



Practical Tips Regarding Planning Permits

This paper is an edited version of a presentation made by Elizabeth Linedale on 17 March 2010.

This paper is not a technical paper, but an attempt to outline a few tips to keep in mind when you're reviewing a planning permit, whether it's one that has been issued upon your application, or perhaps one that is attached to a parcel of land you are considering purchasing. A planning permit can add significant value to a piece of land, however, it's important to ensure you understand the permit and its limitations, in order to avoid over valuing the property, or undervaluing the costs involved in developing the land.

1. Discuss applications with a planning officer

Do not underestimate the benefit of discussing your application with a planning officer at the appropriate responsible authority before lodging it. Every responsible authority operates differently and has different specific concerns, regardless of the uniform scheme provisions. Some authorities are very helpful and will discuss the concerns that they feel must be addressed in your application. If you are aware of these, you have a better chance of being able to address these concerns in your application, and obtaining a permit that you are happy with.

2. Step back from the process

When you are reviewing a permit that has been issued on your application, you need to step back from your knowledge of the application and your discussions with the planning officer in order to try to read the permit conditions from the point of view of a third party who knows nothing of your intentions for development. This is very difficult, however extremely important for a number of reasons. It may appear that the planning officer has included all of the matters which you have discussed, however, if the drafting is such that it will not mean the same thing to a third party as it does to you and the planning officer, then you will run into trouble when that planning officer is no longer involved with the development.

If you are given the opportunity to review the officer's report prior to it going to council then it may be worthwhile to suggest alternative drafting if you are concerned about a particular condition.

3. Timing

Watch the timing provisions of your permit. This relates to two issues.

The first is that the permit will usually define its period of validity by stating that it will expire if certain things do not happen within specified time frames. The requirements often relate to certification of the first plan of subdivision, the completion of the works for the first plan, and completion of all of the works. Many will also indicate that an application for extension can be made within a certain time frame. These provisions should be reviewed carefully to ensure that you are able to meet the deadlines. You need also to keep track of the cut off date for applications for extension, and ensure that such an application is made well before time. There are legislative allowances for this, so if the permit does not include any particular reference to extension, you will still have the ability to request an extension within the time frame allowed by the legislation. There has also been a recent VCAT decision relating to the interpretation of the 'standard' expiration

clause which ties expiration to the first plan of subdivision certified, meaning that permits granted for large developments may expire far earlier than you had anticipated.

The second timing issue is that you should ensure that the permit allows you to develop in stages if this is intended. If it does, make sure that all the provisions are clear on the timing - for example, make sure it is clear that an obligation to be fulfilled prior to a statement of compliance being issued relates to the statement of compliance for the relevant stage plan of subdivision – not the first plan of subdivision. This applies to the requirement to submit detailed plans for design and construction, landscaping, drainage etc to actually doing the works. You want to be able to have general concept plans that identify the issues which need to be dealt with approved, and then submit detailed design and construction plans and perform the construction on a stage by stage basis.

4. Generally vague or uncertain conditions

Watch generally vague provisions that may leave too much to be determined by the responsible authority later. A permit which requires the 'proportional cost' of an item to be provided to the satisfaction of the responsible authority is uncertain as the concept of 'proportional cost' is not defined.

A client of ours obtained a permit which required them to create a reserve and construct a monument which gave recognition to the Aboriginal heritage of the area, and required the developer to obtain the consent of the 'Aboriginal community' to that monument. An issue arose when Aboriginal Affairs Victoria advised that they had not appointed a Registered Aboriginal Party for that area, and there were in fact two separate groups who claimed to be associated with the land. This led to great confusion on what the developer was required to do in order to comply with the permit, and caused significant delay. If the permit had referred to obtaining the consent of a particular group, then this obligation would have been much clearer, and our client would have been able to determine its responsibilities in a much shorter period of time.

5. Requirements for Section 173 Agreements under the *Planning and Environment Act 1997*

It is essential that conditions which require agreements to be entered into pursuant to Section 173 of the *Planning and Environment Act* be clear and concise. You need to review these carefully to ensure that you understand exactly what the Authority requires to be included in the agreement. If the drafting is loose and vague you will have arguments about what is to be included, and this will delay statement of compliance on your first plan, and possibly later plans.

6. Easements

Make sure that the permit refers to the removal of easements if you need to do this. Otherwise, you will not be able to obtain registration of the plan which removes the easements, and an application for a separate permit will have to be made. This may mean that the settlement of a number of lots which are affected by the easement may be delayed, or the registration of the whole plan may be delayed.

7. Services and requirements affecting other land

Be careful with respect to any obligations relating to land other than your land. For example, telecommunications and power authorities often include standard clauses that require easements to be created for any existing and new infrastructure created on your land and abutting land. Obviously, creating easements over other people's land is not an easy job, and although the

authorities may be entitled to require the easements in any case, the neighbours can cause you lengthy delays if they do not co-operate.

It has also become a favourite condition of the power authorities to require developers to enter into long term leases at peppercorn rents for their substations, rather than transferring the land to the company. This means that the developer is often left with outgoings which they must continue to pay for many years, for land which is of no benefit to them. In addition to this, it might be that the company used by the developer for that particular project is not used after its completion, and it is appropriate that it be wound up for the developer's purposes. If the company remains the owner of a number of small pieces of land, this will be difficult. Hopefully, the leases would include indemnities for the landowner in relation to public liability, however, there is always a risk that someone will be injured on the land that that some liability will follow the landlord.

Some of the power companies also want conditions included in permits which require the developer to provide generators to purchasers if the electricity is not available upon registration of the plan. Many developers have experienced delays in obtaining the required sign offs from the authorities which will allow the electricity to be made available to individual lots. This was a big problem when all the inspectors were involved in post bushfire works in 2009. If such a condition is not included in the permit, then a developer may, depending on their contract, be able to argue with their purchasers that they are not required to actually provide the electricity upon settlement, if they have done all things necessary to get the sign off. If there is a condition in the permit requiring a generator (a copy which of course would be in the vendor's statement) then you will have difficulty arguing that you were not required to provide one with the purchaser.

8. Advice Notes

Some authorities like to include advice notes on matters like Aboriginal cultural matters and protected flora and fauna. Whilst it often appears that these are not formally part of the permit, their inclusion raises the possibility of an argument that you are required to comply with them, and that they are in fact a condition of the permit. They are often quite generic but they may be outdated and may therefore create additional obligations that do not exist pursuant to the legislation or regulations to which they purport to relate. It is therefore preferable that advice notes be kept to a minimum to avoid the possibility of the permit creating additional obligations in this regard.

9. Building Envelopes

Many of you are familiar with the concept of a building envelope. Some of you will have been involved with the creation of what is referred to in Part 4 of the Building Regulations as 'approved building envelopes'. An approved building envelope gives the owner of land an exemption from having to comply with certain regulations contained within Part 4 (which deal with siting on a lot), as long as the subject matter of those regulations are dealt with in the approved building envelope, and the owner complies with the approved building envelope. Pursuant to the Building Regulations, in order for a building envelope to be an approved building envelope, it must be in a planning permit and must be shown as a restriction on a plan of subdivision, or contained in a registered agreement pursuant to section 173 of the *Planning and Environment Act 1987*. There is no specific description of how building envelopes are to be 'in a permit' and we do not believe that it is necessary that there be a condition *requiring* building envelopes to be created. A condition which provides for the

developer to include 'any building envelopes' on plans will suffice (i.e. giving the option of including them, rather than requiring them to be created).

If you create building envelopes without them being mentioned in the permit, they will not be approved building envelopes and therefore, they will simply be an additional requirement for your purchaser to comply with on top of Part 4 of the Building Regulations.

10. Construction in accordance with the endorsed plans

During construction there are often many opportunities to construct your project cheaper or quicker than originally anticipated. You need to keep in mind that any changes made to the construction plans need to be assessed against your permit. Otherwise you may find that you are not able to get final sign off from the responsible authority for the work. This can be real issue if you have savvy purchasers and a permit which provides that no one can reside in the property until all of the permit conditions are met.

11. Review and objection

Remember that you have 60 days after a permit is issued, or after a notice of decision to grant a permit is issued, to make an application for review at VCAT. Objectors have 21 days after a notice of decision to grant a permit is issued. If you wish for your permit to be amended after this time, you will need to make a formal application for amendment, which will go through the same process as an application for a fresh permit.

When you do get your permit, keep in mind that if you seek review of any conditions to VCAT, the whole of the permit is up for 'reassessment' by the member. Therefore, you need to consider whether there are any conditions which are to your benefit which may be deleted or amended by the member if it is felt that it is not appropriate, and weigh up the benefit of these provisions against the ones which you are not happy with.

If a permit is the subject of a review and VCAT grants the permit, then you will not be authorised to commence any works until the Responsible authority issues the permit in accordance with VCAT's decision.

12. DSE Guide

The Department of Sustainability and Environment has published a guide to writing planning permits which is available on the web. This is obviously drafted for planning officers, however it is a very useful resource for applicants. Requirements such as relevance to planning purposes and the application, reasonableness and certainty are discussed. This guide may also assist you when negotiating regarding specific conditions, and in determining whether you should make an application for review.

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Warning: The above article does not constitute legal advice, and should not be relied upon. Septimus Jones & Lee recommends that specific legal advice be sought when dealing with planning permits.