

1.0 Amending a Planning Permit

Introduction

With Councils regularly taking up to 12 months to determine an application and permits typically allowing two years in which the development or use may commence, substantial time can pass between the initial application and a permit being enacted. Considering that planning approval is a relatively early phase of the process, circumstantial changes can arise which require the nature of a use or development to be altered. This article explores the options available for amending a planning permit where it is deemed necessary.

The situation which prevails in Victoria provides four options for amending a planning permit. They are:

- Through secondary consent;
- Under Section 72 of the Planning and Environment Act 1987 (“the Act”);
- An amendment under Section 87 or 87A of the Act; or
- An Amendment under Section 89 of the Act.

The preferred option to be applied in any particular situation will depend upon the extent and merits of the changes sought, the need to involve other parties who may be affected by the granting of changes sought and the need to select the most expeditious process possible. Each option will be discussed in turn below.

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Secondary Consent

This option provides the most expeditious means of dealing with alterations though it limits the extent of changes which can be sought and prevents third parties becoming involved in the process. For this reason Councils are often reluctant to allow a permit holder to pursue this option for all but the most minor changes.

In understanding this option, it is necessary to distinguish between “secondary consent” and “primary consent.” The latter constitutes planning permission which is given in response to a planning permit application whilst secondary consent is made available under the wording of a permit which has already been granted. Secondary consent amendments are permissible under permit conditions as opposed to being inferred under the *Planning and Environment Act 1987* (which occurs when a primary consent is given).

Secondary consent applications arise most commonly where a permit holder is seeking to amend plans under Condition 2 of the permit which typically states:

- 2. The use and development as shown on the endorsed plan must not be altered unless with the written consent of the responsible authority.*

Permits may also include conditions relating to hours of operation, staffing numbers, patron numbers, etc. which must not be altered *without written consent of the responsible authority.*

The tests contained within the Victorian Civil and Administrative Tribunal (“VCAT”) decision of *Westpoint Corporation Pty Ltd v Moreland CC [2005] VCAT 1049* are widely regarded as those which should be applied when deciding if the use of secondary consent is appropriate. These tests state that it may be used when:

| Test | Explanation |
|---|--|
| <i>It does not result in a transformation of the proposal</i> | If the nature of use or development will be substantially changed, a new planning permit application or a Section 72 Amendment should be lodged. |
| <i>It does not authorise something for which primary consent is required under the planning scheme</i> | Is not suitable where the request will trip additional permit triggers not previously considered in the initial application. |
| <i>It is of no consequence having regard to the purpose of the planning control under which the permit was granted.</i> | Regard must be given to the purposes of the control that lead to the granting of the initial permit. For example where a planning control was concerned with parking, heritage, etc., a change to an internal building layout may be dealt with under secondary consent on the basis that it was of “no consequence” having regard to the primary factor in the original permit considerations. The physical scale of the change is not necessarily conclusive of what is or is |

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|--|--|
| | not “of consequence,” nor is the fact that there may have been an earlier objector(s) who may simply not like the change. |
| <i>It is not contrary to a specific requirement as distinct from an authorisation within the permit which itself cannot be altered by consent.</i> | It is not suitable where the changes will conflict with other permit conditions which cannot be altered under secondary consent. For example conditions which require changes to plans prior to endorsement. |

The *Westpoint* case and others such as *Zuzek v Boroondara CC [2007] VCAT 2174* provide detailed commentary on ensuring that any secondary consent application is assessed according to these criteria and not based upon the scale of the change sought. In instances where Council refuses a proponent’s request to amend plans under secondary consent, an appeal can be lodged with VCAT pursuant to Section 149 of the *Planning and Environment Act*. It should however be noted that if the appeal fails, the applicant is effectively back to “square one” and will be forced to make a Section 72 Amendment resulting in substantial delays.

Section 72 Amendment

Section 72 of the *Planning and Environment Act 1987* states that:

- (1) *A person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to the permit.*
- (2) *This section does not apply to-*
 - (a) *a permit or a part of a permit issued at the direction of the Tribunal, if the Tribunal has directed under section 85 that the responsible authority must not amend that permit or that part of the permit (as the case requires); or*
 - (b) *a permit issued under Division 6.*

The processes involved in a Section 72 Application are essentially the same as those which occur when any planning permit application is lodged. They include lodgement of an application form with Council, a fee, a request for further information if necessary along with possible public notification and finally the affording of review rights. Despite the similarities, Section 72 provides a means by which a proliferation of multiple permits for any one site can be avoided.

As opposed to a secondary consent application, Section 72 Amendments provide an opportunity for third parties to become involved in the process through the notification and appeal provisions provided under the Act. The timeframes involved for a Section 72 application will generally be substantially longer than secondary consent applications.

Section 72 Applications can provide for changes to plans, documents endorsed under a permit, permit conditions and/or what the permit allows.

Section 87 Amendments

Section 72 Amendments are now available for permits issued at the discretion of VCAT (as at 22 July 2013), unless the Tribunal has specifically directed that Council must not amend that permit (in which case any amendment must be considered by the Tribunal). Alternatively, Section 87A enables the Tribunal to cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so.

A Section 87A application can be lodged only by *the owner or occupier of the land concerned or any person who is entitled to use or develop the land concerned* (i.e. the permit holder).

Section 87(1) by contrast provides an opportunity for other parties to apply for a cancellation or amendment of a permit issued by the responsible authority. Under this Section however the Tribunal can grant the request only if it considers that there has been:

- (a) *a material mis-statement or concealment of fact in relation to the application for the permit; or*
- (b) *any substantial failure to comply with the conditions of the permit; or*
- (c) *any material mistake in relation to the grant of the permit; or*
- (d) *any material change of circumstances which has occurred since the grant of the permit; or*
- (e) *any failure to give notice in accordance with this Act; or*
- (f) *any failure to comply with section 55, 61(2) or 62(1).*

The Tribunal may also amend any planning permit where a subsequent building permit cannot be granted for that development if it does not comply with the Building Regulations.

Whilst anyone can make a request under this provision it is typically used only by non-permit holders (i.e. a responsible authority, referral authorities or third party objectors) due to the qualifying conditions listed above which do not apply under a Section 87A Application.

Section 89 Amendments

A Section 89 Amendment to cancel or amend a permit can be lodged with VCAT by *any person who objected or would have been entitled to object to the issue of a permit* if-

- (a) *the person believes that the person should have been given notice of the application for the permit and was not given that notice; or*

- (b) *the person believes that the person has been adversely affected by-*
- (i) *a material mis-statement or concealment of fact in relation to the application for the permit; or*
 - (ii) *any substantial failure to comply with the conditions of the permit; or*
 - (iii) *any material mistake in relation to the grant of the permit.*

Tribunal needs to be satisfied that the *request has been made as soon as practicable after the person making it had notice of the facts relied upon in support of the request.*

Section 71 Amendment

Whilst Section 71 of the Act may be considered somewhat of a footnote to the issue of planning permit amendments, it is important nonetheless to be aware of the options it provides. Under this Section a responsible authority may correct any clerical error or omission which has been made in the wording of a permit, including a permit issued at the direction of the Tribunal.

Conclusion

Determining which method should be applied in amending a planning permit will involve an assessment of the merits surrounding each particular case and the need to consider the views of other potentially affected parties. This is perhaps best surmised in the decision of *APAC Design & Construction v Whitehorse CC* [2006] VCAT 594 where the Tribunal commented that:

Changes to plans under a permit need to be considered in a context of a continuum. At the lower end there are minor changes that have no external impact and are entirely uncontentious. Changes of this nature are best considered by way of secondary consent without the need for notification, the involvement of third parties or an extensive formal process. At the other end of the continuum are major changes that will have external impacts and affect third parties. Changes of this nature should be considered in the context of an application to amend the permit under s 72 of the Act. This process enables third party participation in the decision-making process, unlike the secondary consent process.

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