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8 May 2017

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Certified B Corporation

Dear Peter,

Advice – Planning permit application P16-318 – Crown Allotments 58, 59, 62 and 63 Jubilee Road, Inverleigh

We refer to the telephone conversation between Tim Waller and Greg Tobin on 5 May 2017 and your email of 8 May 2017.

You have requested our advice in relation to planning permit application P16-318 (**Permit Application**) which seeks permission to construct a dwelling at Crown Allotments 58, 59, 62 & 63 Township of Inverleigh, Parish of Doroq (Jubilee Street, Inverleigh) (**Land**). Specifically, you have asked:

1) The meaning of 'all-weather road' access within the Golden Plains Planning Scheme (**Scheme**).

2) Whether Council and the land-owner should enter into a section 173 agreement which absolves Council's legal responsibly in event of flooding event on the Land. This requires consideration of the risks and potential liability to Council if Council issues a permit for the Permit Application notwithstanding planning officer and Corangamite Catchment Management Authority (**CCMA**) recommended refusal.

Summary of advice

In summary, it is our advice that:

1. 'All-weather road' access means road access in all circumstance. There is no exception for access in major and minor flood events.

2. Council should not enter into a section 173 agreement whereby the owner agrees to absolve Council of any legal responsibility related to death/injury/damage in a flood event as a result of Council's decision to issue a permit. This is primary because such an agreement would circumvent the purpose of the relevant controls and considerations in the Scheme and would not be a proper planning outcome.

3. Council exposes itself to risk of actions being bought against it in breach of statutory duty and negligence, if it issues a permit for the Permit Application. This is notwithstanding the planning officer and CCMA recommended refusal and irrespective of whether the current owner of the Land accepts liability through a section 173 agreement.

Background

We understand that:

1. The Permit Application comprises:
   a. The construction of a dwelling on Crown Allotment 59.
   b. The use of Land for animal keeping (associated with a mobile petting farm), horticulture and a registered kitchen.

2. The Land has a total area of approximately 6.1 hectares. It contains a farm shed and is cleared save for some planted trees. It is currently used for grazing.

3. The Inverleigh township and residential land are located to the north of the Land. Otherwise, surrounding land is predominantly used for farming.

4. The Land is located within the Farming Zone and Schedule (at clause 35.07 of the Scheme).

5. Part of the Land is subject to the Floodway Overlay and Schedule (at clause 44.03 of the Scheme).

6. Part of the Land is subject to the Land Subject to Inundation Overlay and Schedule (**LSIO**) (at clause 44.04 of the Scheme).

7. The CCMA is a recommending referral authority pursuant to clause 66 of the Scheme. In a letter dated 13 February 2017, CCMA objected to issue of a permit for the Permit Application based on the flood risk of the Land. In particular, the CCMA has advised that access to the Land is unsafe and in the event of a flood will result in danger to life of occupants of the development and emergency personnel.

8. Council's Works Engineer has advised that should a permit issue, a permit condition should require the owner of the Land to construct Jubilee Street at its cost to ensure it is compatible with flood hazard.

9. Council planning officers do not support the Permit Application for several reasons including that it is inconsistent with State and Local planning policies, the Floodway Overlay and the LSIO.

10. The permit applicant has proposed the use of a section 173 Agreement as a solution to Council's concerns regarding flooding. The section 173 agreement would provide that the current and future land owners assume full flood risk and absolve Council of any legal responsibility in the event of a flood.

Advice

1. The meaning of 'all-weather road' access

Pursuant to clause 35.07-2 of the Farming Zone, the Land must not be used for a dwelling unless, among other things, access to the dwelling is '*provided via an **all-weather road** with dimensions adequate to accommodate emergency vehicles.*' This is a mandatory requirement. If a proposal does not meet these requirements, the use is prohibited pursuant to the table of uses in clause 35.07-1.

In our view, the correct interpretation of '*access…via an all-weather road*' is that access is provided to the dwelling in all circumstances. We form this view for the following reasons:

- The ordinary meaning of 'all-weather access' is a way of entering or existing a site in <u>any</u> type of weather.
- The purpose of this condition on use is to minimise risk and hazard associated with flooding. This is a risk to both residents and emergency personnel.
- An interpretation of '*access…via an all-weather road*' which required access except in the event of major or minor flood events would be contrary to the purpose of the condition. In particular, it would expose the community and emergency services to unnecessarily risk in times of flood.
- It cannot be regarded as a proper planning outcome to allow a dwelling on a site that would otherwise be surrounded by water and have no (or restricted) access. Such an outcome is not consistent with State and Local planning policies.

In West Gippsland Catchment Management Authority v East Gippsland SC [2010] VCAT 1864 (18 November 2010) Deputy President Gibson described the purpose and meaning of the provision as follows at paragraph 21:

> *'The Government has chosen to require that access to new dwellings must now be provided via an all-weather road with certain dimensions, not by some other means. The provision is not framed in a way that requires it to be accessible in all emergencies. I acknowledge that even an all-weather road may be blocked at times, for example by a fire or by tree falls in a heavy storm, but that is not what the provision requires.*
>
> *An all-weather road means that the road is of a standard normally useable in all types of weather conditions and does not become impassable, for example, in wet weather or by flooding. It is likely that this requirement was intended to prevent dwellings from being built in inaccessible locations where access by emergency vehicles would be problematic.[4] A dwelling on the subject land would fall into this category'. [emphasis added]*

This interpretation is consistent with the earlier findings in of Deputy President Gibson in *Hocking v Northern Grampians SC* [2006] VCAT 318.

In that case, the applicant sought to construct a new dwelling on a site accessed by the Heatherlie Track in the Grampians National Park. A four-wheel drive would be able to get through in most weather. However, sections of the Heatherlie Track would not be passable in a two-wheel drive in dry weather and would become impassable to cars and light commercial vehicles in heavy rain falls. Deputy President Gibson found that adequate access to the property could not be provided as the Heatherlie Tack could not be said to have adequate width or stable surface. It was considered relevant that not all emergency vehicles are four-wheel drives. It is important to ensure that access is available for all vehicles, especially in times of emergency.

In considering the standard for access, Deputy President Gibson stated at paragraph 22:

> *'...I consider that the standards for access expressed in the Overlay are reasonable standards that should be met not only within a property but also in respect of access to a property. A reasonable standard of access to reach a dwelling is a basic, practical requirement and, in my view, equally as important as ensuring that dwellings have a potable water supply, appropriate waste disposal facilities and an adequate energy source. These are the basic requirements that all dwellings must have. They are the requirements identified in clause 35.01-2 as necessary if land is to be used for a dwelling.'*

In *Hauser & Waite v Indigo SC and Ors* [2001] VCAT 547, The Tribunal considered an application for review of Indigo Shire Council's decision to refuse the construction of a dwelling on land subject to inundation. The applicant for review submitted that they would accept the level of risk of flooding. The Tribunal did not accept this argument stating at paragraph 32 that *'While the Applicants may be prepared to take a risk, that fails to recognise the risk to the health and safety of others who maybe required to assist them in an emergency.'*

The Tribunal went on to state that while there may be exceptional circumstances to justify a high level of risk, this was not one of them especially in light of the strong direction in the planning scheme to discourage new development in floodplains. In this case, we do not consider there are any exception circumstances would justify such a high level of risk especially where the CCMA and Council planning officers oppose the Permit Application on safety grounds.

Jubilee Street is currently unmade. CCMA flood data shows in a 1 in 100 year flood event, the proposed dwelling is located outside the flood but access via Jubilee Street is subject to significant flooding of at least 1 metre. It follows that Jubilee Street does not provide the required 'all-weather road' access required under clause 35.07-2.

Therefore, we consider the use of the land as a dwelling is prohibited. Even if it were not prohibited it remains undesirable to grant a permit in the circumstances.

2. Use of section 173 Agreement for owner to assume flood risk and indemnify Council with any risk

As you are aware, section 173 agreements are used to restrict the use or development of land or subject the land to special conditions. Agreements usually impose continuing obligations on the land owner.

There are limitations in the legislative process of imposing conditions requiring agreements including:

- The obligation for the agreement must fairly relate to the permission granted.
- The agreement must not facilitate an ulterior purpose or improper planning purpose.

It is our view that imposing a condition requiring entry into a section 173 agreement whereby the Land owner assumes all flood risk and absolves Council of any liabilities in the event of harm resulting from flood event is not appropriate and contrary to proper planning purposes. We strongly advice against it.

There are cases where the Tribunal has ordered a permit be issued subject to a condition requiring entry to section 173 agreement which indemnifies Council in certain events. For example, Council indemnified for any claim resulting from use of apartment balconies,[1] lower than standard clearance over carriageway,[2] and the location of a drain.[3] Section 173 agreements are also used to notify owners of risk where dwellings are constructed in the Bushfire Management Overlay. In our experience agreements and conditions of this nature have been utilised where the available evidence indicates that the use will be satisfactory. In this instance the only available evidence indicates that the result will not be safe.

The use of a section 173 agreement to indemnify Council against losses arising from a flood event, fails to recognise the fundamental importance of effectively managing the use and development of flood prone land in order to minimise costs and risk to individual health and safety associated with flood events. It would, in effect, allow a proposal which does not achieve the outcomes sort by the planning scheme and is an unsatisfactory substitute for a proper planning decision.

Council has statutory duties as the Responsible Authority under section 14 of the *Planning and Environment Act 1987* (**PE Act**). These duties include to effectively administer and enforce the Scheme, to implement the objectives of the Scheme and to comply with the PE Act and Scheme.

We are of the view that Council in issuing a permit for the Permit Application would breach its obligation to implement the objectives of the Scheme and comply with the PE Act and Scheme. The owner of the Land may bring an action against Council if harm is suffered as a result of this breach. It is possible that emergency service personnel could also bring claims against the Council.

In additional to statutory duties, Council is not immune from liability for negligence under the common law. It is our view that, if Council issue a planning permit for the Permit Application and there is a loss of life or property or injury, Council may be exposed to an action in negligence. Council owes duty of care to permit applicants and land owners in issuing planning permits. Issuing a permit where Council knew access was subject to significant flood hazard, could amount to a breach of this duty. Council should be aware of and consider these risks and potential costs in determining the Permit Application.

Please contact Greg Tobin on 5225 5252 or Allison Tansley on 9611 0197 if you have any questions regarding this advice or wish to discuss these issues further.

Yours sincerely,

HARWOOD ANDREWS

[1] See *Frydman v Port Phillip CC (includes Summary) (Red Dot)* [2012] VCAT 1838.
[2] See *See Bay Ltd v Stonnington CC* [2005] VCAT 734.
[3] See *Sekercioglu v Stonnington CC* [2008] VCAT 1601.