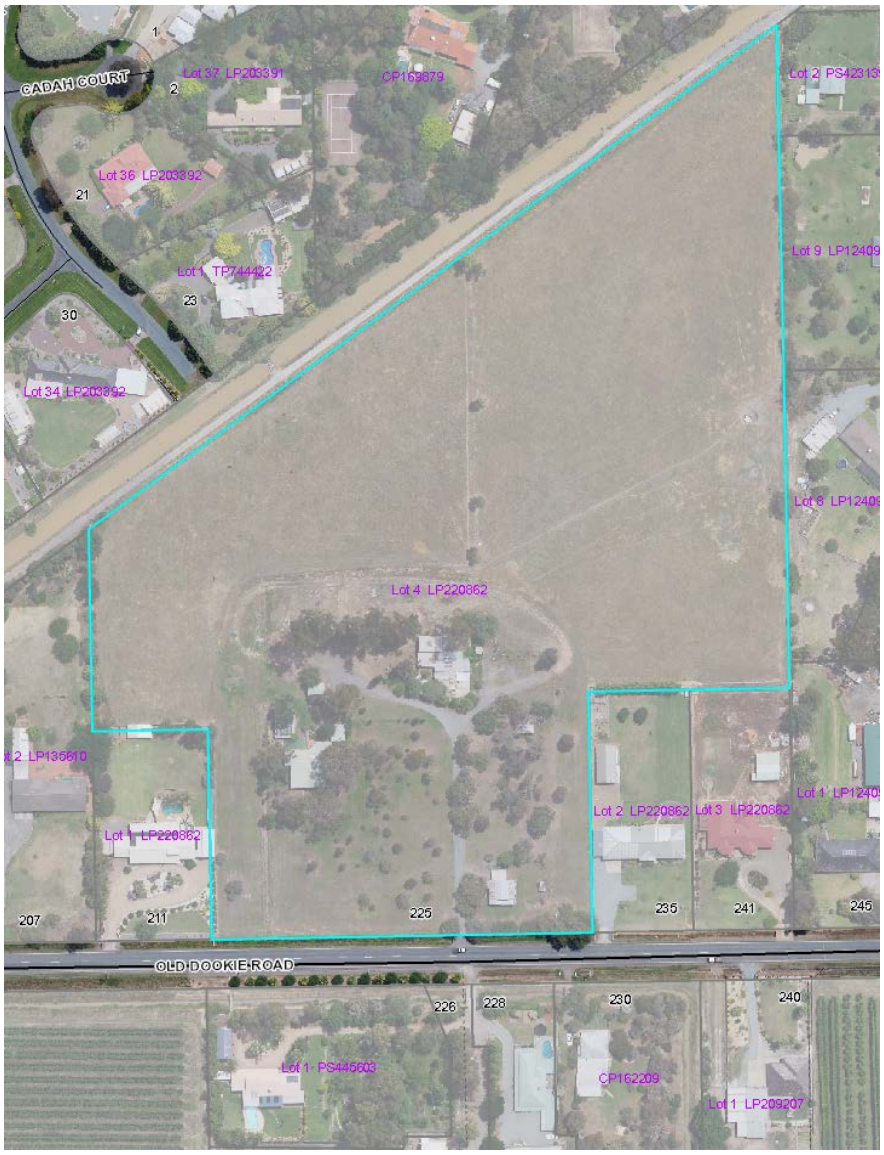
View of the land fronting Old Dookie Road

Sign indicating the previous use of the land as Redbyrne Pottery

View of the land from Park Avenue in the existing Dobsons Estate

GMW channel to the rear of the land

Aerial Photo:



Permit/Site History

The history of the site includes:

- A pre-application meeting was held on 18 November 2010 attended by Gary Steinberger, Mark McDonald and Council officers John Dunn, Braydon Aitken and Andrew Dainton. A file note from this meeting is on the file.
- A meeting between the Council's EHO and the applicant was held on 25 May 2011. The Council's EHO informed of the need for a LCA to be submitted with the application.

Further Information

Was further information requested for this application? Yes, on 12 September 2011. This RFI requested the submission of a TIAR on any required intersection treatments to Old Dookie Road. Following a response from GMW a second RFI was sent to the applicant on 22 September 2011, seeking the following:

a) The applicant must provide further information concerning wastewater disposal areas setbacks from G-MW 12/12 Irrigation Channel. The relevant setback requirements of the current EPA Code of Practice – Onsite Wastewater Management (December 2008) must be complied with, and should be identified on the Plan of Subdivision as a waste water exclusion zone. If a 20 metre setback is proposed evidence through an appropriate survey that the base level of the channel is above the natural surface level must be provided.

b) In accordance with Clause 56 of the Victorian Planning Provisions, developments must consider principles of best practice for stormwater management and must include principles of Water Sensitive Urban Design (WSUD). Clause 56 also states that this must be addressed before a permit for the development is approved from the information provided with this application it would appear that drainage would be into G-MW irrigation drain, therefore careful consideration by G-MW of stormwater management for this subdivision is required prior to the subdivision layout being approved. Therefore prior to further assessment of this application, G-MW requests the applicants MUSIC model in electronic format.

These RFI included lapse dates of 31 October 2011. The requested information was provided to the Council on 31 October 2011.

Public Notification

The application has been advertised pursuant to Section 52 of the *Planning and Environment Act 1987*, by:

- Sending notices to the owners and occupiers of adjoining land.
- Placing a sign on site.

The applicant provided a signed declaration stating the sign was displayed on the land between 11 November to 25 November 2011.

The application was exempt from being advertised in accordance with Clause 44.04-4 (LSIO) of the planning scheme.

Objections

The Council has received two objections to date. The key issues that were raised in the objections are.

- Prevent the exclusion zone in the rear of lots three to eight from becoming a future road
- Park Avenue continue to cross the channel to provide connectivity from the existing and proposed developments

Officer's response to the grounds of objection:

- The exclusion zone at the rear of lots being three to eight is a required setback for effluent disposal to a GMW channel. This exclusion zone must be maintained so as to comply with GMW requirements
- The construction of a road along the rear of these lots, would result in a road to nowhere and is of not benefit to either the Council or the developer
- The developer has agreed to enter into a S173 agreement on lots 3 to 8 prohibiting the construction of a public road within the 30 metre effluent disposal field
- The Council's engineers have deemed the construction of a bridge crossing of the GMW channel as cost prohibitive to the development of the land. The Council has no record of receiving a developer contribution towards the construction of a bridge crossing of the channel

The objections to the development are largely dealt with by a S173 that removes the ability to construct a road in the exclusion zone. It would be preferred if Park Avenue did cross the channel and provide connection, the cost of such infrastructure would be cost prohibitive to the development of the land.

It is the view of the officer that the objection should not prevent the issue of a NOD to grant a permit.

Title Details

The title does not contain a Restrictive Covenant or Section 173 Agreement

Consultation

Consultation was not undertaken.

Referrals

External Referrals/Notices Required by the Planning Scheme:

Referrals/Notice	Advice/Response/Conditions
Section 55 Referrals	The application was referred to the CMA under clause 44.04-4. The CMA consented to the issue of permit to subdivide land in the LSIO. The application was referred to service authorities under clause 66.01, being Powercor, APA, Telstra and GVW, all of whom consented to the issue of a permit.
Section 52 Notices	The application was referred to GMW who required conditions be included in the permit. Some of the GMW conditions relating to effluent disposal were the same as the EHO conditions. To prevent duplication of conditions within the S173 the GMW effluent conditions were not included under the GMW heading.

Internal Council Notices	Advice/Response/Conditions
Development Engineers	The Council's development engineers consented to the issue of a permit subject to conditions relating to drainage of the land.
EHO's.	The Council's EHO's consented to the issue of a permit subject to permit conditions relating to the onsite effluent disposal.

Assessment

The zoning of the land

The land is within the Low Density Residential Zone and abuts land in the PUZ1 (GMW channel) and RDZ2 (Old Dookie Road).

A purpose of this zone is to provide for low-density residential development on lots which, in the absence of reticulated sewerage, can treat and retain all wastewater.

A permit is required to subdivide land under clause 32.03-3 of the LDRZ.

Each lot created must not be less than 4000sqm in size.

The application requirements of the zone are:

An application must be accompanied by a site analysis, documenting the site in terms of land form, vegetation coverage and the relationship with surrounding land, and a report explaining how the proposed subdivision has responded to the site analysis. The report must:

- In the absence of reticulated sewerage, include a land assessment which demonstrates that each lot is capable of treating and retaining all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria) under the *Environment Protection Act 1970*.
- Show for each lot:
  - A building envelope and driveway to the envelope.
  - Existing vegetation.
  - In the absence of reticulated sewerage, an effluent disposal area.
- Show how the proposed subdivision relates to the existing or likely use and development of adjoining and nearby land.
- If a staged subdivision, show how the balance of the land may be subdivided.

The submitted application was well made and included the following information:

- Planning report
- Land capability assessment
- Traffic impact assessment report
- Drainage plans and report
- Plans of proposed subdivision including building envelopes

Decision guidelines of the LDRZ include:

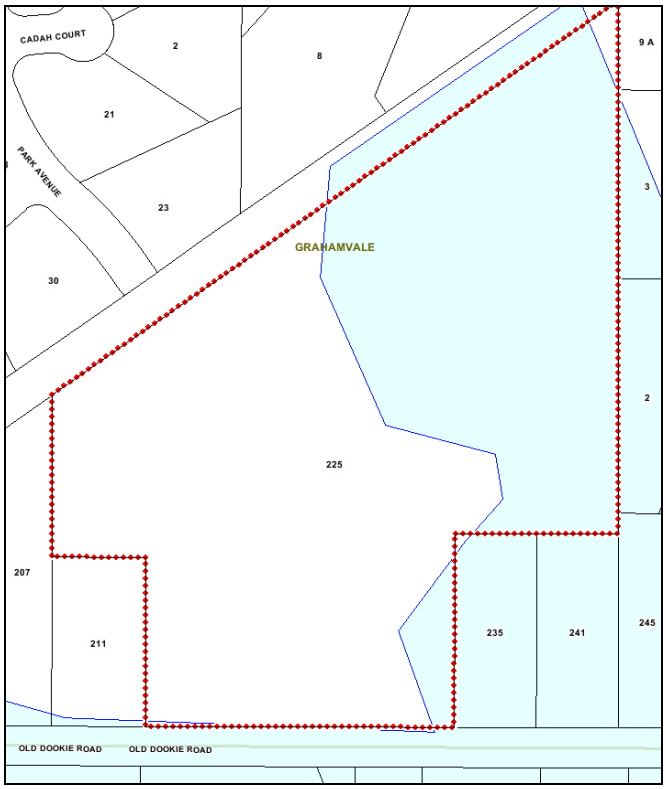
- The protection and enhancement of the natural environment and character of the area including the retention of vegetation and faunal habitat and the need to plant vegetation along waterways, gullies, ridgelines and property boundaries.
- The availability and provision of utility services, including sewerage, water, drainage, electricity, gas and telecommunications.
- In the absence of reticulated sewerage:
  - The capability of the lot to treat and retain all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria) under the Environment Protection Act 1970.

- The benefits of restricting the size of lots to the minimum required to treat and retain all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria).
- The benefits of restricting the size of lots to generally no more than 2 hectares to enable lots to be efficiently maintained without the need for agricultural techniques and equipment.

- The relevant standards of Clauses 56.07-1 to 56.07-4.

Relevant overlay provisions

The land is partly within the LSIO.



The application was referred to the CMA, who consented to the issue of a permit limited the area of fill on the lots to 500sqm.

The State Planning Policy Framework (SPPF)

13.02-1 – Floodplain Management

The objective of this clause is to assist protection of life, property and community infrastructure from flood hazard.

13.03-1 - Use of contaminated and potentially contaminated land

Require applicants to provide adequate information on the potential for contamination to have adverse effects on the future land use, where the subject land is known to have been used for industry, mining or the storage of chemicals, gas, wastes or liquid fuel.

15.01-3 Neighbourhood and subdivision design

The objective of this clause is to ensure the design of subdivisions achieves attractive, liveable, walkable, cyclable, diverse and sustainable neighbourhoods.

In the development of new residential areas and in the redevelopment of existing areas, subdivision should be designed to create liveable and sustainable communities by:

- Contributing to an urban structure where networks of neighbourhoods are clustered to support larger activity centres on the regional public transport network.
- Creating compact neighbourhoods that have walkable distances between activities and where neighbourhood centres provide access to services and facilities to meet day to day needs.
- Creating a range of open spaces to meet a variety of needs with links to open space networks and regional parks where possible.
- Providing a range of lot sizes to suit a variety of dwelling and household types to meet the needs and aspirations of different groups of people.
- Contributing to reducing car dependence by allowing for:
  - Convenient and safe public transport.
  - Safe and attractive spaces and networks for walking and cycling.
  - Subdivision layouts that allow easy movement within and between neighbourhoods.
  - A convenient and safe road network.
- Creating a strong sense of place because neighbourhood development emphasises existing cultural heritage values, well designed and attractive built form, and landscape character.
- Protecting and enhancing native habitat.
- Environmentally friendly development that includes improved energy efficiency, water conservation, local management of stormwater and waste water treatment, less waste and reduced air pollution.
- Being accessible to people with disabilities.
- Developing activity centres that integrate housing, employment, shopping, recreation and community services, to provide a mix and level of activity that attracts people, creates a safe environment, stimulates interaction and provides a lively community focus.

15.01-5 Cultural identity and neighbourhood character

The objective of this clause is to recognise and protect cultural identity, neighbourhood character and sense of place.

19.03-2 Water supply, sewerage and drainage

Relevant strategies include:

Provide for sewerage at the time of subdivision, or ensure lots created by the subdivision are capable of adequately treating and retaining all domestic wastewater within the boundaries of each lot.

The Local Planning Policy Framework (LPPF)- including the Municipal Strategic Statement (MSS), local planning policies and Structure Plans

21.04-1 Urban consolidation and growth

Based on population forecasts (2004) a need for an additional 13,154 dwellings by 2031 in the urban areas of Shepparton and Mooroopna has been identified. In order to accommodate this population forecast, 1,057 ha (approximately) of residentially zoned land will be required in these areas (including the available 151 hectares). These estimates assume a shift in the mix of dwelling type occurring to accommodate the changing demographic composition of the municipality as follows:

- Medium Density Dwellings – 20% of dwelling stock (up from 5%)
- Conventional Dwellings – 60% of dwelling stock (down from 70%)
- Low density Dwelling – 20% of dwelling stock (down from 25%)

Objectives – Urban consolidation and growth

- To provide for a broader range of dwelling densities and types of housing to meet projected community needs and differing lifestyles.

Officer's response to LDRZ, SPPF and Local Policy

Effluent disposal

The land and adjoining Dobson's estate is not connected to reticulated sewerage, the land relies of onsite effluent disposal.

The application was referred to GVW who originally required the development be connected to sewerage. Following discussions between the applicant and GVW, the water authority changed their position and did not require the land be connected to sewerage.

The Council's EHO reviewed the submitted LCA and decided that on site effluent disposal was appropriate subject to the following:

- Effluent disposal area for lots 2 – 8 have a minimum area of 960sqm
- Effluent disposal area for lot 1 and 9-12 have a minimum area of 1080sqm
- The effluent disposal areas for lots 1 -12 have a setback of 3 metres from all boundaries and building envelopes

Traffic

The applicant and the Council has prepared traffic reports considering the treatment of the intersection with Old Dookie Road.

Old Dookie Road is within a RDZ2 and carries 2867 vehicles per day. The Council's and applicants traffic engineers have both considered and discussed the vehicle access to the land from Old Dookie Road.

The applicant engaged Paffrath Consulting who has made the following conclusions:

- Based on the characterised traffic generation rates, supplied information for the proposed usage of the development and utilising the supplied information on traffic volumes, the establishment of the proposed site for a low density residential use will have no adverse affect on the current level of through traffic along Old Dookie Road or on the surrounding road network or intersections

- A standard T intersection with give way control connecting the development with Old Dookie Road adequately provides for the expected generation and distribution of traffic by the development in the long term

- Despite the apparent warrant from figure 2 that this intersection between Old Dookie Road and the development will ultimately require basic turn treatments, the SIDRA analysis examined the level of service for further traffic volumes at the intersection without basic turn treatments and found that treatments were not required to maintain a level of stable flow conditions

The Council's traffic engineer recommended the following:

- Recommended treatment is a widened shoulder (type BAL)

- Dobson Road has a higher traffic volume and should also be improved with a type BAL treatment

Both traffic engineers following the preparation of their reports have agreed a slightly widened approach to the intersection is required to provide for safe traffic movements.

These works involve the construction of a sealed shoulder to allow for cars to decelerate and turn left without significantly impacting on vehicles following behind. To provide for this widened approach it is possible that part of the existing open drain within the road reserve will need to be piped.

Permit conditions will require the submission of plans showing the widened approach and require the works be complete before the issue of SOC.

Drainage

The proposed drainage design includes vegetated swales within the road reserve which fall to a bio-retention system in a detention basin. The drainage will ultimately outfall to a GMW drain with a restricted discharge of 1.2l/sec/ha.

The proposed detention basin is relevantly shallow of 800mm in depth. This will allow the detention basin to be landscaped to improve the appearance of the basin and provide a point of entry to the development.

The proposed bio retention system and detention basin will be vested to the Council and become a Council asset.

The Council engineers have reviewed this drainage design and have conceptually approved the design. Planning permit conditions will require the submission of detailed plans and construction drawings of the drainage systems.

Subdivisional design

The proposed subdivision consists of a road ending in a cul de sac serving 12 lots. The subdivision does not provide connection to the existing Dobson's estate to the north.

Whilst it would have been preferable to connect with the existing Dobson's estate, this would have involved the construction of a bridge crossing of the GMW channel. Given this is the final piece of zoned developable land in Dobson's estate it was decided in the pre-application discussions that the connection across the channel was not warranted, given the cost of the bridge crossing.

The subdivision provides with the exception of lots 3 and 9 generally regular shaped lots with large building envelopes.

Access to all lots is from the internal road.

Site contamination

The permit applicant was not supported by a soil assessment of the lands suitability for residential development. A permit condition will require the submission of an assessment before the commencement of any works on the land.

Relevant Particular Provisions
Clause 52.01 – Public open space

The proposed application is not provided any useable open space to the Council; therefore a condition will require the payment in lieu in accordance with the schedule to clause 52.01.

Clause 56 assessment as required by the decision guidelines of the LDRZ.

INTEGRATED WATER MANAGEMENT	
56.07-1: Drinking Water Supply Objectives	All proposed lots will have independent connections to reticulated town water to the satisfaction of Goulburn Valley Water. **- Complies**
56.07-2: Reused and Recycled Water Objective	Reticulated reused water is not available to this subdivision. Future owners should consider incorporating water harvesting features into house design. **- Complies**
56.07-3: Waste Water Management	The Council's EHO's have reviewed the submitted LCA and consented to on site effluent disposal subject to strict

	conditions, which will be incorporated into permit conditions and a S173. The S173 will set out the ongoing maintenance schedule for the effluent systems to ensure they operate in accordance with the SEPP's and EPA Act. **- Complies**
56.07-4: Urban Runoff Management	The development engineers have required a drainage plan as part of the permit conditions for the subdivision. The subdivision will incorporated WSUD and include a throttled discharged to 1.2l/sec/ha in accordance with the GMW requirements **– Complies**

The decision guidelines of Clause 65

Clause 65.02: Decision Guidelines: 'Approval of an Application to Subdivide Land'

Before deciding on an application to subdivide land, the responsible authority must also consider, as appropriate:

- The land is deemed to be suitable for subdivision into 4000sqm lots. The area has been identified as an area for urban growth in the Greater Shepparton Housing Strategy which allows for residential development. The proposed subdivision also meets the provisions of Clause 56 of the Greater Shepparton Planning Scheme.

- The land to the north west, and east is zoned and used for residential purposes and any future development would remain residential in the foreseeable future. To the south of the land is land in the FZ which is developed with orchards.

- The subdivision pattern of the general locality is generally of new conventional residential lots.

- The proposed subdivision will have a minimal effect, if any, on the use or development of other land which has a common means of drainage. The land will be connected to an existing GMW drain.

- The density of the proposed subdivision is deemed to be reasonable as the proposed lot sizes reflect the existing subdivision pattern of the area and therefore the subdivision will reflect the surrounding neighbourhood character.

- The area and dimensions of each lot in the subdivision are deemed to be appropriate to cater for a dwelling on each lot.

- Roads will be created in accordance with the IDM as a result of the subdivision

- The risk of fire is minimal as the land is within an urban area.

- The provision of off-street parking can be accommodated within each lot.

- No common property is proposed and therefore there will not be any body corporate involved.

- A permit condition requires a survey to be undertaken to determine if there is any self established native vegetation on the land

Based on the above the application complies with clause 65.02.

Relevant incorporated or reference documents
Council's Infrastructure Design Manual (reference document)

Other relevant adopted State policies or strategies policies
There is no other relevant adopted state or strategic policies that relate to this application.

Relevant Planning Scheme amendments
There are no relevant planning scheme amendments to this application.

Are there any significant social & economic effects?
The application does not raise any significant social or economic effects.

Discuss any other relevant Acts that relate to the application?
There are no other relevant Acts that relate to this application.

Conclusion

The application to subdivide the land is recommended for approval by the planning officers as the application achieves a beneficial outcome. The objection by two land owners which related to the possible future road is without merit or relationship to the application, despite this the applicant has agreed to a S173 to prohibit such a road to satisfy the objectors concerns. The potential road link has been deemed cost prohibitive to the developer and the applicant has proposed an alternative which produces acceptable planning outcomes.

Draft Notice Of Decision

APPLICATION NO: **2011-258**

PLANNING SCHEME: **GREATER SHEPPARTON PLANNING SCHEME**

RESPONSIBLE AUTHORITY: **GREATER SHEPPARTON CITY COUNCIL**

THE RESPONSIBLE AUTHORITY HAS DECIDED TO GRANT A PERMIT.

THE PERMIT HAS NOT BEEN ISSUED.

ADDRESS OF THE LAND: **225 OLD DOOKIE ROAD GRAHAMVALE VIC 3631**

WHAT THE PERMIT WILL ALLOW: **MULTI-LOT RESIDENTIAL SUBDIVISION IN THE LOW DENSITY RESIDENTIAL ZONE AND LAND SUBJECT TO INUNDATION OVERLAY**

WHAT WILL THE CONDITIONS OF THE PERMIT BE?

1. **Amended Plans Required**

Before the certification of the plan of subdivision, amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and a minimum of two copies must be provided. Such plan must be generally in accordance with the plan submitted with the application but modified to show:

a) The effluent disposal areas for lots 2 – 8 be a minimum of 960sqm
b) The effluent disposal areas for lots 1 and 9 – 12 have a minimum area of 1080sqm
c) The effluent disposal areas for all lots be setback 3 metres from all boundaries and building envelopes
d) Removal of the vehicle crossing to the 4180sqm reserve (reserve) from Old Dookie Road and relocate the vehicle crossing to the reserve from the internal road
e) Landscape screen along the southern boundary of the land
f) A widened left turn approach to the subdivision from Old Dookie Road in accordance with Figure 8.2 in the AustRoads guidelines

2. **Layout not altered**

The subdivision as shown on the endorsed plans must not be altered without the written consent of the responsible authority.

3. Section 173 Agreement

Before the issue of a Statement of Compliance, the owner must enter into an agreement with the responsible authority, pursuant to Section 173 of the *Planning and Environment Act 1987*. This agreement must be registered on the title to the land pursuant to Section 181 of the *Planning and Environment Act 1987*. The owner must pay the reasonable costs of the preparation, execution and registration of the section 173 agreement. The agreement must provide that:

a) A secondary treatment facility for the disposal of effluent, will be required for any single dwelling to be built on lots 2 – 8 inclusive, and

b) All effluent from a dwelling on lots 2 – 8 must be treated to a standard of not less than 20mg/L Biochemical Oxygen Demand and 30mg/L Suspended Solids using an EPA approved package treatment plant or equivalent, and the system be installed, operated and maintained in compliance with the relevant EPA Code of Practice and Certificate of Approval, and

c) The effluent disposal areas as indicated on the plan of subdivision must be kept free of buildings, driveways, paths, servicing trenching or other domestic facilities, and must be planted with appropriate vegetation to maximise their performance, and

d) The construction of any dwelling having more than four bedrooms will require the applicant to lodge with the Council plans indicating an amended layout of the building and effluent disposal envelopes to accommodate the increased area required for effluent disposal

e) The 30 metre effluent disposal field on lots 3 to 8 cannot be developed with a public road

Goulburn Murray Water Requirements

- If a community effluent disposal system or reticulated sewerage system becomes available, all wastewater from the dwelling must be disposed of via this system and the on-site treatment and disposal system must be decommissioned.

- An Endorsed Plan that shows the following to the satisfaction of the Responsible Authority and Goulburn-Murray Water:

    - Wastewater disposal exclusion zones 30 metres from Goulburn-Murray Water Irrigation Channel.
    - Building exclusion zones 30 metres from Goulburn-Murray Water Irrigation Channel.

- All future dwellings and associated onsite wastewater disposal areas must be in accordance with the Endorsed Plan.

- The owner must provide evidence of registration of the Agreement to Goulburn-Murray Water within three months of this occurring.

- This agreement is cancelled if (a) above is satisfied.

The said agreement is to be prepared by the Council. The Council will undertake to have the agreement prepared upon written notification from the applicant. All costs associated with the preparation and registration of the agreement shall be borne by the applicant. All fees associated with the documentation must be fully paid prior to execution and registration of the document by the Council.

4. Construction of Works

Before the Statement of Compliance is issued under the *Subdivision Act 1988*, the owner must construct and complete road works, drainage and other civil works, in accordance with endorsed plans and specifications approved by the responsible authority and in accordance with the Infrastructure Design Manual. Road works, drainage and other civil works to be constructed must include:

a) street and drainage in accordance with the approved construction drawings;
b) planting of street trees or as otherwise agreed in writing by the responsible authority
c) landscaping in accordance with the approved landscape plans;
d) intersection and traffic control/mitigation measures;
e) street lighting and signage;
f) high stability permanent survey marks;
g) post and wire fence abutting the detention basins to the south and west
h) 1.8m high colourbond abutting the large detention basin to the east and north and the small reserve to the west and north

to the satisfaction of the responsible authority.

Supervision Fees

Before the statement of compliance for each stage, the owner must make a payment comprising up to 2.5% of the value of the works, to the Responsible Authority being the costs of the Responsible Authority in supervising the works on the land.

Plan Checking Fee

Before the statement of compliance for each stage, the owner must make a payment comprising 0.75% of the value of the documented works to the Responsible Authority, for the checking of the engineering design of the works.

5. Drainage Discharge Plan

Before the certification of the plan of subdivision, a drainage plan with computations prepared by a suitably qualified person to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and a minimum of two copies must be provided. The plans must be in accordance with the Council's Infrastructure Design Manual and include:

a) how the land will be drained;

b) underground pipe drains conveying stormwater to the legal point of discharge;

c) incorporation of water sensitive urban design in accordance with the "Urban Stormwater Best Practice Environmental Management Guidelines" 1999;

d) provision of an electronic copy of the MUSIC model (or equivalent) demonstrating achievement of the required reduction of pollutant removal;

e) a maximum discharge rate from the site of 1.2l/sec/ha

f) details of how the runoff from the land is to be retarded

g) a point of discharge and independent drainage of each lot

h) documentation demonstrating approval from the relevant authority for the legal point of discharge; and

i) Documentation demonstrating how drainage will be designed so neighbouring properties are not adversely affected by the development, including water flow to and from neighbouring properties

Before the issue of statement of compliance for the development, the works as shown on the endorsed drainage plan must be completed to the satisfaction of the responsible authority.

6. <u>Detailed Construction Plan</u>

Before any road, drainage or landscaping works associated with the development or subdivision start, detailed construction plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must include:

a) fully sealed pavement with concrete edge strip
b) widened sealed pavement approach for left turns to the development from Old Dookie Road
c) water sensitive urban design features
d) underground drains;
e) site grading from the rear to the frontage of each lot of at least 1:200;
f) silt and erosion control measures and
g) services and street lights;

All road, drainage and landscaping works must be constructed in accordance with the endorsed plans.

Before the issue of the statement of compliance for each stage all works as shown on the endorsed construction plans must be completed to the satisfaction of the responsible authority.

7. Landscape Plan

Before the development starts a landscape plan must be submitted to and approved by the responsible authority. When approved, the plan will be endorsed and will then form part of the permit. The plan must be drawn to scale with dimensions and three copies must be provided to show:

a) a survey of all existing vegetation and natural features showing plants (greater than 1200mm diameter) to be removed and considering if any of the plants are considered native vegetation under clause 52.17 of the Greater Shepparton Planning Scheme;

b) building envelopes and vehicular access points for each lot in the subdivision.

c) a schedule of all proposed trees, shrubs and ground cover, including the location, number and size at maturity of all plants, the botanical names and the location of areas to be covered by grass, lawn or other surface materials as specified;

d) tree planting within the retention basin

e) the method of preparing, draining, watering and maintaining the landscaped area;

f) details of surface finishes of pathways and driveways;

g) landscaping and planting within all open areas of the site

h) all landscaped areas to be used for stormwater retardation;

i) a permanent screen of trees and shrubs with a minimum of two rows using a mixture of local trees and understorey species along the southern boundary of the land

All species selected must be to the satisfaction of the responsible authority.

All trees planted as part of the landscape works must be a minimum height of 1.5 metres at the time of planting.

Before the issue of a statement of compliance or by such a later date as is approved by the responsible authority in writing, landscaping works shown on the endorsed plan must be carried out and completed to the satisfaction of the responsible authority.

8. Soil Assessment

Before the commencement of any works, a soil assessment must be undertaken by a suitably qualified person to determine the extent of any contaminated soils that may exist on the subject land or determine that the land is suitable for residential development.

If contaminates are detected, a more detailed assessment outlining the location of contaminated soil, the type of contaminates detected and the strategies required to be undertaken to decontaminate the affected areas must be prepared and submitted to the responsible authority and works carried out to decontaminate the land to the

satisfaction of the responsible authority.

9. Payment in Lieu of Open Space

Before the statement of compliance is issued under the *Subdivision Act 1988*, the owner must pay to the responsible authority a sum equivalent to three per cent of the site value of all land in the subdivision.

The owner must advise the Council, in writing, to undertake the property valuation and must pay the Council's reasonable costs and expenses to provide such a valuation for payment in lieu of the public open space contribution.

10. Subdivision Development

Form 13

Before a Statement of Compliance is issued under the *Subdivision Act 1988* by the Responsible Authority the owner must provide a completed Form 13.

Other Matters

Before a Statement of Compliance is issued under the *Subdivision Act 1988* the owner must provide to the satisfaction of the responsible authority:

a) a water supply/tapping (including a water meter) to each area of parkland/reserve in the subdivision or as otherwise agreed to by the responsible authority;

b) an assets statement for each street including a valuation for land within each road reserve;

c) full set of 'as constructed' digitised construction plans in PDF and .dwg format for landscaping, roads and drainage (CD or other format as appropriate);

d) an electronic copy on CD a Survey enhanced "as constructed" GIS data for the drainage information component of the subdivision, in accordance with the current version of D-SPEC;

e) a certified plan showing the extent and depth of fill in excess of 300 mm placed on any of the allotments;

f) street name plates;

g) issue of a Preliminary Acceptance Certificate by Council's Development Engineers section for the acceptance of street construction, site grading, landscaping etc;

h) fire plugs in accordance with the Country Fire Authority requirements, at the subdivider's expense; and

i) a bond to the value of 5% or $5000 whichever is greater of the cost of works for the maintenance of the street and drainage and a separate bond for the landscape construction to a value of 5% of the landscape shall be submitted to the Council to be held for the duration of the maintenance period.

11. General Provision of Services

Before the issue of Statement of Compliance for each stage, reticulated water and electricity must be available to the satisfaction of the responsible authority.

Before the issue of Statement of Compliance for each stage, all reticulated services including telecommunications infrastructure shall be under grounded. Where possible all services are to be provided within common trenches.

12. Prior to Commencement of Construction

Before the commencement of any road/drainage works associated with the subdivision, the following items must be satisfied;

a) certification of the Plan of Subdivision;

b) approval of the construction plans; and

c) an on-site meeting be undertaken with officers of the responsible authority, the contractor and the owner and / or owner's consultant to discuss, amongst other things, roadside management, construction techniques, vegetation clearing controls and vegetated areas to be barricaded off prior to and during construction must have taken place.

13. Street/Road Name Allocation

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the owner must lodge an application to the Council's Street Naming Committee for the approval of any street names and street numbers on the plan of subdivision.

14. Covenants

Before the issue of statement of compliance, a copy of the proposed covenants (if any) is to be provided to the Council.

15. Goulburn Broken Catchment Management Authority Requirements

To avoid adverse flooding impacts to neighbouring properties, filled building envelopes are to be limited to a maximum area of 500sqm per allotment.

16. Goulburn Valley Region Water Corporation Requirements

a) Payment of a new customer contribution for water supply to the development, such amount being determined by the Corporation at the time of payment;

b) Provision of a reticulated water supply and associated construction works to each allotment within the development, at the developers expense, in accordance with standards of construction adopted by and to the satisfaction of the Goulburn Valley Region Water Corporation.

c) Any existing water service that crosses any of the proposed allotment

boundaries within the proposed development must be disconnected and re-located at the developer's expense, to be wholly within one allotment only and to the satisfaction of the Goulburn Valley Region Water Corporation;

d) The operator under this permit shall be obliged to enter into an agreement with Goulburn Valley Region Water Corporation relating to the design and construction of any sewerage or water works required. The form of such Agreement shall be to the satisfaction of Goulburn Valley water. A copy of the format of the Agreement will be provided on request;

e) The plan of subdivision lodged for certification is to be referred to the Goulburn Valley Water Region Water Corporation pursuant to Section 8(1) of the *Subdivision Act, 1988*.

17. <u>Country Fire Authority Requirements</u>

Amended plans required

a) Before the development commences, amended plans to the satisfaction of CFA must be submitted for approval by CFA and the responsible authority. When

approved, the plans will be endorsed and will then form part of the permit. The

plans must be drawn to scale with dimensions and must demonstrate compliance

with the following conditions.

Hydrants

b) Operable hydrants, above or below ground must be provided to the satisfaction of CFA.
c) The maximum distance between these hydrants and the rear of all building envelopes (or in the absence of building envelopes, the rear of all lots) must be 120m and hydrants must be no more than 200m apart. This distance must be measured around lot boundaries.
d) Hydrants must be identified as specified in "Identification of Street Hydrants for Firefighting purposes" available under publications on the Country Fire Authority web site (www.cfa.vic.gov.au).

Access

e) Roads shall be constructed to provide emergency vehicle access to all lots. These roads shall be designed, constructed and maintained for vehicles of at least 15 tonnes and be of all weather construction. A minimum trafficable width of 7.3m, if parking is unrestricted, or 5.4m if parking is prohibited on one side of the road, shall be provided.
f) The vertical and horizontal alignment of the roads shall be designed to accommodate the design vehicle equivalent to the Austroads Design service

vehicle – 12.5m radius.

g) Provision shall be made at the end of all dead-end streets greater than 60m in length (whether or not created by staged construction) for turning this design vehicle to the satisfaction of the Responsible Authority. (A three point turn is acceptable)

h) Plans demonstrating compliance with conditions 3.1, 3.2 and 3.3 shall be provided to the CFA prior to Certification of the Subdivision.

i) The average grade of roads must be no more than 1 in 7 (14.4%) (8.1 degrees) with a maximum of no more than 1 in 5 (20%) (11.3 degrees) for no more than 50 meters.

18. <u>Powercor Requirements</u>

a) The Plan of Subdivision submitted for certification under the *Subdivision Act 1988* shall be referred to Powercor Australia Ltd in accordance with Section 8 of that Act.

The applicant shall:-

b) Provide an electricity supply to all lots in the subdivision in accordance with Powercor's requirements and standards, including the extension, augmentation or re-arrangement of any existing electricity supply system, as required by Powercor (a payment to cover the cost of such work will be required).

c) Where buildings or other installations exist on the land to be subdivided and are connected to the electricity supply, they shall be brought into compliance with the Service and Installation Rules issued by the Victorian Electricity Supply Industry. You shall arrange compliance through a Registered Electrical Contractor.

d) Any buildings must comply with the clearances required by the Electrical Safety (Network Assets) Regulations.

e) Any construction work must comply with the Officer of the Chief Electrical Inspector 'No go zone' rules.

f) Set aside on the plan of subdivision for the use of Powercor Australia reserves satisfactory to Powercor Australia where any electric substation (other than pole mounted type) is required to service the subdivision.

g) Provide easements satisfactory to Powercor Australia, where easements have not been otherwise provided, for all existing Powercor Australia electric lines on the land and for any new power lines required to service the lots and adjoining land, save for lines located, or to be located, on public roads set out on the plan. These easements shall show on the plan an easement in favour of Powercor Australia for Powerline purposes pursuant to Section 88 of the *Electricity Industry Act 2000*.

h) Obtain for the use of Powercor Australia any other easement external to the subdivision required to service the lots.

i) Adjust the position of any existing easement(s) for power lines to accord with the position of the line(s) as determined by survey.

j) Obtain the approval of Powercor Australia to lot boundaries within any area affected by an easement for a powerline and for the construction of any works in

such an area.

k) Provide to Powercor Australia Ltd, a copy of the version of the Plan of Subdivision submitted for certification, which shows any amendments which have been required.

19. Telstra Requirements

That the plan of subdivision submitted for certification be referred to Telstra in accordance with Section 8 of the *Subdivision Act, 1988*.

20. Goulburn Murray Water Requirements

a) Any Plan of Subdivision lodged for certification must be referred to Goulburn-Murray Rural Water Corporation pursuant to Section 8(1)(a) of the *Subdivision Act.*

b) All works within the subdivision must be done in accordance with EPA Publication 960 "Doing *It Right on Subdivisions, Temporary Environmental Protection Measures for Subdivision Construction Sites",* September 2004*.*

c) Prior to the Statement of Compliance being issued, the owner must enter into an agreement with the responsible authority and Goulburn-Murray Water pursuant to Section 173 of the *Planning and Environment Act 1987*, requiring:

- If a community effluent disposal system or reticulated sewerage system becomes available, all wastewater from the dwelling must be disposed of via this system and the on-site treatment and disposal system must be decommissioned.

- An Endorsed Plan that shows the following to the satisfaction of the Responsible Authority and Goulburn-Murray Water:

    - Wastewater disposal exclusion zones 30 metres from Goulburn-Murray Water Irrigation Channel.
    - Building exclusion zones 30 metres from Goulburn-Murray Water Irrigation Channel.

- All future dwellings and associated onsite wastewater disposal areas must be in accordance with the Endorsed Plan.

- All wastewater from any future dwellings on lots 2 – 8 must be treated to a standard of at least 20mg/L BOD and 30mg/L suspended solids using a package treatment plant or equivalent. The system must be an EPA approved system, installed, operated and maintained in accordance with the relevant EPA Code of Practice and Certificate of Approval.

- All costs associated with the preparation and registration of the agreement are to be borne by the applicant/developer/owner of the subject land.

- This agreement must be registered on title.

- The owner must provide evidence of registration of the Agreement to Goulburn-Murray Water within three months of this occurring.

- This agreement is cancelled if (a) above is satisfied.

d) Prior to the issue of the Statement of Compliance, an amended stormwater management plan and/or MUSIC model must be submitted for assessment to Goulburn-Murray Water and the responsible authority. The plan must be prepared in accordance with the principles described in Urban Stormwater: Best Practice Environmental Management Guidelines (Victorian Stormwater Committee, 1999) and be to the satisfaction of G-MW and the responsible authority.

e) The retardation basin(s) and Stormwater Treatment Areas must not interact with the watertable. Prior to construction, a test hole should be dug to ensure that groundwater does not leak in and that the soil is consistent to the depth required.

f) Urban development of property holding delivery shares.

For urban development of property holding delivery shares the applicant must either:

- make application to G-MW pursuant to sections 224 and 229 of the Water Act 1989 to: terminate the delivery shares in relation to the property; make a declaration that the property cease to be a serviced property (to effect excision from the district); and trade or transfer any Water Share in relation to the property; ***or alternatively***
- demonstrate to G-MW's reasonable satisfaction the means by which a G-MW water supply will be metered and delivered to the lots created by the subdivision, bearing in mind requirements for water use licences and annual use limits.

21. <u>Time for Starting and Completing a Subdivision</u>

This permit will expire if one of the following circumstances applies:

a) the subdivision is not started (certification) within **two (2)** years of the date of this permit;

b) the subdivision is not completed (statement of compliance issued) within **five (5)** years of the date of this permit.

The responsible authority may extend the periods referred to if a request is made in writing before the permit expires or within three (3) months afterwards. Prior to approval being given for the extension of these periods the responsible authority may require the re-submission of Plans, Computations and other relevant information to assess compliance with current requirements, Acts and Regulations, Codes of Practice and Australian Standards, as may be relevant.

Delegates Report – Extension of Time

PURSUANT TO SECTION 69 OF THE *PLANNING AND ENVIRONMENT ACT 1987*

Application Details:

Responsible Officer:	Andrew Dainton

Application Number:	2008-254
Applicant Name:	W J Bradshaw
Permit expiry date	24 September 2011 (commencement)
Date extension request received:	22 March 2012

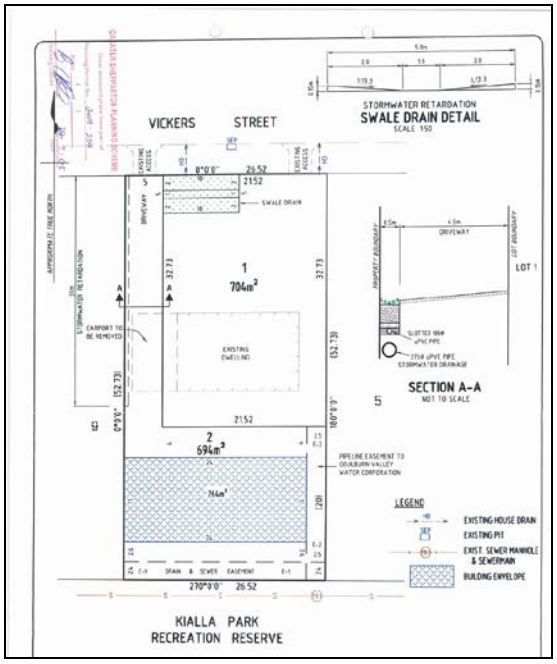
Land/Address:	7 Vickers Street KIALLA VIC 3631
Zoning & Overlays:	Residential 1 Zone Development Plan Overlay - Schedule – 3 Floodway Overlay Land Subject to Inundation Overlay
Why was a permit required at the time of issue (include Permit Triggers):	Subdivision in R1Z under clause 32.01-2 Subdivision in FO under clause 44.03-2 Subdivision in LSIO under clause 44.04-2

Proposal

In accordance with Section 69(1) of the *Planning and Environment Act 1987* an application for extension of time to the above planning permit has been made.

DETAILS OF APPLICATION

The planning permit allowed a two lot subdivision of the land, which creates a lot for an existing dwelling and a vacant developable lot to the rear of the existing dwelling. A copy of the endorsed plan is below.



The applicant has sought a six month extension to the permit, to allow the plan to be certified.

The permit was issued on 24 September 2008 and condition 10 of the permit required the plan be certified by 24 September 2010. On 19 October 2010 the permit was extended to allow certification until 24 September 2011.

A further application to extend the permit to allow the permit to be certified was received on 22 March 2012.

Given the permit expired on 24 September 2011, this application is outside the three month grace period, therefore the permit has expired and cannot be extended by the Council.

The application seeks that the Council refuse to extend the application, so that the applicant can apply for an extension to VCAT.

Planning Considerations

The responsible authority may consider the following in accordance with *Kantor & Ors v Murrindindi Shire Council 18 AATR 285 at 313*:

- **WHETHER THERE HAS BEEN A CHANGE OF PLANNING POLICY.**

  Since the issue of the permit is September 2008 the zoning and overlays affecting the land are unchanged. The permit triggers are also unchanged since the issue of the permit in September 2008.

  The Council has progressed with a Housing Strategy which is now a seriously entertained document. The Housing Strategy includes the land within a minimal change area (MCA).

  The MCA is described within the Housing Strategy as:

  Minimal Change Areas are established residential areas that for a number of reasons have limited capacity to accommodate future residential development. Minimal Change Areas do not prohibit all residential development, but seek to allow limited residential development that is generally consistent with the type, scale, style and character of the area.

  Minimal Change Areas have generally been designated in locations that:
  - *have a strong neighbourhood character, largely evidenced by a significant presence of historical buildings and places;*
  - *are affected by environmental factors such as flooding which limit development capacity;*
  - *have a low density or rural living character;*

- *are in close proximity to uses which cause significant off-site impacts;*
- *have a widespread application of restrictive covenants which limit housing diversity; and*
- *have valued landscape features and / or views and vistas.*

The Council may also consider smaller Minimal Change Areas in locations immediately adjacent to a sensitive use or affected by a particular environmental factor that has the potential to create significant risk to development or a valued feature of the landscape or detrimentally affect character that is desirable to retain.

The strategies for managing residential development in Minimal Change Areas seek to:

- *ensure development respects existing scale and character;*
- *ensure development respects heritage buildings and their curtilage;*
- *ensure development does not considerably impact on significant natural features or views and vistas;*
- *ensure extensions to existing dwellings do not cause significant new overlooking; overshadowing, visual bulk or neighbourhood character impacts; and support and encourage environmentally friendly technologies for new development and major renovations.*

- **WHETHER THE LANDOWNER IS SEEKING TO 'WAREHOUSE' THE PERMIT.**

The applicant since obtaining a planning permit has undertaken the following to pursue the permit:

- Lodged a certification application
- Entered into a S173 as required by the planning permit, which relates to WSUD
- Received consent from all authorities to certify the plan of subdivision
- Received endorsed drainage plans for the development
-

Based on the above the applicant is not warehousing the permit.

- **INTERVENING CIRCUMSTANCES BEARING ON GRANT OR REFUSAL OF THE EXTENSION.**

The matter that prevented the certification of the plan of subdivision within the life of the permit was the submission and approval of a drainage plan.

The drainage plan and report was submitted to the Council on 14 October 2010.

The drainage details were subsequently endorsed by the Council engineers on 25 November 2010.

The Council engineers did not consent to the certification of the plan of subdivision until 16 March 2012, at which time the permit has expired.

The applicant could not have expected that such a delay would occurred between the endorsement of plans and consent to certify.

Despite this the applicant is very experienced and should of followed up with the Council the status of the certified plan.

- **THE TOTAL ELAPSE OF TIME AND WHETHER THE TIME LIMIT ORIGINALLY IMPOSED WAS ADEQUATE.**

  The time originally allowed and the first extension provided a total of three years to achieve a certified plan, which is considered an adequate period of time.

- **THE ECONOMIC BURDEN IMPOSED ON THE LANDOWNER BY THE PERMIT.**

  The landowner has invested heavily into the development, through the preparation of plans and consultative costs.

- **THE PROBABILITY OF A FRESH PERMIT ISSUING SHOULD A FRESH APPLICATION BE MADE.**

  The triggers to the original application have not changed since the issue of the permit. The only significant change is the housing strategy including the land within the minimal change area. The likely reason for this designation is the FO which affects the front four metres of the land, the land to the east which is not within the FO is designated incremental change area.

  As the application is limited to a two lot subdivision which creates a conventional size residential lots of 704sqm and 694sqm, it is likely that a permit would re-issue with similar conditions as contained within 2008-254.

DISCUSSION / COMMENTS

The above assessment against the relevant tests allows the conclusion that on its merits the permit could be extended.

Despite this, the request was lodged outside the three month grace period, which is fatal to the application.

Therefore it is recommended that the application should be refused.

As the applicant has indicated they will apply to VCAT to have the permit extended, the Council should decide its position for a future VCAT proceeding.

Allday v Moreland CC 2011 (VCAT 1283), Member Cook considered an application for extension of time which was lodged outside the three month grace period. The permit in this case was granted in 2006, and following an extension of time the permit was required to be commenced by 7 April 2009.

Member Cook made the following comment within her decision:

> *Whether there would be any impact on established practices and considerations of fairness between the applicant and other people in a similar position – this is a critical issue. The Tribunal is very conscious of the importance of time frames fixed by the legislation. It has often been said by the Tribunal that permits are valuable rights in relation to land and that permit holders need to act in a timely and informed way to preserve these rights. The power to disregard compliance is exercised sparingly to enable justice to be done. Occasionally, leeway is given to, say, a first time applicant who is just out of time where all the circumstances would support the grant of a fresh permit for the same use or development. On the other hand, where there is a delay of over one year without any convincing reason, it is not sufficient to exercise this power simply to provide an additional development opportunity to a permit holder who has been clearly neglectful in the absence of any other convincing factors. To do so would be to open the door to requests for extensions of time for long expired permits being made to the Tribunal in circumstances clearly contrary to the spirit of the legislation;*

Planning permit 2008-254 expired on 24 September 2011 as the plan was not certified.

Whilst not ideal it is considered there is no planning benefit in opposing VCAT application for an extension to the permit to allow the plan to be certified and the subdivision completed, for the following reasons:

- The permit triggers have not changed
- The proposed lots are large in size and will not detrimentally impact on the neighborhood character of Vikers Street
- The landowner has undertaken significant efforts to progress the application, through the lodgment of applications, preparation of construction plans and registration of the required section 173 agreement
- It is likely if a fresh application were made that a permit would issue

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Moved: Colin Kalms
Seconded: Braydon Aitken

That the responsible authority refuses the application for extension of time to a planning permit as the application was made outside of the three month grace period.

That should the applicant seek to extend the permit through VCAT, the Council not oppose a one year extension to the permit i.e. certification being achieved by no later than 24 September 2012.

Carried