
From: Todd Langtry [REDACTED]
Sent: 19 November 2020 11:39 AM
To: Angela Hughes <ahughes@mrsc.vic.gov.au>; Christo Crafford <ccrafford@mrsc.vic.gov.au>
Cc: Cr Anne Moore <anmoore@mrsc.vic.gov.au>; Cr Annette Death <adeath@mrsc.vic.gov.au>; Cr Bill West <bwest@mrsc.vic.gov.au>; Cr Dominic Bonanno <dbonanno@mrsc.vic.gov.au>; Cr Geoff Neil <gneil@mrsc.vic.gov.au>; Cr Janet Pearce <jpearce@mrsc.vic.gov.au>; Cr Jennifer Anderson <janderson@mrsc.vic.gov.au>; Cr Mark Ridgeway <mriddgeway@mrsc.vic.gov.au>; Cr Rob Guthrie <rguthrie@mrsc.vic.gov.au>; John Nevins <jnevins@mrsc.vic.gov.au>
Subject: RE: Request that Council review and deny a further permit extension for 2-4 Davy Street Woodend.

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Dear Ms Hughes & Mr Crafford

Thank you Ms Hughes for your prompt correspondence dated 18/11/2020 which I had not expected, but thank you for taking the time to write.

I'm afraid the intent of my email may have been misunderstood. I directed this matter to our Councillors directly so that they have full visibility of the issues and that Council subscribes to and owns any decision in this matter as my elected representatives. That is, I want Council to call this in and review the matter and own the decision, rather than leaving it to the Planning Department under delegated authority as has happened previously.

One of the matters that was not addressed in your response below which relates directly to the Planning departments remit and not Council in general - is the decision not to enforce the permit requirements over the last four years. In particular I'm keen to understand why the obligations the owner had under point 13 of the permit approval which has a direct financial impact upon me and is a threat to the structure and longevity of the historic Islay house. The protection of Islay House will be a matter directly relevant to the Council and the CEO.

I thank you for your engagement on this and I request my submission be given due consideration in the deliberations about whether or not to extend. I note specifically the following:

Firstly, it is clear that the only real work occurred in October 2018. Since then, there has been nothing. The owner has tried to sell the property (advertising the permit as one of the key desirables of the lot) with no success. My understanding is the asking price is significantly higher than the purchase price (\$2.495M vs ~\$0.5M) and the only value add in the interim is the permit. It appears to me that the owner has no intent to start the works. The tree felling was the very least he could do to activate the permit and there has been nothing since. I contend the permit is being warehoused.

Secondly, the owner had obligations Under point 13 and others of the permit approval. There was a requirement that the developer monitor changes to the structure of Islay House (to check for settlement, cracks etc) and also monitor sub-soil moisture levels "on a regular basis" and for up to two years after the construction of a floodway. This requirement was due to the very real concern (following the provision of the geotechnical engineering reports to VCAT) that the removal of trees and excavation of the floodway would dry out the underlying highly reactive

clays that [REDACTED] is founded upon causing settling and cracking to this historic structure. The permit holder has not complied with this requirement. As such, I contend he is in breach of his obligations and should not be entitled to an extension.

Finally, the almost total lack of commitment to the project by the owner shows a disregard for the process. The owners lack of action (other than lopping trees and applying for extensions) demonstrates that there is no real intention to commence this project. The law in relation to the matter steps out how commencement and intention is to be determined. I contend the evidence in this matter is clear that there is no such intention.

Due to the significance of this matter in terms of local character and impact on [REDACTED] [REDACTED], I ask that you or Mr Christo forward this matter to your CEO for consideration.

I look forward to a response and have confidence that you will see that it should be the recommendation of your unit to the Council that the permit should not be extended.

Thank you for your interest in this matter.

Todd Langtry

From: Todd Langtry [REDACTED]

Date: 17 November 2020 at 11:19:07 am AEDT

To: Cr Annette Death <adeath@mrsc.vic.gov.au>, Cr Geoff Neil <gneil@mrsc.vic.gov.au>, Cr Bill West <bwest@mrsc.vic.gov.au>, Cr Dominic Bonanno <dbonanno@mrsc.vic.gov.au>, Cr Rob Guthrie <rguthrie@mrsc.vic.gov.au>, Cr Anne Moore <anmoore@mrsc.vic.gov.au>, Cr Jennifer Anderson <janderson@mrsc.vic.gov.au>, Cr Janet Pearce <jpearce@mrsc.vic.gov.au>, Cr Mark Ridgeway <mriddgeway@mrsc.vic.gov.au>

Cc: [REDACTED]

<[\[REDACTED\]](#)>

Subject: Request that Council review and deny a further permit extension for 2-4 Davy Street Woodend.

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Todd Langtry
[REDACTED]
[REDACTED]
[REDACTED]

17th November 2020

Dear Mayor and Councillors

RE : Permit extension for 2-4 Davy Street Woodend

Congratulations on your recent win in the Council elections. I have great respect for people who commit themselves to public service and apologies that my first communication is a lengthy email.

As you may be aware, the development permit for the construction of fourteen units on the land adjacent to [REDACTED] is shortly due to expire. This permit was initially granted on 11th January 2017 and was due to expire 11th January 2019. Despite my objections to the permit being extended, and clear precedents at VCAT that the permit did not meet the requirements for being extended, the MRSC Planning department determined that they would grant a further extension of two years to 11th January 2021. This extension was on the basis that the developer had officially commenced work since the developer had removed some trees on site. It should be noted that in a number of cases taken to VCAT, tree clearance was not regarded as an adequate reason to extend a permit.

In my correspondence with MRSC Planning they advised that *“There is no need to obtain a Council decision in this regard”*. I find it disappointing that our elected representatives do not seem to have a say and/or chose not to consider the matter despite a request that this be done in advance of the extension being granted – refer my email of 23 November 2018 (well before permit approval review) responded to by MRSC Planning 15th January 2019 - disappointingly after approval was given so that I had no opportunity for appeal.

I would urge Council to take a direct interest in this matter and decline any further extension of the permit on the basis of a number of permit breaches and the total absence of works on site for the last several years – I have kept a photographic record to provide evidence of this point should I need to take it to VCAT.

The site has had a troubled history, with the development proposal having gone to VCAT on three occasions – for the development of 23, 21 and 14 units respectively.

Council should be aware that the approval was NOT granted on the basis of compliance with the relevant planning standards and overlays present in Victoria and Woodend specifically. I understand that the final approval was based largely on a degree of exhaustion on the part of Council Officers and the perception that in reducing the unit count from 23 to 14 the developer had made significant concessions in the number of units and dwelling density. I’m sure you will be aware that it is common practise for developers to apply for significantly more units than they hope to build so that they can be shown to have offered such ‘concessions’.

Council should also be aware that in a VCAT review of the permit application for the adjacent 4-6 Davy street development – which shared many features of the 2-4 application since it was put forward by the same developer - the presiding VACT Member expressed surprise that Council had approved the 2-4 Davy Street application.

In the original application, I understand the dwelling density objectives were side-stepped by not subdividing the land. For clarity, during the development all units were consolidated onto a single large lot and then, once built, the developer will then seek to use transitional provisions (designed to protect owners of existing structures) to subdivide the lots into parcels smaller than the regulations allow on the basis that the buildings already exist on site. This rort enables the developer to build at a much higher density than the regulations allow for our community. I find this manoeuvre particularly unethical and troubling and am of the view that developers who perform unethically should be subject to increased oversight and enforcement, not less.

Since the permit was granted it would appear that the developer has simply tried to profit from the sale of land with a valid permit and not actually undertake any meaningful development, contrary to the understood intent at VCAT. This lack of intent to develop is supported by the fact that following the granting of the permit the land was put up for sale multiple times including the potential for it to be an aged care community - despite the permit granting no such facility. I note that the

“For Sale” signs have been removed now that they are applying for a further extension.

I have observed the following activity has been undertaken on site over the last 4 years:

- Undertaking a dilapidation survey of Islay House on 14/9/2018
- Undertaking ground moisture measures at Islay House on 5/10/18
- Removal of the initial “For Sale” sign end September
- Removal of Trees on site from 22-26 October 2018
- Installing a new “For Sale” sign on 30th October 2018
- Erection and removal of two further “For Sale” signs with different agents in 2019/20.

It is well within the Council’s remit to refuse to extend a permit. I would strongly urge the Council to not support any further extension to the permit issued for the site based on the token works undertaken on site to date, and the clear intent to sell the permit on to others, who are likely to seek to change the design to support a lower cost or higher density development. I believe Councils policy on land-banking and ‘warehousing’ permits is to not allow or support such practise and I believe this to be a demonstrable case of such an activity.

Whilst the Act is not specific about the requirements or ‘tests’ for either allowing or denying a permit extension, the case of *Best & Zygier v City of Malvern* (1974) 1 VPA 284 is relevant in terms of providing a widely accepted framework against which decisions to extend can be considered by the Council. In that case, the Tribunal found that the considerations necessary to determine whether to extend the time for completion of a planning permit were whether:

- The time originally limited was in all the circumstances reasonable and adequate taking into account the steps which would be necessary before the development could actually commence;
- Any intervening circumstances have rendered it unreasonable that the appellant should be held to the time originally fixed;
- Whether since the issue of the original planning permit there have been any changes in town planning policy which would militate against the grant of a permit for the proposed development at the time when the appeal is heard.

In addition, His Honour Mr. Justice Ashley, in considering a number of Tribunal decisions in *Kantor v. Murrindindi Shire Council* 18 AATR 285 stated that a Responsible Authority “may rightly consider” the following:

1. Whether there had been change in planning policy;
2. Whether the landowner is seeking to “warehouse” the permit;
3. Intervening circumstances as bearing upon grant or refusal;
4. The total lapse of time;
5. Whether the time limit originally imposed was adequate;
6. The economic burden imposed on the landowner by the permit; and
7. The probability of a permit issuing should a fresh application be made.

His Honour Mr. Justice Ashley's decision is often cited as the authority which lists factors that should be considered when determining whether the life of a Permit should be extended.

I offer the following views in relation to the above factors:

1. ***Whether there had been change in planning policy;***

As Council will be aware, this application was approved on the basis of planning regulations in force prior to the adoption of amendment C98. Under C98 this development would not just be even more inappropriate than it was under the previous planning scheme, it would be prohibited.

In addition Amendment VC154 gazetted on 26 October 2018 governs water management and in a separate submission, the Council has argued that a similar development at 6-8 Davy Street is inconsistent with that Amendment and this was upheld at VCAT and the permit denied.

2. ***Whether the landowner is seeking to "warehouse" the permit;***

Since gaining the planning permit the developer sought to put the land up for sale without undertaking any observable construction activity. When the permit period was due to expire the developer has undertaken token tree removal activity to give the impression of development as described above and has then re-put the land up for sale immediately.

It is interesting to note that the planning permit requires that Tree Protection Zones are erected and remain in place *during the life of the development*. Whilst the developer erected tree protection zones for the period that the above-mentioned tree removal activities were taking place, these have since been removed, strongly indicating a lack of intent to proceed with the development.

I would argue that these factors are strong evidence of "warehousing" a permit.

3. ***The total lapse of time and whether the time limit originally imposed was adequate;***

I would argue that four years since the permit was granted has provided ample opportunity for the developer to complete the development. Therefore time allowed for the development has been more than reasonable. This argument is strengthened by the VCAT decision since, having reviewed all facets of the development specified such a timeframe to complete the works. VCAT would be unlikely to define a period that they would find unreasonable. The fact that no development has taken place rests with the developer and not Council.

4. ***Intervening circumstances as bearing upon grant or refusal***

With the exception of the changes to planning legislation that would discourage and prohibit the development if it was submitted today (see (6) below) there are no other circumstances I'm aware of that have a bearing on the

development. The weather has been kind, access has been readily available and no emergent risks or obstructions have precluded the development taking place. Even during the last six months of COVID, the government has been offering Grants to ensure construction continues to take place. In addition, the developer, or their associate is seeking to develop the adjacent land at 6-8 Davey Street so I cannot conceive of any constraints on their side. As an aside, I suspect the 6-8 Davy street land will also now be sold with the permit without any intent to develop the land.

5. ***The economic burden imposed on the landowner by the permit;***

The permit conditions set by Council and approved by VCAT, whilst lengthy were not economically burdensome. Their intent to develop adjacent parcels of land, and potentially others across the state would argue that their financial ability to meet the permit conditions is sufficient and the cost and effort required for the development was well known prior to the final permit approval.

6. ***The probability of a permit issuing should a fresh application be made.***

This is a key consideration. The permit was granted on the regulations in force prior to Amendment C98 being in place. As you will be aware C98 has significantly changed the development landscape for this part of Woodend and that the proposed development would be at best very strongly discouraged, and would be prohibited under the current schemes in force i.e. there is near zero probability that a permit would be issued should a fresh application be made. I would also draw Council's attention to the report by their own Strategic Planning department which states "*...the application is not consistent with the Structure Plan or the planning provisions proposed by Amendment C98 as the intensity of the development is considered too high and inconsistent with the neighbourhood character sought for this precinct*"

With the above I would argue that the developer would fail to contest the six tests outlined by His Honour Mr. Justice Ashley and the extension of permit should be rejected.

In addition to the above VCAT guidance on Council's rights to deny any further permit extension, I would draw the Council's attention to the following failures by the developer to meet the terms of the existing permit:

- Under point 7 of the permit approval there was a requirement that TPZ fencing of a height of 1.5m with signage "...clearly marked 'Tree Protection Zone – No Entry' on all sides". **This was not done.** For clarity fencing *without signage* was erected. However this was lightweight plastic that sagged as low as 0.9m and in many instances did not reach 1.5m when taught.
- Under point 8 of the permit approval there was a requirement that "... tree protection fencing shall be maintained in good condition and may only be removed upon completion of all development works...." **This**

was not done. In addition it is somewhat surprising that if there was an intent by the developer to actually develop the site that they would go to the trouble and expense of removing fencing that they would be required to re-erect for the build to proceed.

- Under point 13 of the permit approval there was a requirement that the developer monitor changes to the structure of Islay House (to check for settlement, cracks etc) and also monitor sub-soil moisture levels “on a regular basis” and for up to two years after the construction of a floodway. This requirement was due to the very real concern (following the provision of the geotechnical engineering reports to VCAT) that the removal of trees and excavation of the floodway would dry out the underlying highly reactive clays that Islay House is founded upon causing settling and cracking to this historic structure. **These checks have not been done and is a breach of good faith and the permit conditions.** Further, following the removal of the trees, Islay House has now experienced additional cracking and this will be the subject of a separate claim for damages following the completion of engineering and inspection reports. I would ask Council why they have not enforced provisions designed to protect a heritage property from damage?
- Under section 39 of the permit approval there was a requirement that “...the alignment of the existing sewer main must be clearly marked on site with clearly identifiable crossing points.” The basis of the prior extension was that construction had commenced. Since in Council’s view construction has commenced it is therefore required that the sewer main is so marked. **This has not been done.**
- Under point 54 of the permit approval there was a requirement that “Prior to the commencement of any works, appropriate silt control measures must be installed to prevent sediment laden runoff from entering the waterway. Silt control measures must be maintained throughout the construction period.” The basis of the prior extension was that works had commenced. Since in Council’s view works is that works have commenced it is therefore required that the silt control measures are installed. **This has not been done.**
- As I do not have access to Council’s documents I have not been able to confirm whether the developer has complied with the following requirements – 15, 16, 17, 28, 37, 38, 42, 45, and 53. On the basis of the laid back attitude to complying with other requirements I suspect that a number of these permit requirements have not been complied with.

In summary, the site shows no appearances of any meaningful development; the actions taken to date such as not maintaining tree protection or silt control measures and putting the land up for sale as-is strongly indicate no intent to

develop the land; the failure to comply with permit conditions for an ongoing development; and the failure to pass the six tests used for considering permit extension provide a clear case for permit extension refusal.

Given the above, I would respectfully request that prior to any decision to extend the Permit the Councillors call the application in and review it. I would also request that should Council decide to extend the permit then, unlike on the last occasion, I am given sufficient notice of the decision to raise community awareness and the necessary funds to take the matter to VCAT for review.

Yours Faithfully

Todd Langtry

A black rectangular redaction box covering the signature of Todd Langtry.

Cc : Local neighbours