

Writing Planning Permits

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Introduction

The purpose of this manual is to provide guidance for preparing planning permits. Planning permits must be legally valid, clear, and concisely written if the permits are to be enforceable, and their requirements understood by permit holders and other interested and affected persons. Although the word 'permit' is used throughout the manual, it equally applies to preparing a notice of decision to grant a permit.

The *Planning and Environment Act 1987* authorises the preparation and implementation of planning schemes by a municipal council. Planning schemes regulate the use and development of land and other related matters. One way they do this is by requiring that certain uses, developments or other matters may only proceed if planning permission is granted. This permission is in the form of a planning permit. Planning permits are legal documents that allow a certain use and/or development to proceed on specified parcels of land. Planning permit conditions can confer rights and obligations on the permit operator. So long as a permit is relied upon, these rights and obligations live on in relation to the land in addition to any scheme requirements.

The manual is principally intended to assist council planners, who have the primary responsibility for drafting planning permits, and referral authorities. As planning permits are sometimes varied in the course of a council meeting, it is also important that the principles set out are understood by councillors so that later additions can be properly constructed.

The manual may be viewed and downloaded from www.dse.vic.gov.au/planning.

About this manual

Parts 1 and 2 of the manual contain advice about the preparation of planning permits. Part 1 deals with drafting of the permit preamble or what the permit allows. Part 2 relates to the drafting

and ordering of conditions. Guiding principles have been provided to ensure that conditions included on any permit are both relevant and valid. Parts 1 and 2 of the manual should assist users to select the right conditions from Part 3 and, if necessary, modify the conditions to meet specific requirements. A brief discussion of the difficulties surrounding some of the key issues is included in Parts 1 and 2.

Part 3 of the manual contains model conditions that have been grouped according to purpose or function, or by type of land use or development. Not all activities or developments are covered. Conditions most commonly required in both country and urban areas have been included, as well as some specialised conditions. Those included under the heading of Environmentally Sensitive Areas may be especially useful to referral authorities in the drafting of their conditions. This revised edition of the manual also includes conditions relevant to native vegetation offset requirements.

The model conditions need to be applied judiciously. The question of the relevance of a condition to a particular circumstance must always be considered. It may be necessary to modify a model condition or draft a new one depending upon the nature of the permission being granted. The model conditions have been carefully drafted with a view to meeting the principles set out in Parts 1 and 2 as far as is practicable. However, the relevance and applicability of any condition to a specific proposal will always need to be determined on a case-by-case basis.

Further reading material in relation to planning permit drafting is suggested on the back cover.

Part 1

Writing the permit preamble

The Planning and Environment Regulations 2005 set out the format for a planning permit. Form 4 requires the permit preamble to state the address of the land and what 'the permit allows'. Getting this part of a planning permit right is essential to the identification of relevant and valid conditions. The permit preamble should clearly and unambiguously set out the scheme permission(s) being granted.

1.1 Description of requirements

When considering any planning permit application, all of the permissions required to be obtained under the scheme must be properly identified. Clear identification of the required permissions ensures the proposal is assessed against all relevant matters for consideration and reduces the possibility of irrelevant matters being taken into account.

An understanding of the extent and nature of the permissions being considered and with that, the 'ambit of the discretion' being exercised - is critical in ensuring the relevance and validity of conditions. The correct expression of what the permit allows enables effective enforcement proceedings. It also defines the existing use rights of those uses already established under permit at the approval date of the planning scheme.

Specify each use, development and other matter allowed.

The subject of a permit is usually the use of the land for one or more specified purpose and/or its development (including subdivision). These matters have been the traditional focus of planning schemes.

The display of advertising signs, the installation and use of gaming machines, the sale and consumption of liquor, the reduction or waiver of car parking requirements and the creation of a new point of access to a major roadway are some of the other matters subject to permission. A

scheme may also require particular permissions to be granted for variations from standard development requirements such as specified preferred heights for buildings, minimum setbacks or site layouts. Planning schemes also enable permits to be granted to vary or remove restrictive covenants, easements and rights of way.

The permit preamble needs to state that the permit allows:

- **the use of land for a specified use (or uses), or**
- **the development of the land (or the construction of buildings and works or subdivision of the land), or**
- **the use and development of the land (for a specified purpose), and/or**
- **any other matter (such as the variation or removal of a restrictive covenant, the waiver of car parking requirements, the installation of gaming machines etc).**

When allowing a reduction or waiver of car parking, the use to which the waiver or reduction relates should be specified in the preamble.

1.2 Group multiple permissions

Proposals can sometimes generate the need for a considerable number of permissions under the planning scheme. This commonly arises where the subject land is affected by multiple overlays and/or particular scheme requirements.

It may be beneficial to group the permissions granted into a generalised description in the permit preamble to avoid a long list of permissions.

For example a number of permitted variations to the particular requirements for the use of land for a service station, under Clause 52.12 of the planning scheme, might be simply described as 'variation of the requirements for use of land as a service station'.

However, care must be taken when grouping permissions to avoid omitting any necessary permission.

1.3 Outcomes v scheme requirements

Permit applications often describe the proposal in terms not indicated as requirements of the planning scheme. An example of this is in the case of restaurants in the Business 1 Zone. Applications may describe the proposal as the use of land for a restaurant. In that zone, however, unless the site is in an area specified in the schedule to the zone, a permit is not required for the use of land for a restaurant. What may be required is permission to reduce the standard amount of parking. If an application is misconstrued as being for use rather than to reduce or waive parking, inappropriate objections may be lodged, irrelevant matters considered and invalid conditions applied.

In specifying what the permit allows, it is important to clearly identify the scheme requirements that apply rather than the outcomes of the permit.

Another common example is where an applicant operating a business describes the proposal on the application form as 'extend hours of operation' or 'increase patron numbers'. Such descriptions may be accurate in terms of the outcome sought, but do not describe the permissions required under the planning scheme. In such a case, the actual permission required may be to use the land for a particular purpose because an existing permit, which includes conditions restricting patron numbers or hours, is no longer appropriate. When giving notice of the permit application, however, the description of what is proposed might usefully refer to the fact that longer hours of operation than are currently allowed are intended or that a greater patronage level is sought.

1.4 Description of the use(s) allowed

In writing the permit preamble, the question arises about the level of particularity to which the use should be described. This occurs especially where the definition of a proposal is 'nested' within a wider land use group. An example is the nesting of five specified uses, including car wash and laundromat, within the wider definition (or land use group) of service industry in the

planning scheme. This is illustrated in the nesting diagram opposite.

The use being permitted should normally be described in particular use terms rather than as a land use group.

This will prevent a later shift to another use within the scope of the land use group allowed by the permit, which may result in an intensified use or effects not associated with the particular use originally proposed. For example, if the use allowed is specified as a nursing home rather than as a residential building, this would prevent its future use as a motel, which may be associated with increased traffic or parking demands. This issue is especially relevant in relation to changes in industrial uses that are subject to particular 'buffers' under Clause 52.10 of the planning scheme.

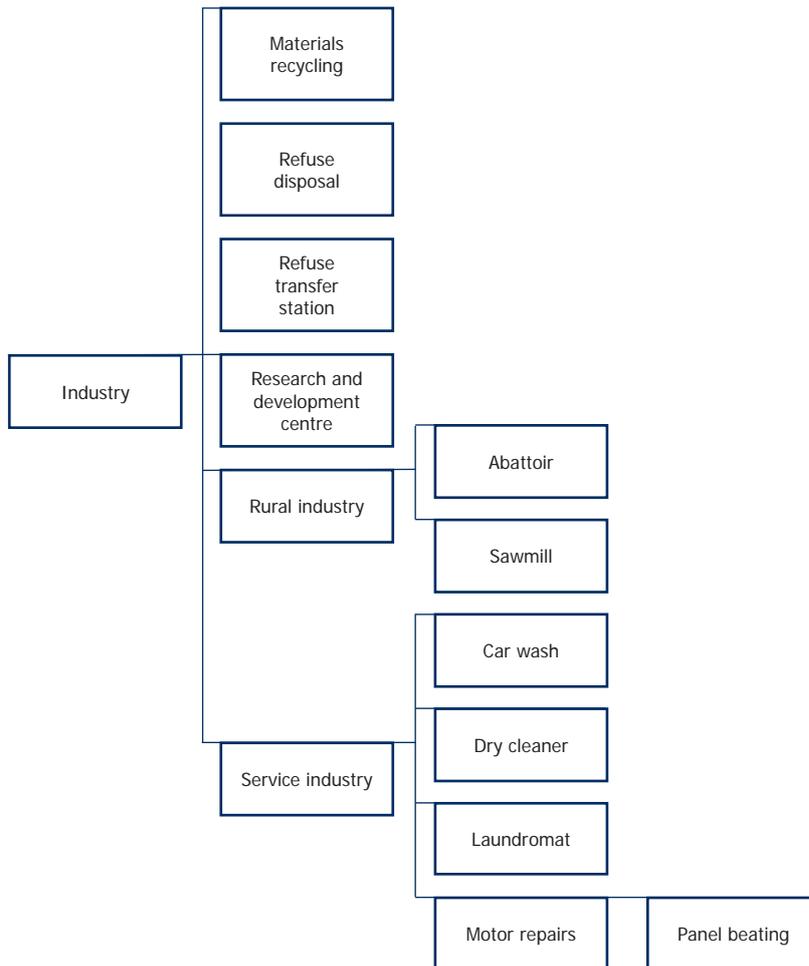
Alternatively the use allowed can be described in terms of the land use group or subgroup specified in the scheme, with the particular use (or sub-category of use) included in brackets after it. An example of this is 'place of assembly (bingo hall)'.

Sometimes, it may be preferable to use the wider term in order to avoid the need for a subsequent planning application. It may be sufficient to define the permitted use as an education centre rather than as a karate or ballet school. This approach should only be adopted where the effects of changes within a wider category of use can be clearly identified as inconsequential.

If a wider group is employed, to avoid conflict with scheme requirements, it is appropriate to specify the same exclusions from the land use group as apply to the group in the relevant zone. This will avoid conflict with scheme requirements. Additional exclusions may also be made without conflict with the scheme. For example, in a Business 3 Zone, a shop is excluded from the discretionary retail premises nest by the zone provisions. In addition to specifying a shop, other types of specific retail premises could be excluded, such as trade supplies.

Writing the permit preamble

Industry group



Part 2

Preparing and organising conditions

The general objective in preparing conditions is to achieve a cohesive and ordered set of relevant and effective requirements upon the permitted uses, development or other matter(s). Observation of the following principles will assist in achieving that objective.

2.1 Order and cross-reference the list of conditions

- Conditions requiring immediate action by the operator under the permit, such as the submission of amended plans or the entering into an agreement under section 173 of the Act, should be placed at the start of the permit.
- Related conditions should be grouped, so that the full extent of requirements in relation to a particular topic or aspect of the proposal can be readily understood. Headings may be useful.
- Where possible, referral authority requirements should be identified by the appropriate authority name.
- Conditions must be consistent with other requirements of the permit including any endorsed plans, as well as with the requirements of the planning scheme. Cross-referencing between matters to be included on amended plans and other conditions is appropriate.
- Development changes or other development requirements should be incorporated in a condition requiring plans to be amended before they are endorsed, rather than by separate condition.
- Each page should be numbered with reference to the total number of pages in the permit, for example 'page 1 of 3'.

2.2 Clearly express condition requirements

A permit condition may be invalid if it is vague and uncertain. It is only fair that a permit holder and other affected persons are able to understand the limitations placed upon a particular use or development. Without sufficient clarity, it may also be difficult to enforce the condition requirements. To this end:

- time frames for compliance with all requirements should generally be included
- 'plain English' drafting should be adopted.

Particular care should be taken to avoid unnecessary words and information; to use defined terms and accepted forms of expression; and to distinguish between the use of 'and' and 'or', and 'may' and 'must'. 'Shall' should not be used. 'Must' is the plain English equivalent. 'Should' is also inappropriate in conditions as it does not impose a definite obligation.

Using Victoria's Planning System (www.dse.vic.gov.au/planning) may be of assistance. The plain English drafting section included in that guide applies primarily to planning schemes, but the principles can be extended to the drafting of planning permits.

2.3 Validity of conditions

PEA s. 61(1)

A responsible authority may decide to grant a permit with or without conditions. It is usual, however, for permits to be granted subject to conditions.

PEA s. 62

The Act deals with the types of conditions that may or must be put on permits. Section 62(1) deals with mandatory conditions. These are discussed in section 2.4 of the manual. Section 62(2) of the Act relates to the discretion to impose other conditions. It provides that: 'the

responsible authority may include any other conditions that it thinks fit'. A list of possible conditions then follows. The list is not exhaustive and a responsible authority may also impose other types of conditions provided they meet the common law tests for validity. These broadly relate to relevance, certainty and reasonableness.

A useful discussion of much of the case law relating to the validity of conditions is found in *Rosemeier v Greater Geelong City Council (No.1)* (1997) 20 AATR 86.

Essentially, the matters bearing on the validity of conditions are:

Relevance

- **A condition must fairly and reasonably relate to the permitted development.** This means that there must be a connection between the approval granted and the limitation placed upon it. **A condition must also serve a planning purpose.** The relationship between the permission granted and the condition does not have to be interpreted in an overly narrow or specific way. It is sufficient that the condition relates to the achievement of planning policy as set out in the Act or scheme – provided that the policy applies to the land or the use or development in question.
- A condition must not be imposed in order to achieve an ulterior or irrelevant planning purpose, however worthy that purpose may seem to be. It must implement a stated policy, rather than be 'just a good idea' in general planning terms.

Reasonableness

- Even if a condition properly relates to the permission granted, it must meet the test of reasonableness. **A condition is invalid if it is so unreasonable that no reasonable responsible authority would have imposed it.**
- It is also inappropriate to include superfluous or unnecessary conditions. Excessive use of unnecessary conditions could be found to be unreasonable.

Certainty

- A condition will also be found to be void or invalid if it is overly vague or uncertain. A permit holder is entitled to know what obligations arise from the permit.

- The permit must also represent the end of the decision-making process for the permit application. It should not leave open an uncertain future process.
- A condition, which, if complied with, would legally transform the use or development applied for, is also invalid.

Other important matters to consider in relation to these principles

- A condition can require action to be taken external to the land that is the subject of the application for permit, although it may sometimes be appropriate for an agreement to be entered into under section 173 of the Act to deal with this issue (see section 2.12 of this manual).
- Ordinarily a condition regulating use should not be imposed on a permit for development alone. An exception to this may be where an intensification or variation of an existing use (now in section 2 or 3 of the zone) arises as a consequence of the permitted development. For example, extensions to an existing school may require regulation of vehicle access or student numbers for the first time. See the decision in *St Catherine's School v Prahran City Council* (1983) 8 APAD 167.

Other exceptions may occur where there is a need to regulate activities because of the particular characteristics of the development. Careful consideration needs to be given to the relevance of such conditions if they are to avoid a legal challenge.

- A condition tying the operation of a use to a particular operator will not usually be valid except where the operator has special capabilities without which the use could not be operated satisfactorily.
- A condition that defers the resolution of key issues may be inappropriate. Before it decides on an application, a responsible authority must consider any significant impact on the environment. It should not grant a permit that requires that those impacts be assessed after the permit has issued (see the decision in *Holland & Ors v Colac-Otway Shire Council and Hoffman and Anor* (1997)18 AATR Part 3 disc service).
- A condition cannot require a planning permit to be obtained for a subsequent use

or development of the land. Only a planning scheme can specify when a permit is or is not required.

- Conditions requiring development contributions must be carefully considered. Sections 62(5) and (6) of the Act limit the types of development requirements that can be included in conditions. A condition may be imposed requiring a permit applicant to provide or pay for works, services or facilities 'on or to the land or on other land' which the responsible authority considers necessary as a result of the grant of the permit. However the condition cannot require these to be paid for in part by the permit applicant unless the remaining cost is to be met by any Minister, referral authority, public authority or council providing the works, services or facilities (refer to section 62(5)). A condition may also require specified works, services or facilities to be provided or paid for in accordance with an agreement made under section 173 of the Act.

Decisions discussing types of development contributions include *Christian Brothers Victoria Pty Ltd v Banyule City Council* [2001] VCAT 2120, 9 VPR 260; *Curry v Melton Shire Council* (No.1) [2000] VCAT 488, and 5 VPR 59; *Curry v Melton Shire Council* (No.2) [2000] VSC 352, 7 VPR 109, and 111 LGERA 30; *Curry v Melton Shire Council* (No. 3) [2001] VCAT 1602, and 9 VPR 38; *Curry v Melton Shire Council* (No.4) (2002) Application for Review P51974/2001; *Hand v Warrnambool City Council* [2004] VCAT 19,16 VPR 177; *Springhaven Property Group Pty Ltd v Whittlesea City Council* [2005] VCAT 816; and *Tatura Abattoirs Pty Ltd v Greater Shepparton City Council* [2005] VCAT 2639.

- Normally the ambit of discretion and the validity of conditions are viewed as being limited by the purpose of the requirement(s) triggering the need for permission(s). An exception is the assessment of single and multi-dwelling applications in the Neighbourhood Character Overlay. Despite the specialised purpose of the overlay, residential amenity and on-site liveability must be considered as well as character effects (see planning scheme Clauses 54 and 55). In the case of dwelling permits arising from this overlay, conditions with a wider scope than the purpose of the overlay alone would appear to be acceptable.

- Conditions requiring compliance with some other Act or regulation (such as the need for a building permit) are not required.

2.4 Mandatory conditions

Section 62(1) of the Act provides that certain types of conditions must be included on planning permits. They are:

- any condition which the planning scheme or a relevant referral authority requires to be included
- where the grant of the permit would authorise anything which would result in a breach of a registered restrictive covenant, a condition that the permit is not to come into effect until the covenant is removed or varied.

Conditions required by planning schemes must be included on the permit

Conditions include those related to the servicing of those types of subdivision that do not require referral (see planning scheme Clause 66.01-6); the prohibition of further subdivision of rural land; subdivision contributions for public open space (planning scheme Clause 52.01); conditions required to give effect to contributions or levies required by a Development Contributions Plan Overlay (see planning scheme Clause 45.06); and expiry dates for signs.

Conditions required by referral authorities must be included on the permit

A condition required by a referral authority must meet the tests of validity referred to in section 2.3 above. It is expected that the referral authority will appropriately draft the conditions. Conditions suggested by a public authority that is not a referral authority for the purpose of the particular application are not mandatory conditions, nor are conditions suggested by a public authority or another body where the scheme simply requires that their views or comments be sought, or where the responsible authority otherwise seeks assistance from the authority. The Department of Infrastructure Planning Practice Note, *Managing Referrals and Notice Requirements* provides further advice on this matter (www.dse.vic.gov.au/planning).

It may be useful for responsible authorities to develop a set of standard letters that distinguish the various roles of public agencies.

In some instances there may be more than one referral authority in relation to a particular permit application. If the conditions required by them are in conflict, the responsible authority should attempt to resolve the conflict by negotiation and develop a set of compatible conditions. This is unless the responsible authority decides to refuse the permit.

2.5 Conflicting conditions

PEA s.62(1)(b)

The Act prevents the inclusion of conditions where they would conflict with referral authority requirements or conflict with a condition relating to delaying the permission until a restrictive covenant is removed from the land.

PEA s.62(4)

A condition inconsistent with the *Building Act 1993*, with a building regulation made under that Act, or with a relevant determination of the Building Appeals Board, also cannot be imposed.

2.6 Endorsed plans

Most permits refer to and are accompanied by endorsed plans.

Endorsed plans form part of a permit and should be described as such. Although it might be said that this is implicit in the permit, it is also appropriate to **include a condition requiring the permitted development to accord with the endorsed plans. The plans that are to be endorsed as part of the permit should be clearly identified as such.** Normally the condition enables secondary consent to be sought for variations from the endorsed plans. See section 2.7 of the manual.

Sometimes aspects of the development shown on the plans may not require planning permission under the scheme. Fencing is a common example. In these cases, a notation may be placed on the plans indicating that these 'as-of-right' components of the development are not intended to form part of the application. However, if they are seen as essential to granting the development permission they should be included on the endorsed plans irrespective of whether scheme permission is required.

Unless annotated to the contrary, the layout and all components of development shown on the endorsed plans then become subject to the permit. So long as that permit is relied upon,

new development cannot lawfully proceed on the land unless the permit is amended or consent is granted for development to depart from that shown on the endorsed plans. **Amendment of the permit or the granting of secondary consent will be necessary in circumstances where the land continues to 'enjoy the benefit of the permit' whether or not any permission under the scheme is required.** See the decision in *Benedetti v Moonee Valley City Council and Anor* [2005] VSC 434.

PEA s.50, 50A and 57A

The Act provides that before notice of an application has first been given, changes to an application, whether proposed by the applicant or the responsible authority, may be approved by the responsible authority. The Act also provides that after notice is first given, changes to the application may also be approved by the responsible authority but only where they are proposed by the applicant. Where the responsible authority wishes to amend plans prior to endorsement, this can only be dealt with by issuing a permit incorporating appropriate conditions specifying the changes and requiring that new plans consistent with the conditions be submitted.

2.7 Secondary consent conditions

A condition may provide that some future or further changes be carried out to the satisfaction of the responsible authority or not be carried out except with the further consent of the responsible authority. For example a condition may limit the operation of a use to particular hours but may also provide for the hours to be altered with the consent of the responsible authority.

Primary consents refer to the requirements of the planning scheme for permits, and 'secondary' consents are less formal planning approvals commonly available under permit conditions. The distinction between the two is described in the decision of *Art Quest Pty Ltd v City of Whittlesea* (1990), Appeal No. P89/2322, noted at 5 AATR 4.

It is common for a secondary consent clause to be included in a permit condition referring to compliance with endorsed plans. The usual words are:

The (use and) development as shown on the endorsed plans must not be altered without the written consent of the responsible authority.

Secondary consent given under a permit condition does not substitute for any new permission required by the scheme but not yet granted. For example, where an existing building is to be extended, in addition to obtaining secondary consent to vary the plans of the original permit, it may be necessary to obtain a new permission, such as under an overlay introduced since the permit was granted. This approach - that secondary consent cannot substitute for primary consent and must be consistent with the scheme - is set out in a number of decisions including *Kitson Pty Ltd v Doncaster and Templestowe City Council* (1993) 10 AATR 135, and *Westpoint Corporation v Moreland City Council* [2005] VCAT 1049 (31 May 2005). In the decision of *Cope v Hobsons Bay City Council* [2004] VCAT 2487 the Tribunal departed from this otherwise consistent VCAT approach.

Westpoint also describes the limits to changes that may be allowed by secondary consent.

A secondary consent clause can be drafted so as to limit the consent that can be sought. For example, it may indicate that no consent may be sought for changes involving an increase in building height or reduced setbacks. The formal permit amendment processes under sections 72 and 87 of the Act, including notice to third parties, would be available for changes beyond the scope of this kind of confined secondary consent condition.

Any limitations included in a secondary consent condition should be clearly drafted and reasonably relate to the permitted development.

PEA s.149(1)(a)

The permit holder may lodge an application for review with VCAT in relation to a secondary consent clause contained in a permit. Third parties, however, have no formal right of objection and no review rights in relation to secondary consents. This matter should be kept in mind when deciding whether or not to include a secondary consent clause within a condition.

PEA s. 62(2)(a)

A condition may also allow secondary consent to be exercised by a Minister, public authority or referral authority.

2.8 Time for commencement

The words 'this permit has no force or effect until ...' should be avoided. **If the permission granted**

is conditional upon another event occurring – such as approval of amended plans or other documents, or the amendment of another permit – the permit should provide that the use or development or other matter authorised by it must not start until those specified events occur.

PEA s.67

This approach avoids confusion about the commencement date of the permit. The Act provides that a permit commences from the date specified in the permit or on the day it was issued. Confusion about the commencement date is particularly unhelpful in the context of enforcement proceedings, requests to extend the life of permits, and when defining existing use rights.

2.9 Expiry date

It is common practice to impose an expiry date on permits. The usual words for use and/or development permits are:

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

- the development (and use) is (are) not started within two years of the date of this permit
- the development is not completed within four 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 months afterwards.

PEA s. 69

The final sentence of this paragraph reflects the Act, which provides for requests to extend the life of permits.

Careful thought should be given to the appropriate period for both commencement and completion. The period should fairly relate to the nature and complexity of the use or development allowed, accommodate the need to obtain subsequent approvals, and allow for a suitable construction period.

PEA s. 68

In the absence of a stated expiry date, default expiry dates for development, for use, and for use and development permits is two years

for commencement, with a further two years to complete development. It is five years for subdivision following certification of the plan of subdivision under the *Subdivision Act 1988*.

The Act does not, however, include default expiry dates for other types of requirements. An expiry date therefore will be normally required on a permit for matters other than use or development, for example, consumption of liquor. Careful drafting is required.

It is sometimes possible to relate the expiry date directly to the permitted matter. Commencement dates can sensibly be applied in this manner to activities such as the sale and consumption of liquor, the installation and use of gaming machines, and the display of signs. Where a permit allows the reduction or waiver of car parking for a particular use, however, the parking permission needs to be tied to the commencement of the parent use. This applies whether or not the use is as of right.

2.10 Limited life permits

In unusual circumstances, a responsible authority may require a use to operate for a limited period only. Careful consideration should be given to whether this is appropriate. If the use is short term, there can be a danger that any amenity impacts resulting from the use will be downplayed because they are not ongoing.

It is not appropriate to specify the limited period in the words describing what the permit allows, for example, 'this permit allows the use of the land for a restaurant for a period of two years'. **The permitted period should be imposed as a condition of the permit.** This allows for a review of the condition by VCAT.

A choice must also be made about the use of secondary consent to extend the life of the permit or whether a new permit should be obtained (see section 2.7 for a discussion of this issue). To provide for secondary consent, the words 'except with the further consent of the responsible authority' must be included in the condition.

2.11 Amendment of existing permits

PEA s. 6(3)

Sometimes an applicant seeks to modify the manner in which an already established use operates. If the use was established before the

approval date of the present planning scheme or a relevant amendment of the scheme, then existing use rights limit the ongoing operation of the use and/or the ability of the land to be further developed. Those rights are broadly established by the Act but are further refined by Clause 63 of the planning scheme. Where an existing use was established under a permit, the existing use right is defined by that permit and its conditions.

The existing use provisions at Clause 63 enable a use that is prohibited under the new scheme or amendment to continue to operate provided that a number of requirements are met. Similarly, Clause 63 enables an existing use that would ordinarily require a permit under the new scheme or amended scheme to continue, without the need of a new permit, provided that the same requirements set out in the clause can be met.

One of the requirements of Clause 63 is that any condition or restriction to which the existing use was subject (at the approval date) continues to be met. This applies to existing uses which were established under permits.

If application is made to redevelop the site of an existing use established under a permit before the approval date of the current scheme or relevant scheme amendment or to alter the nature of the operation, it is important to consider whether any condition or restriction on the existing permit, such as operating hours, can continue to be met. If not, a new permit may be required and the existing permit may need to be amended. **It must be understood that the granting of any further permit will not amend the earlier permit.** Separate steps to amend the earlier permit are required.

PEA s. 72 and s. 87

The amendment of earlier permits requires careful consideration. Sections 72 and 87 of the Act limit the amendment powers of responsible authorities and VCAT respectively. The nature of the changes required, whether VCAT (or a predecessor tribunal) issued the permit, the effect of the changes and other matters must be considered.

A section 2 use and/or associated development authorised by a permit granted after the approval date of the present scheme or of any relevant amendment may also require modification to avoid conflict with any new permit. There is again

a choice as to whether to seek a complete new use and/or development permit, or simply to require, by condition, that the earlier permit be amended. The need for such amendments arise out of the desirability of avoiding conflicting permits, rather than from any need to preserve existing use rights.

2.12 Section 173 agreements

PEA s. 62(2)(4)

A responsible authority may include a condition in a planning permit that the owner of the land (or an applicant who may become the owner of the land) is to enter into an agreement with the responsible authority (section 173). Other persons may also be parties to the agreement.

PEA s. 173

The circumstances in which section 173 agreements can be amended once registered are limited. The Act provides that, once registered, the obligations contained in the section 173 agreement bind future owners. Consequently, the decision to impose a section 173 agreement as a permit condition is a serious matter.

PEA s. 174

The scope of what may be included in a section 173 agreement is broad. A section 173 agreement may impose positive obligations on the owner of land, for example, to do certain works and/or to maintain those works into the future. An agreement may also impose restrictions upon the ability of the owner of the land to use or develop the land in a certain way. An agreement cannot, however, require or allow anything to be done which would breach the scheme or the permit.

A condition requiring an agreement to be entered into prior to commencement of the use or development permitted by a planning permit is subject to the same tests of validity as any other planning permit condition.

It is not possible to make valid a planning permit condition that would otherwise be invalid by imposing a requirement to enter into a section 173 agreement, a term of which is to be the otherwise invalid condition. See *Harmon Pty Ltd v Casey City Council* [2006] VCAT 629.

The obligation imposed by the section 173 agreement therefore must:

- fairly and reasonably relate to the permitted development

- be in aid of a planning purpose
- not be imposed to give effect to an ulterior purpose
- not be vague and uncertain.

PEIA s. 181

The requirement to enter into a section 173 agreement should normally be followed by a requirement to register the agreement on the title of the land.

PEA s. 182

This enables the content of the agreement to be enforced against future owners.

Importantly section 173 agreements provide clear notice to purchasers of land of the ongoing restrictions on the land.

PEA s. 173

Section 173 agreements are often useful when the subdivision of land is proposed. The creation of new lot sizes can alter the way that other scheme controls operate such as in the case of native vegetation and dwelling controls. The subdivision of land can also nullify conditions which are planned to have ongoing effect.

A section 173 agreement is a practical way of putting beyond doubt an ongoing obligation where land is to be subdivided. However care needs to be taken to avoid a section 173 agreement created at the time of subdivision living on long after it is useful. A clause in the agreement providing for its ending may be included.

Where development is to be confined within building envelopes, a condition requiring that a section 173 agreement be entered into and registered on title is preferable to a restriction being imposed on the land title to the same effect. The latter approach precludes third parties from seeking enforcement action where there is non-compliance and can be ended by agreement between the land owners without third party involvement.

Section 173 agreements are generally not required to impose ongoing restrictions on buildings and works permits (see *Cope v Hobsons Bay City Council* [2004] VCAT 2487, *Benedetti v Moonee Valley City Council* [2005] VCAT 1580 and *Benedetti v Moonee Valley* [2005] VSC 434).

In the case of permits for native vegetation removal, a section 173 agreement may be appropriate to ensure appropriate replacement offsets. In the case of permits for demolition of heritage structures, a section 173 agreement could be used to ensure conservation of remaining structures or maintenance of archival material.

2.13 Conditions relying on outside documents

It is not appropriate for conditions to require compliance with other documents in an unqualified fashion. Confusion can arise as to the nature of the requirements imposed. Where reliance is sought to be placed on particular standards included in an outside document, only the relevant section of the document should be referred to and, desirably, the standards should be directly included within the planning permit itself.

2.14 Notes on permits

It is not appropriate to include warnings, advice or statements of policy as conditions on a permit. Conditions place obligations on a permit operator, or otherwise restrict the permitted use or development. Conditions requiring compliance

with some other Act or regulation (such as the need for a building permit) should not be included. If a warning or advice such as this is thought necessary then it is recommended that these matters be raised in a covering letter.

Footnotes are not part of the permit and should be kept to a minimum.

Appropriate topics to be raised in a covering letter or footnote include:

- advice about the need to comply with other legislative requirements or apply for other permissions, such as under a council local law or from a State government agency or Commonwealth agency. It is usually worthwhile to indicate that a building permit will also be required in appropriate circumstances
- that the application for the dwelling has been assessed under Clauses 54 or 55 of the planning scheme (ResCode provisions). This may be of assistance to building surveyors in determining the extent of the subsequent assessment required under the Building Regulations
- that the permit has been amended under section 72 of the Act in specified ways.

Part 3

Model conditions

Using this part

This part contains model conditions applicable to a variety of planning permits.

Each condition has been carefully drafted. Where the effect of a condition matches the requirement sought to be imposed, the wording of the model condition should be adopted, except that references to multiple uses and developments may be necessary.

Sometimes, a model condition will not be appropriate. It may be too general, insufficiently stringent, not match a referral authority's requirements, or be unsuitable in some other way. In these circumstances, more particular conditions should be applied. Any new condition should be drafted with care. The principles of Part 2 of this manual should be applied.

In the model conditions, italics are used where words need to be inserted, deleted or amended to suit particular circumstances. They may also indicate optional requirements or other guidance. Acts also appear in italics and are not optional requirements.

It is recommended that referral authorities have their own sets of model conditions. Some suggested specialised conditions that may be used to assist the drafting of these conditions are provided.

An electronic copy of the model conditions may be accessed from www.dse.vic.gov.au/planning.

3.1 Expiry of a permit

• Time for starting and completion

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

- */the development/the use/the development and the use/(specify as appropriate)/is/are/* not started within *two* years of the date of this permit.

- the development is not completed within *four* 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 months afterwards.

See section 2.9 concerning default expiry dates and section 3.8 for special subdivision requirements.

3.2 Endorsed plans

• Plans to be endorsed

The plans to be endorsed and which will then form part of the permit are *the plans submitted with the application*.

• Amended plans required

Before the *use and/or development* start(s), 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 three copies must be provided. The plans must be generally in accordance with *the plans submitted with the application* but modified to show:

- (a) *development changes (to be specified)*
- (b) *landscaping changes (to be specified)*
- (c) *other requirements (to be specified)*.

See section 2.6

See section 3.8 for special subdivision condition.

• Plans required

Before the *use and/or development* start(s), 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 three copies must be provided. The plans must show:

- (a) *development (to be specified)*
- (b) *landscaping (to be specified)*
- (c) *other requirements (to be specified).*

- **Layout not altered**

The development as shown on the endorsed plans must not be altered *without the written consent of the responsible authority. Consent may not be sought for alterations which (insert details, for example increase the height of the building/increase building floor area/reduce boundary setbacks/reduce car parking provision/increase the number of dwellings).*

- **Layout not altered – use of land**

The layout of the uses on the endorsed plans must not be altered without the written consent of the responsible authority.

This condition should only be applied to a use permit that requires different uses to be specified on the endorsed plans.

- **Layout not altered – activities forming part of use of land**

The various activities forming parts of the use as shown on the endorsed plans must not be altered without the written consent of the responsible authority.

This condition should only be applied to a use permit that requires different activities within the use to be specified on the endorsed plans.

3.3 General requirements

- **Agreements under section 173 of the Act**

Before the *use and/or development start(s)*, the owner must enter into an agreement with the responsible authority and (*name of other authority or person*) under section 173 of the *Planning and Environment Act 1987* to provide for the following:

- (a) *(specify works and/or services)*
- (b) *(specify other requirement(s)).*

except with the written consent of the responsible authority.

Before (specify time or event), application must be made to the Registrar of Titles to register the section 173 agreement on the title to the land under section 181 of the Act.

The owner/operator under this permit must pay the reasonable costs of the preparation, (and) execution and registration of the section 173 agreement.

See section 3.8 for agreements arising from subdivisions.

- **Cancellation/amendment of existing permits**

Before the *use and/or development start(s)*, planning permit number (*insert number*) must be *cancelled/amended as follows:*

- (a) *(specify required changes)*

This condition should only be applied where conflicts with earlier permit requirements occur (see section 2.11).

- **Covenant removal**

This permit does not come into effect until the covenant contained in Instrument of Transfer (*insert number*) in the Register of Titles is *removed/varied so as to (specify variation).*

This condition must be applied where the permit authorises something that would breach a restrictive covenant (see section 2.4).

- **Temporary permits**

Except with the written consent of the responsible authority, the use of the land for the purpose of (insert permitted use) must cease on (insert relevant date).

See section 2.10.

- **No compensation payable**

No compensation is payable under part 5 of the *Planning and Environment Act 1987* in respect of anything done under this permit.

This condition may be appropriate for uses or developments occupying land subject to a Public Acquisition Overlay on an interim basis.

- **Schedule of materials and colours**

Before the development starts, a schedule of construction materials, external finishes and colours (incorporating *[insert details, for example paint samples]*) to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the schedule will be endorsed and will then form part of the permit.

3.4 Regulating off-site amenity impacts

These conditions seek to ameliorate a variety of amenity impacts potentially arising from different land uses and developments. Most relate to industrial and entertainment uses but some are relevant to residential and other permits. The conditions should be judiciously applied according to the type of use or development.

- **General amenity provision**

The use and development must be managed so that the amenity of the area is not detrimentally affected, through the:

- (a) *transport of materials, goods or commodities to or from the land*
- (b) *appearance of any building, works or materials*
- (c) *emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil*
- (d) *presence of vermin*
- (e) *others as appropriate.*

- **Hours of operation**

The use may operate only between the hours of *(insert operating times and days)*.

- **Regulation of delivery times**

Deliveries to and from the site (including waste collection) must only take place between:

- ____ am and ____ pm Monday to Friday.
- ____ am and ____ pm Saturday
- ____ am and ____ pm Sunday or public holiday.

- **Limit on number of persons**

No more than *(insert number) persons/patrons/patients/staff, etc.* may be present on the premises at any one time *without the written consent of the responsible authority.*

- **Maximum seating**

No more than *(specify number)* seats may be made available at any one time to patrons on the premises, without the written consent of the responsible authority.

- **Provision of seating**

Tables and chairs must be placed in position on the premises so as to be available for at least *(specify number)* patrons attending the premises at any one time.

- **Regulation of sale and consumption of liquor**

The predominant activity carried out on the premises, must be the preparation and serving of meals for consumption on the premises.

This condition may be applied to a permit for sale and consumption of liquor to restrict the nature of bar/café/restaurant uses.

- **Parking and traffic management plan**

Before the use starts, a traffic and parking management plan to the satisfaction of the responsible authority 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. Traffic and parking operations on and adjacent to the site must conform to this endorsed plan. Three copies of the plan must be submitted. The plan must be generally in accordance with the plan *(specify any earlier submitted plan)* but must include:

- (a) *the location of all areas on-and/or off-site to be used for staff and patron parking*
- (b) *owner's permission and any required planning permission for parking on other land*
- (c) *specification of staff numbers adequate to enable efficient operation of car parking areas both on- and off-site*
- (d) *the number and location of all on- and off-site security staff*

- (e) *the means by which the direction of traffic and pedestrian flows to and from car parking areas will be controlled both on- and off-site*
- (f) *measures to discourage patron car parking in (specify location)*
- (g) *measures to preclude staff parking in designated patron car parking areas*
- (h) *staffing and other measures to ensure the orderly departure and arrival of patrons especially any large groups departing at closing time*
- (i) *servicing of the drainage and maintenance of car parking areas.*

- **Management/supervision of premises**

At all times during the operation of the use, there must be present on the premises a person over the age of 18/21 years who is responsible for ensuring that the activities on the premises and the conduct of persons attending the premises do not have a detrimental impact on the amenity of the locality to the satisfaction of the responsible authority (referred to in this permit as ‘the manager’).

The manager must be authorised by the operator under this permit to make statements at any time on his/her behalf to any officer of the responsible authority *and of the Victoria Police and/or of Liquor Licensing Victoria authorised under section 129 of the Liquor Control Reform Act 1998*; and/or to take action on his/her behalf in accordance with a direction by such officer.

- **Noise control**

Noise levels emanating from the premises must not exceed those required to be met under State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade), No. N-1.

Or

Noise levels emanating from the premises must not exceed those required to be met under State Environment Protection Policy (Control of Music Noise from Public Premises), No. N-2.

Or

Noise levels emanating from the land must comply with the requirements of the

Environment Protection Authority’s Information Bulletin No. N3/89 *Interim Guidelines for Control of Noise from Industry in Country Victoria.*

- **Noise and amenity plan / patron management plan**

Before the use starts, a *noise and amenity plan/patron management plan* to the satisfaction of the responsible authority must be submitted to and approved by the authority. When approved, the plan will be endorsed and will then form part of the permit. All activities forming part of the use must comply with the endorsed plan. The plan must include:

- (a) *staffing and other measures which are designed to ensure the orderly arrival and departure of patrons*
- (b) *signage to be used to encourage responsible off-site patron behaviour*
- (c) *the training of staff in the management of patron behaviour*
- (d) *staff communication arrangements*
- (e) *measures to control noise emissions from the premises*
- (f) *(specify other requirements).*

- **Security alarms**

All security alarms or similar devices installed on the land must be of a silent type in accordance with any current standard published by Standards Australia International Limited and be connected to a security service.

- **Loudspeakers**

No external sound amplification equipment or loudspeakers are to be used for the purpose of announcement, broadcast, playing of music or similar purpose.

- **Soundproofing of plant and equipment**

All external plant and equipment must be acoustically treated or placed in soundproof housing to reduce noise to a level satisfactory to the responsible authority.

- **Acoustic fencing/mounding**

Before the *use starts and/or the building(s) is/are occupied*, an *acoustic fence must be erected/*

earth mounding must be put in place along the (insert relevant boundary/ boundaries) of the site to a minimum height of (insert height of fence in metres) above natural ground level. The design of the fence/mounding must be prepared in consultation with/by a suitably qualified acoustic engineer. The details of the design and acoustic qualities of the fence/mounding must be to the satisfaction of the responsible authority.

- **Screening requirement**

Before the building(s) *is/are* occupied, a free-standing trellis (maximum 25 per cent openings) must be erected to a height above the existing fence on the *(insert boundary for example 'northern')* boundary of the site to an overall height of *(insert height in metres)* above natural ground level, to restrict overlooking into the *(private open space areas and/or the interior of the dwelling(s) on the)* adjoining residential property to the satisfaction of the responsible authority.

- **Trellis construction**

The trellis required by condition *(insert number)* must be framed *(and formed)* and maintained to the satisfaction of the responsible authority.

- **Concealment of pipes, etc.**

All pipes, fixtures, fittings and vents servicing any building on the site, other than storm water down pipes, must be concealed in service ducts or otherwise hidden from view to the satisfaction of the responsible authority.

- **Plant/equipment or features on roof**

No plant, equipment, services or architectural features other than those shown on the endorsed plans are permitted above the roof level of the building(s) without the written consent of the responsible authority.

- **Boundary walls**

The walls on the boundary of the adjoining properties must be cleaned and finished to the satisfaction of the responsible authority.

- **Garbage storage**

Provision must be made on the land for the storage and collection of garbage and other solid waste. This area must be graded and

drained and screened from public view to the satisfaction of the responsible authority.

- **Regular waste removal**

All waste material not required for further on-site processing must be regularly removed from the site. All vehicles removing waste must have fully secured and contained loads so that no wastes are spilled or dust or odour is created to the satisfaction of the responsible authority.

- **Wheel-wash**

A truck wheel-wash must be installed and used so vehicles leaving the site do not deposit mud or other materials on roadways to the satisfaction of the responsible authority.

- **Dust control**

All *roads/storage areas/external stockpiles/vacant or grazed areas* must be *(covered and)* maintained to avoid dust nuisance to any residential area to the satisfaction of the responsible authority.

- **Control of light spill**

External lighting must be designed, baffled and located so as to prevent any adverse effect on adjoining land to the satisfaction of the responsible authority.

- **Sales to the public from industrial premises**

No direct sales of goods or other materials may be made to the public on the site.

- **Specified operator only**

This permit allows the use of the land only by *(insert name or company and address of operator)*. *Except with the written consent of the responsible authority, if (insert name only) ceases to use the land, this permit will expire.*

This condition should only be applied where the operator has special qualifications to carry out the use and the permit would not have been granted if the operator did not possess those qualifications (see section 2.3).

3.5 Car parking, loading and access

- **Car park construction**

Before the use *or occupation of the development* starts, the area(s) set aside for the parking

of vehicles and access lanes as shown on the endorsed plans must be:

- (a) constructed
- (b) properly formed to such levels that they can be used in accordance with the plans
- (c) surfaced with an all-weather-seal coat
- (d) drained
- (e) line marked to indicate each car space and all access lanes
- (f) clearly marked to show the direction of traffic along access lanes and driveways

to the satisfaction of the responsible authority.

Car spaces, access lanes and driveways must be kept available for these purposes at all times.

- **Vehicle manoeuvring**

All car parking spaces must be designed to allow all vehicles to drive forwards both when entering and leaving the property.

- **Number of car spaces required**

No fewer than *(insert number)* car space(s) must be provided on the land for the use and development, including *(insert number)* spaces clearly marked for use by disabled persons.

- **Car parking for disabled persons**

A minimum of *(insert number)* car space(s) must be provided for the exclusive use of disabled persons. The car space(s) must be provided as close as practicable to (a) suitable entrance(s) of the building and must be clearly marked with a sign to indicate that the space(s) must only be utilised by disabled persons. The minimum dimensions of the car space(s) must be 3.2 metres wide by 4.9 metres long.

- **Parking signs**

A sign/signs to the satisfaction of the responsible authority must be provided directing drivers to the area(s) set aside for car parking and must be located and maintained to the satisfaction of the responsible authority. The area of each sign must not exceed 0.3 square metres.

- **Protective kerbs**

Protective kerbs must be provided to the satisfaction of the responsible authority to prevent damage to fences or landscaped areas.

- **Vehicular crossings**

Vehicular crossing(s) must be constructed to the road to suit the proposed *driveway(s)* to the satisfaction of the responsible authority and any existing crossing or crossing opening must be removed and replaced with footpath, nature strip, and kerb and channel to the satisfaction of the responsible authority.

- **Vehicle crossing removal**

All disused or redundant vehicle crossings must be removed and the area reinstated to kerb and channel to the satisfaction of the responsible authority.

- **Provision of kerb/barriers**

Concrete kerbs or other barriers must be provided to the satisfaction of the responsible authority to prevent direct vehicle access to *(specify road[s])* other than via the vehicle crossing(s) shown on the endorsed plans.

- **Controlled access points**

Access to the site must only be at the nominated crossing shown on the endorsed plan. The crossing and road pavement works are to be constructed to the satisfaction of the *(VicRoads Corporation and/or the)* responsible authority.

- **Access roads**

Access to and egress from the site for all commercial vehicles (including waste collection vehicles) must only be from *(nominate the roads)*.

- **Mechanical stackers**

The mechanical stackers must be routinely serviced and maintained to the satisfaction of the responsible authority to ensure satisfactory access to all car spaces and to prevent any adverse effect on adjoining land by the emission of noise.

- **Security gate**

Any security boom, barrier or similar device controlling vehicular access to the premises must be located a minimum of six metres inside the property to allow vehicles to store clear of *(specify road)* pavement and footpath.

- **Loading/unloading**

The loading and unloading of goods from vehicles must only be carried out on the land *(within the designated loading bay[s]/and must not disrupt the circulation and parking of vehicles on the land).*

3.6 Landscaping

- **Landscape plan required**

Before the development starts, a landscape plan to the satisfaction of the responsible authority 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. *The landscaping plan must be generally in accordance with the landscape concept plan dated (insert date) prepared by (specify consultant), except that the plan must show / The plan must show:*

- (a) a survey (including botanical names) of all existing vegetation to be retained and/or removed*
- (b) buildings and trees (including botanical names) on neighbouring properties within three metres of the boundary*
- (c) details of surface finishes of pathways and driveways*
- (d) a planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, sizes at maturity, and quantities of each plant*
- (e) landscaping and planting within all open areas of the site*
- (f) (specify number) canopy trees (minimum two metres tall when planted) in the following areas: (specify location)*
- (g) (specify other requirements).*

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

The landscape plan must also indicate that an in-ground irrigation system is to be provided to all landscaped areas.

- **Completion of landscaping**

Before the *use/occupation of the development* starts or by such later date as is approved by the responsible authority in writing, the landscaping works shown on the endorsed plans must be carried out and completed to the satisfaction of the responsible authority.

- **Landscaping maintenance**

The landscaping shown on the endorsed plans must be maintained to the satisfaction of the responsible authority, *including that any dead, diseased or damaged plants are to be replaced.*

- **Tree protection during construction**

Before the development *(including demolition)* starts, a tree protection fence must be erected around the *(insert details of tree[s])* at a radius of *(insert number)* metres from the base of the trunk(s) to define a 'Tree Protection Zone'. *The fence must be constructed of (specify star pickets and chain mesh or similar) to the satisfaction of the responsible authority.* The tree protection fence must remain in place until construction is completed. Before the development starts, the ground surface of the Tree Protection Zone must be covered by a 100 mm deep layer of mulch. The Tree Protection Zone must be watered regularly to the satisfaction of the responsible authority.

The above condition may be modified to require protection of other types of vegetation.

- **Regulation of activities in Tree Protection Zone**

Except with the written consent of the responsible authority, within the Tree Protection Zone:

- No vehicular or pedestrian access, trenching or soil excavation is to occur.
- No storage or dumping of tools, equipment or waste is to occur.
- *(Specify other activities).*

To be used in conjunction with previous condition.

- **Pruning of trees to be retained**

Any pruning that is required to be done to the canopy of *any tree to be retained/ the (specify particular tree[s])* is to be done by a qualified

arborist to Australian Standard - Pruning of Amenity Trees AS4373-1996. Any pruning of the root system of *any tree to be retained/the (specify particular tree(s))* is to be done by hand by a qualified arborist.

- **Removal of street tree(s)**

Before the development starts a fee of (*insert fee*) must be paid to the responsible authority for the removal of the existing street tree(s).

- **Replacement of street tree(s)**

The street tree(s) to be removed must be replaced with an advanced tree(s) (minimum of *two* metres high at time of planting), of a species and in a location to the satisfaction of the responsible authority.

3.7 Conserving built heritage

- **Recording**

Before the demolition starts, an *archival quality* annotated photographic study of the building prepared to the satisfaction of the responsible authority by a suitably qualified person must be submitted to the responsible authority as a record of the building.

The survey must include:

- (a) each elevation of the building
- (b) *the interior of the building*
- (c) architectural design detailing of the building
- (d) a statement prepared by an architectural historian describing and explaining both the design and construction of the building and the photographs.

- **Conservation management plan**

Before the development (including demolition) starts, a conservation management plan to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the conservation management plan will be endorsed and will then form part of the permit.

The conservation management plan must identify the buildings and works to be conserved and include:

- (a) *window and door repairs/restoration*

- (b) *external joinery restoration*

- (c) *stripping of painted brickwork*

- (d) *fence design*

- (e) *removal of the slate tiles on the portion of the building, which is to be demolished, and their re-use to repair the remaining roof*

- (f) *(other requirements as specified).*

Works must be undertaken in accordance with the conservation management plan to the satisfaction of the responsible authority. The works must be completed by (*specify date or event*).

3.8 Subdivision

- **Amended plans required**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, 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 then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with *the plans submitted with the application/other specified plans but modified to show:*

- (a) *all bearings, distances, levels, street names, lot numbers, lot sizes, reserves and easements*

- (b) *an area set aside as a public open space reserve (describe location) equivalent to (specify number) percent of all land in the subdivision*

- (c) *other information relevant to the development of the land such as dams, wells, filled land, land subject to inundation, etc.*

- (d) *easements in favour of (insert name of council or referral authority) to the satisfaction of the responsible authority*

- (e) *(other requirements as specified).*

- **Easements**

All existing and proposed easements and sites for existing and required utility services and roads must be set aside in favour of the

relevant authority for which the easement or site is to be created on the plan of subdivision submitted for certification under the *Subdivision Act 1988*.

- **Payment in lieu of open space provision**

Before the statement of compliance is issued under the *Subdivision Act 1988* the applicant or owner must make a financial contribution to open space in accordance with *the approved development contribution plan/the schedule to Clause 52.01 of the scheme*.

Or

Note: Before the statement of compliance is issued under the *Subdivision Act 1988*, in accordance with a decision of Council dated (*insert date*) made under section 18 of that Act, the applicant or owner must pay to the responsible authority a sum equivalent to (*insert number*) percent of the site value of all the land in the subdivision.

- **Staged subdivision**

The subdivision must proceed in the order of stages as shown on the endorsed plan unless otherwise agreed in writing by the responsible authority.

- **Time for starting and completion**

This permit will expire if:

- (a) the plan of subdivision is not certified within (*specify number*) years of the date of this permit; or
- (b) the registration of the subdivision is not completed within (*specify number*) years of the date of this permit.

The responsible authority may extend the time if a request is made in writing before the permit expires or within three months afterwards.

The default periods under the Act are two years and five years for (a) and (b) respectively (see section 2.9 of the manual).

- **Reticulated services**

The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity, gas and telecommunication services to each lot shown on the endorsed

plan in accordance with the authorities' requirements and relevant legislation at the time.

- **Works on or to the land**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the applicant must provide (*specify works, for example, fencing, street trees, road works, drainage, landscaping*) (*on/for each lot*) to the satisfaction of the responsible authority.

- **Detailed construction plans**

Before any *road/drainage* works associated with the 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 be drawn to scale with dimensions and three copies must be provided. The plans must include:

- (a) *fully sealed pavement with (insert type) kerb and channel (insert number), metres back to back*
- (b) *concrete footpaths*
- (c) *underground drains*
- (d) *(other specified requirement(s)).*

All works constructed or carried out must be in accordance with those plans.

- **Development contributions**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the owner must enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987* and make application to the Registrar of Titles to have the agreement registered on the title to the land under section 181 of the Act, which provides that the owner of the land will contribute \$(*specify amount*) *per lot, at the time a statement of compliance is issued/some other specified time*, to the provision of infrastructure for the residents who will occupy the land in accordance with the approved development contributions plan for (*specify relevant plan*).

The *owner/applicant* must pay the reasonable costs of the preparation, execution and registration of the section 173 agreement.

- **Building envelopes**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the owner must enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987*, and make application to the Registrar of Titles to have the agreement registered on the title to the land under section 181 of the Act, which provides that on each lot to be created, buildings may be constructed only within the building envelopes, *and effluent disposal must be confined to the effluent disposal envelopes* as shown on the endorsed plans of this permit.

This/these envelope(s) cannot be varied except with the consent of the responsible authority.

The owner must pay the reasonable costs of the preparation, execution and registration of the section 173 agreement.

- **Restriction on subsequent development**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the owner must enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987* and must make application to the Registrar of Titles to have the agreement registered on the title to the land under section 181 of the Act, which provides that the subsequent development of the land will accord with the plans endorsed to Planning Permit (*insert permit number*) issued on (*insert date*).

The owner must pay the reasonable costs of preparation, execution and registration of the agreement.

- **No further subdivision**

Before the plan of subdivision is certified under the *Subdivision Act 1988*, the owner must enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987*, and make application to the Registrar of Titles to have the agreement registered on the title to the land under section 181 of the Act which provides that the land will not be further subdivided.

The owner must pay the reasonable costs of the preparation, execution and registration of the section 173 agreement.

3.9 Advertising signs

- **Signs not to be altered**

The location and details of the sign(s), and any supporting structure, as shown on the endorsed plans, must not be altered without the written consent of the responsible authority.

- **No flashing light**

The sign(s) must not contain any flashing light.

- **No sign illumination**

The sign(s) must not be illuminated by external or internal light except with the written consent of the responsible authority.

- **Light emissions**

The sign lighting must be designed, baffled and located to the satisfaction of the responsible authority to prevent any adverse effect on adjoining land.

- **Illumination during specified hours**

The sign(s) may only be illuminated between the hours of (*specify hours*).

- **Sign maintenance**

The sign(s) must be constructed and maintained to the satisfaction of the responsible authority.

- **Removal of existing advertising signs**

Before the sign(s) *is/are* displayed, the following existing advertising signs must be removed:

(a) (*specify signs*).

- **Expiry date**

This permit expires (*insert time period, for example, 15 years*) from the date of this permit.

3.10 Environmentally sensitive areas

- **Environmental management plan**

Before the use starts, an environmental management plan for the management and operation of the use which is to the satisfaction of the responsible authority *and (specify authority)* must be submitted to and approved by the responsible authority. Three copies must be provided. When approved, the plan will be endorsed and will then form part of the permit. The environmental management plan must include:

(a) overall environmental objectives for the operation of the use and techniques for their achievement

(b) procedures to ensure that no significant adverse environmental impacts occur as a result of the use

(c) proposed monitoring systems

(d) identification of possible risks of operational failure and response measures to be implemented

(e) day to day management requirements for the use

(f) (specify other requirements).

The environmental management plan must be reviewed annually to the satisfaction of the responsible authority and any consequential changes to the plan submitted to and approved by the responsible authority.

The use must be conducted in accordance with the endorsed plan at all times.

- **Run-off control**

No polluted and/or sediment laden run-off is to be discharged directly or indirectly into (specify authority) drains or watercourses. To this end, pollution or litter traps must be provided on site.

- **Septic disposal of waste**

An approved septic disposal system must be installed concurrently with the erection of the dwelling and all waste must be disposed of within the curtilage of the property.

- **Separation of effluent areas from water bodies**

Dwellings, outbuildings and effluent absorption lines must not be located within:

- 300 metres of the full supply level of (specify dam/reservoir)
- 100/200 metres of a domestic supply channel
- 100 metres of the banks of (specify watercourse within Special Water Supply Catchment Area).

- **Setback of works to watercourses**

Except with the further written consent of the responsible authority upon the advice of the Department of Sustainability and Environment, no works may be undertaken within (specify

number) metres of the drainage line(s) and/or watercourse(s) shown on the endorsed plan.

- **Watercourse crossings**

Where a road or other accessway crosses (a) drainage line(s) and/or (a) watercourse(s) (identified on the endorsed plans), a piped crossing or other suitable bridging structure must be constructed to the satisfaction of the responsible authority upon the advice of the Department of Sustainability and Environment.

- **Ongoing soil erosion control**

All works must be undertaken in a manner that minimises soil erosion, and any exposed areas of soil must be stabilised to prevent soil erosion, to the satisfaction of the responsible authority.

- **Control of erosion during construction**

Soil erosion control measures must be employed throughout the construction stage of the development (in accordance with Construction Techniques for Sediment Pollution Control, EPA 1991) to the satisfaction of the responsible authority.

Or

All cleared areas for vehicle use must be stabilised, drained and surfaced/sealed to prevent soil erosion to the satisfaction of the responsible authority upon the advice of /and the Department of Sustainability and Environment.

- **Batters**

The slope of batters, both cut and fill, should not exceed (specify grade) (horizontal:vertical) or, where this is not practicable, batters must be stabilised by other means to the satisfaction of the responsible authority.

- **Top soil retention**

All topsoil to a depth of (specify number) metres removed during the earthworks must be stockpiled, maintained in a weed-free condition, respread on disturbed ground after completion of the earthworks and revegetated to prevent erosion, all to the satisfaction of the responsible authority upon the advice of/and the Department of Sustainability and Environment.

- **Environmental weeds**

No environmental weeds as referred to in (*specify municipal/Department of Sustainability and Environment list*) may be planted on or allowed to invade the site.

- **Pest animals**

The operator under this permit must control vermin and pests to the satisfaction of the responsible authority *upon the advice of/ and the Department of Sustainability and Environment*.

- **Minimising glare**

The exterior colour and cladding of the building(s) must be non-reflective to the satisfaction of the responsible authority.

- **Fire control and management**

Unless there is a hydrant connected to a reticulated water supply within 120 m of (*the building envelope of the dwelling/other development*), a water storage of not less than (*specify number*) litres must be provided on the site for fire fighting purposes, and must be kept full at all times. The design of the storage and its location on the site must be to the satisfaction of the responsible authority *upon the advice of the Country Fire Authority/ Department of Sustainability and Environment*.

The development must be designed and constructed to minimise fire risk/hazard to the satisfaction of the responsible authority *upon the advice of the Country Fire Authority/ Department of Sustainability and Environment*.

- **Earthwork volumes in flood-liable areas**

Before the development starts, earthwork volume calculations which are to the satisfaction of (*specify relevant water authority*) must be submitted to and approved by the responsible authority. When approved, the calculations will be endorsed and will then form part of the permit. The calculations must demonstrate that the volume of filling does not exceed the volume of cutting. Earthworks carried out on site must accord with the calculations.

- **Minimum floor and basement entry levels**

The finished floor levels of the *dwelling/other structure* must be a minimum of 300 mm/*other specified height* above the applicable flood level for the property which is (*specify number*) metres above AHD.

The *finished floor level/surface level* of the *new garage/carport/vehicle parking area* must be a minimum of 150 mm/*other specified level* above the applicable flood level for the property which is (*specify number*) metres AHD.

The basement *entry/entries* must be designed so that the apex of any entry ramp is a minimum of (*specify number*) metres above the applicable flood level for the property which is (*specify number*) metres above AHD.

Note: The applicable flood level for this property is (*specify number*) metres AHD.

- **Dams**

Before the *use/development* starts, construction plans for a bank system and dam (*with a capacity of at least (specify number) megalitres*) to collect and contain all surface run-off from the site, designed in accordance with sound engineering practice 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 show:

- (a) the wall of the dam to have a suitable foundation and be constructed of compacted clay material so as to be completely stable and watertight
- (b) *the spillway of the dam constructed of rock or similar non-erodible material*
- (c) (*specify other requirements*).

- **Salinity/whole farm plan**

Before the vegetation removal starts, a whole farm plan, which is to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*, 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 include:

(a) (specify requirements).

The management of the land and the activities on the site must accord with the plan.

3.11 All vegetation types

• Notification of permit conditions

Before the *vegetation removal/development* starts, all persons undertaking the *removal/works* on site must be advised of all relevant conditions of this permit.

• Minimising removal

The removal of vegetation must only be to the minimum extent necessary to (*carry out the development/allow the construction of roads/allow the provision of services/allow the construction of fences/provide for essential firefighting protection works/etc*) to the satisfaction of the responsible authority *upon the advice of the (specify authority)*.

This condition may be applied when no direct permission is required for vegetation removal.

• Avoiding damage during vegetation removal

Vegetation removal and disposal must not cause damage to vegetation stands to be retained *and to drainage lines and/or watercourses*.

• Delineating vegetation stands for removal and retention

Before the vegetation removal starts, the boundaries of all vegetation stands to be removed and retained must be clearly marked on the ground or marked with tape or temporary fencing to the satisfaction of the responsible authority.

Or

Before the removal of any vegetation starts:

(a) a plan to the satisfaction of the responsible authority identifying all trees to be retained must be submitted to and approved by the responsible authority. When approved, the plan will be endorsed and will then form part of this permit

(b) the trees to be retained as shown on the endorsed plan must be marked on the site to the satisfaction of the responsible authority.

Removal must accord with the endorsed plan.

Or

Before the removal of vegetation starts, a construction management plan to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plan will be endorsed and will then form part of this permit. The plan must:

(a) *identify the vegetation to be retained*

(b) *describe the measures to be used to protect the identified vegetation during construction*

(c) *identify areas to be used to store vehicles and plant used during construction*

(d) *(specify requirements)*.

All works must accord with the endorsed plan.

• Tree hollows

Any pruning or removal of tree limbs, particularly hollow-bearing tree limbs, must be to the minimum extent necessary.

• Enhancing ground habitat

Except with the further written consent of the responsible authority felled or dead timber is to be retained on-site to create ground habitat in (a) location(s) to the satisfaction of the responsible authority.

Or

Felled timber containing hollows must be retained and located on-site to the satisfaction of the responsible authority *upon the advice of the Department of Sustainability and Environment*.

• Weed control

All vehicles, earth-moving equipment and other machinery must be cleaned of soil and plant material before entering and leaving the site to prevent the spread of weeds and pathogens.

3.12 Native vegetation offsets

• Offset provision in accordance with application

Before the vegetation removal starts (*or specify other time*), the proposed revegetation or

Model conditions

vegetation management site(s) to compensate for the removal of (*specify number*) *habitat hectares of vegetation and/or (specify number) of old trees* as shown on the endorsed plans must be provided to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*.

• Offset to be determined

Before the vegetation removal starts, an offset plan showing appropriate offsets to compensate for the removal of (*specify number*) *habitat hectares of vegetation and/or (specify number) of old trees to the satisfaction of the Department of Sustainability and Environment* must be submitted to and approved by the responsible authority. Three copies of the plan must be provided. When approved, the plan will be endorsed and will then form part of this permit.

Maps or plans forming part of the offset plan must be drawn to scale with dimensions (where appropriate).

The offset plan must be generally in accordance with the draft offset plan dated (insert date) prepared by (specify consultant), except that the plan must include / The plan must include details of the:

- (a) *vegetation to be removed, including details of:*
 - (i) *the location of the vegetation including details of the Bioregion*
 - (ii) *the Ecological Vegetation Class (EVC) of the vegetation*
 - (iii) *the Bioregional Conservation Status of the EVC*
 - (iv) *the area to be removed (in hectares)*
 - (v) *the habitat hectare score (out of 1) of the vegetation*
 - (vi) *the number of large and medium old trees to be removed (where applicable)*
 - (vii) *the presence of any rare or threatened species*
 - (viii) *whether the site is potential habitat for any rare or threatened species*

(ix) *conservation significance*

(x) *total vegetation loss calculated in habitat hectares.*

(b) *gain targets*

(c) *offset(s) to compensate for the vegetation removal, including details of:*

(i) *type of offset(s) to be provided in each location*

(ii) *location of the offset(s) including details of the Bioregion*

(iii) *Ecological Vegetation Class of the offset vegetation*

(iv) *habitat hectare score (out of 1) of the offset*

(v) *number of large and medium old trees to be protected (where applicable)*

(vi) *rare or threatened species habitat to be protected (if applicable)*

(vii) *conservation significance of the offset*

(viii) *gains in vegetation and habitat quality to be achieved by the offset(s)*

(d) *details of any revegetation including number of trees, shrubs and other plants, species mix, and density*

(e) *methods of managing and restoring the existing vegetation to be retained*

(f) *methods of interim protection for newly established vegetation*

(g) *methods of permanent protection for established offsets*

(h) *persons responsible for implementing and monitoring the offset plan*

(i) *time frame for implementing the offset plan.*

Vegetation removal and the provision of offsets must accord with the endorsed plan.

• Ongoing management and protection of offset

The offset area(s) must be permanently protected by (*specify how for example by fencing, excluding stock, etc*) and maintained to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*.

And/or

The offset area(s) must be fenced to control grazing threats, including stock, rabbits and other pest herbivores.

And/or

Vermin and pests must be controlled in the offset area(s) to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*.

And/or

The offset area must be managed so as to ensure that high threat woody environmental weeds as referred to in (*specify municipal/Department of Sustainability and Environment list*) are eliminated, and other high threat environmental weeds are controlled to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*.

And/or

The offset area must be managed so as to ensure that no high threat environmental weeds as referred to in (*specify municipal/Department of Sustainability and Environment list*) invade the area to the satisfaction of the responsible authority *and/upon the advice of the Department of Sustainability and Environment*.

And/or

No firewood, dead vegetation, fallen branches or organic leaf matter may be removed from the offset area identified in the endorsed plan.

- **Security of offset**

Before the vegetation removal starts (*or specify other time*), the owner must enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987* and make application to the Registrar of Titles to have the agreement registered on the title to the land under section 181 of that Act which provides for a native vegetation offset in accordance with the endorsed offset plan of this permit.

The *owner/applicant* must pay the reasonable costs of the preparation, execution and registration of the section 173 agreement.

Or

Before the vegetation removal starts (*or specify other time*), the owner must enter into a covenant with the Trust for Nature (Victoria) under section 3A of the *Victorian Conservation Trust Act 1972* and make application to the Registrar of Titles to have the agreement registered on the title to the land which provides for a native vegetation offset in accordance with the endorsed offset management plan of this permit.

The *owner/applicant* must pay the reasonable costs of the preparation, execution and registration of the covenant.

Or

Before the vegetation removal starts (*or specify other time*), the owner must enter into an agreement under section 69 of the *Conservation, Forests and Lands Act 1987* and make application to the Registrar of Titles to have the agreement registered on the title to the land under section 72 of that Act which provides for a native vegetation offset in accordance with the endorsed offset plan of this permit.

The *owner/applicant* must pay the reasonable costs of the preparation, execution and registration of the agreement.

This condition should be applied to ensure protection of offsets after vegetation removal has been completed.

- **Offset payment**

Before the vegetation removal starts, the applicant or owner must pay to the responsible authority a sum of \$ (*insert number*) in accordance with the (*specify payment scheme or native vegetation credit system*).

Further reading

General reading

Department of Infrastructure (2002): *General Practice Note: Managing Referrals and Notice Requirements*

Department of Infrastructure: *Using Victoria's Planning System*

Eccles, Des and Tannetje Bryant (2006): *Statutory Planning in Victoria*, 3rd edition, Federation Press, Sydney

Butterworths Pty Ltd: *Planning and Environment Service (Victoria)* See especially Volume 1 'Planning in Victoria', Chapter 7 (Permits); and 'Planning Appeal Case Notes' Part 5 (Permits and Conditions)

Victorian Planning Reports published by AAT Reports Pty Ltd, Glen Waverley

Useful cases

Most of these cases can be accessed at www.austlii.edu.au

Art Quest Pty Ltd v City of Whittlesea (1990), Appeal P89/2322, noted at 5 AATR 41¹

Benedetti v Moonee Valley City Council [2005] VCAT 1580²

Benedetti v Moonee Valley City Council [2005] VSC 434²

Cardwell Shire Council v King Ranch Pty Ltd (1984) 54 LGRA 110; 85 ALJR 386; and 53 ALR 632³

Christian Brothers Victoria Pty Ltd v Banyule City Council [2001] VCAT 2120, 9 VPR 260⁴

Cope v Hobsons Bay City Council [2004] VCAT 2487²

Curry v Melton Shire Council (No.1) [2000] VCAT 488; and 5 VPR 59⁴

Curry v Melton Shire Council (No.2) [2000] VSC 352; 7 VPR 109; and 111 LGRA 30⁴

Curry v Melton Shire Council (No. 3) [2001] VCAT 1602; and 9 VPR 38⁴

Curry v Melton Shire Council (No. 4) (2002) VCAT Application for Review P51974/20014

Hand v Warrnambool City Council (2004) 16 VPR 177⁴

Harmon Pty Ltd v Casey City Council [2006] VCAT 629⁴

Holland & Ors v Colac-Otway Shire Council and Hoffman & Anor (1997) 18 AATR Part 3 disc service⁵

Kitsone Pty Ltd v Doncaster and Templestowe City Council (1993)10 AATR 135¹

Mobile Ezy Pty Ltd v Boroondara City Council [2003] VCAT 688⁸

Protean (Holdings) Ltd v Environment Protection Authority [1977] VR 151³

Pyx Granite Company Ltd v Ministry for Housing and Local Government (1958) 1 QB 554³

Further reading

Rosemeier v Greater Geelong City Council (No. 1) (1997) 20 AATR 86³

Springhaven Property Group Pty Ltd v Whittlesea City Council [2005] VCAT 816⁴

St Catherine's School v Prahran City Council (1983) 8 APAD 167⁶

Stameen Pty Ltd v Port Phillip City Council and Ors [2003] VCAT 1903¹⁰

Tatura Abattoirs Pty Ltd v Greater Shepparton City Council [2005] VCAT 2639⁴

Victorian National Parks Association Inc v Iluka Resources Limited [2004] VCAT 20⁹

Villawood Properties v Greater Bendigo CC [2005] VCAT 2703¹¹

Westpoint Corporation v Moreland City Council [2005] VCAT 1049 (31 May 2005)¹

White Ash v Frankston City Council [2004] VCAT 2170⁹

271 William Street v City of Melbourne [1975] VR 156³

Wolveridge v Mornington Peninsula Shire Council [2000] VCAT 685⁷

Notes

- 1 Relates to issue of secondary consent
- 2 Relates to ongoing requirements on development permits
- 3 Relates to general validity of conditions
- 4 Relates to development contributions requirements
- 5 Relates to non-deferral of decisions through conditions
- 6 Relates to use conditions on development permits
- 7 Relates to amendment of existing permits
- 8 Relates to interpretation of conditions
- 9 Relates to ambit of discretion
- 10 Relates to notes
- 11 Relates to native vegetation offsets

