IN THE MATTER OF 1221 – 1249 CENTRE ROAD, OAKLEIGH

FORMER SAND QUARRY – REHABILITATION FOR RESIDENTIAL DEVELOPMENT

PLANNING QUESTIONS

MEMORANDUM OF ADVICE

INTRODUCTION

1. Our instructing solicitors act for Huntingdale Estate Nominees Pty Ltd (Huntingdale) and Talbot Road Finance Pty Ltd (Talbot) (collectively, the clients) in relation to the proposed reclamation and rehabilitation of a former sand quarry for residential development at 1221 – 1249 Centre Road, Oakleigh (the site).

2. Huntingdale (the landowner) became the registered proprietor of the various titles comprising the titles to the site on 26 November 2010. Talbot is the mortgagee, it having taken a transfer of a previous mortgage over those titles on 18 September 2013.

3. The site was previously the site of a sand quarry and in part it has been filled. It remains amongst other things, to rehabilitate the south-western section of the land by filling a previous quarry void. That void, parts of which have a depth of around 16-18m was created by Pioneer Construction Material Pty (former name of Hanson Construction Materials Pty Ltd) (Hanson) in the course of extractive industry operations on the land. Hanson has continuing obligations to rehabilitate the site but does not wish to do so in a manner consistent with Huntingdale's objectives for residential development.

4. In essence, Huntingdale wants to know what legal rights, mechanisms and processes it might invoke in order that the land is filled in a manner consistent with ultimate residential development.

5. We were [redacted] briefed to advise on [redacted] the following three planning questions:

[redacted]

Question 3: Options for Huntingdale to lodge its own planning permit application to the City of Monash for site filling and associated works [redacted]

[redacted]

14. [redacted]

15. [redacted]

Question 3: Options for Huntingdale to lodge its own planning permit application to the City of Monash for site filling and associated works.

16. Huntingdale can lodge a planning permit application for the use and development of the land for the purposes of rehabilitation (an innominate use) in the General Residential Zone.

17. We are of the opinion that Huntingdale should have an overall strategy for the development of the site, and pre-application discussions with the Council prior to undertaking any works, and prior to making any applications.

18. [redacted]

[redacted]

19. [redacted] the works must be associated with some "use" of the land. We consider that the works are too extensive to be simply characterized as works associated with the development of the land for dwellings. (We note that, if the works were characterized in that way, then no permit would be required for them in the General Residential Zone given that the use of the land for dwellings is a section 1 use). Although Huntingdale could commence the works on the basis that no permit was required, we think that that would be a risky strategy. If Huntingdale wished to rely upon this argument, we consider that it would be better to make an application for subdivision first, and commit to doing the works as a condition of the subdivision.

20. The alternative is to argue that the filling of the land (with clean fill) is an innominate use (rehabilitation), and hence a permit could be obtained for use and development associated with that use in the General Residential Zone. We consider that this option is the least risky option. It also is consistent with our instructions that Huntingdale's preference is to not wait for the subdivision permit in order to commence the works

21. While the existence of Work Authority 389 is not a legal impediment to obtaining a planning permit, in exercising its discretion as to whether or not to grant such a permit, the Council would have regard to the opinions of the Department of State Development, Business and Innovation (DSDBI) and Environment Protection Authority (EPA) (and/or any environmental auditor) as to the rehabilitation proposed.

22. Further, in our opinion, Huntingdale should also apply to the Council to end the Section 173 Agreement that is registered on the titles to the site at the time that it makes its planning permit application for rehabilitation.

23. Council may ask for a fresh section 173 Agreement that obliges Huntingdale to undertake the rehabilitation (in order to provide the Council with a legal mechanism to require the rehabilitation to be undertaken). [redacted]

[redacted]

[redacted]

BACKGROUND

30. Our instructions are set out in a memorandum to counsel dated 8 August 2014 (with further oral instructions provided in conference on 21 August 2014) and are not repeated here. Suffice is to say that we have assumed and relied upon the following key facts.

31. Huntingdale is the registered proprietor of the site.

32. The relevant history of land ownership is as follows:

    a) Prior to 2002: Consolidated Quarries Ltd

    b) From March 2002 – July 2003: Danjala Pty Ltd

    c) From July 2003 – November 2010: Jandaro Pty Ltd

    d) From Nov 2010 to present: Huntingdale.

33. A planning permit was issued for the subject site on 29 November 1963 for the use of the land for the pre-mixing of concrete.

34. A planning permit was issued for the land described in Certificate of Title Volume 9402 Folio 344 formerly described as Talbot Avenue, "and portions of the land abutting such land" on 1 May 1989 for the use of the land for the purpose of extraction and treatment of sand (Planning Permit 4371).

35. We have assumed that no other relevant permits have been issued for the site. In particular, the stockpiling of soil, and the filling of parts of Zone 4 since 2004 have been done without a permit.

36. A section 173 agreement was registered on the titles to the site on 26 May 1993. The section 173 agreement was made between the (then) City of Oakleigh and the (then) owner of the site. The section 173 agreement runs with the land and provides for the regulation of the use and development of the site.

37. The site is zoned part Special Use Zone (Schedule 2) and part General Residential Zone (Schedule 2).

38. Hanson is the holder of Work Authority 389, Work Plan Conditions, Reclamation Management Plan and Approved Work Plan 1533/3 which were issued for the site.

39. Extractive industry licence No. 44-2 and 1322 was issued for the site.[2]

40. Work Authority 389 was varied on or about 19 December 2001 to excise the majority of the site from the Work Authority Area. The area that remains in the Work Authority area is marked Zone 4 as shown on the plan attached (taken from Coffey, *Environmental Management Plan* dated 26 August 2013).

41. The majority of the site (namely zones 1-3 and 5) has been backfilled with uncontrolled fill and/or soft clay slimes, which are a by-product of sand mining operations. There is a layer of uncontrolled fill in Zone 2 which was filled in the 1980s or 1990s. Zone 1 was used as a Council tip for putrescible wastes until about the 1970s.

42. We do not have instructions or documents that disclose exactly when quarrying (and landfilling) commenced and ceased at the site. However we note that:

    a) we are instructed that the land has not been used for a quarry for approximately 20 years; and

    b) various documents in our brief (including the Oakleigh Reclamation Management Plan August 1994) refer to the proposed rehabilitation of the land as being the "final phase that will culminate in excess of 40 years of mining on the site".

43. The part of the land that has not yet been rehabilitated is in the south west section of the site (ie in Zone 4) and contains a "lake" (approximately 18m to the top of the water, with approx. 6 m of water) and quarry pit (approximately 16 m deep) (the Quarry Pit);

44. The lake and Quarry Pit are located in the General Residential Zone (Schedule 2).

45. In 2004, when the land was owned by Jandero Pty Ltd, clean fill was brought onto the site and stockpiled in Zone 1. That fill was later deposited into Zone 4 to create a platform within the Quarry Pit.

46. Huntingdale proposes to redevelop the site for residential purposes and it requires the lake and Quarry Pit to be backfilled for that purpose.

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[2] The current legislation does not require that extractive industries (stone quarries) be "licenced" as with mining operations. Presumably this licence was issued pursuant to the relevant legislation that applied at the relevant time.

47. In order for a residential use of the land to be permitted, the Quarry Pit must be backfilled in accordance with requirements that go beyond the conditions of reclamation under Work Authority 389, but are generally consistent with it (according to a letter from DSDBI).

48. Approximately 60,000 cubic metres of clean fill remains in Zone 1. Approximately 1 million loose cubic metres of fill is needed to fill the site.

49. It will take between 18 and 24 months to fill the site (plus lead time).

50. [redacted]

51. [redacted]

52. [redacted]

53. [redacted]

b) [redacted]

c) [redacted]

54. [redacted]

[redacted]

65. [redacted]

66. [redacted]

OPTIONS FOR HUNTINGDALE TO LODGE ITS OWN PLANNING PERMIT APPLICATION TO THE CITY OF MONASH FOR SITE FILING AND ASSOCIATED WORKS

67. There is no legal impediment to making an application for a planning permit for the rehabilitation of the land arising from the:

a) existence of previous planning permits;

b) the existence of a section 173 Agreement; or

c) the existence of the Work Authority.

Previous Permits

68. A planning permit may be granted for land notwithstanding the existence of other permits affecting the subject land. If there is a desire to have a previous permit cancelled prior to a new permit coming into effect, then there is a procedure to apply to VCAT for cancellation of the permit, and a power in Section 62(2)(b) of the Act to include a condition on the new permit that "the permit is not to come into effect unless a specified permit is cancelled or amended". The process for cancelling an old permit is usually relatively straight forward. In any event, in this case it will not be necessary given that the old permits have expired.

[redacted]

[redacted]

94. [redacted]

95. [redacted]

Fresh Planning Permit Application

96. In order to determine whether or not the application could be lawfully made, and whether it would be likely to be granted, it is important to understand:

    a) the planning controls (eg the zone and overlays controls and any applicable "particular provisions") applicable to the site; and

    b) the characterization of the use of the land and associated works.

97. In relation to the latter, a permit for "use" and "development" (including "subdivision" and "works") will only be required if specified in the Monash Planning Scheme (eg under the zone or overlay control).

98. The site is zoned part Special Use Zone (Schedule 2) and part General Residential Zone (Schedule 2).

99. In order to be able to develop and use the whole of the site for residential purposes, that part of the site in the Special Use zone would need to be zoned for residential purposes and a permit would be required:

    a) for *subdivision*; and

    b) for medium density *development*.

100. No permit would be required for the *use* of the land for residential purposes once the site is zoned for residential purposes.

101. Further, given that the Environmental Audit Overlay applies to the site, before construction or carrying out of buildings and works in association with a sensitive

use commences, either a certificate or statement of environmental audit must be issued for the land in accordance with Part IXD of the *Environment Protection Act 1970*. In practice, the requirement for a certificate or statement of environmental audit may also be considered at the rezoning stage and at the subdivision stage.

102. It appears to us from the planning property report in our brief that the vast majority of zone 4 (including the Quarry Pit) is contained in the General Residential Zone.

103. It is not possible to get a permit for a "landfill" in the General Residential zone. A "landfill" is nested in the land use term "refuse disposal", which is nested under "industry". The Monash Planning Scheme defines "refuse disposal" as:

> Land used to dispose of refuse, by landfill, incineration, or other means.

104. In the General Residential zone, "industry" is a prohibited use, and hence a permit for "industry" could not be obtained. Accordingly, if Huntingdale wanted to fill the site with "refuse", in our opinion it would need to argue that it was permitted to do so by way of the existing permit or existing use rights. [redacted]

105. If the land was proposed to be filled with clean fill for the purposes of the residential development, then there is an argument that the final landform, and the issues associated with filling, could be examined in any application for subdivision, and the permit for subdivision could be conditional upon the site being rehabilitated in accordance with a specified plan (see eg *Moorabool C40 (PSA)* [2010] PPV 61 (2 June 2010) for an example of a subdivision permit with details provisions regarding filling and earthworks as a requirement of the subdivision).

106. Further, there are many examples of cases in which certification of the subdivision is contingent upon a statement or certificate of environmental audit being issued (see eg *Capozza v Nillumbik SC* [2008] VCAT 326 (29 February 2008); *Synergy (Chapel Rd) Keysborough Pty Ltd v Greater Dandenong CC* [2011] VCAT 2024 (14 October 2011) [redacted]

107. It could be argued that there is no need for a "works permit" because the works are not associated with a section 2 use. Rather, they are associated with a section 1 use, and the requirement to obtain a permit to "construct two or more dwellings on a lot" is not applicable to site preparation works. However, we are concerned about this argument due to the sheer extent of the works. That is, we

are concerned that the works are not simply preparatory, but constitute a use of land in their own right.

108. For the sake of certainty and to progress rehabilitation prior to subdivision, Huntingdale could apply for a permit for the use and development of the land for the purposes of "rehabilitation" as an "innominate" use according to the reasoning of VCAT in *Barro Group Pty Ltd v Brimbank CC & Ors* [2013] VCAT 372 (28 March 2013) at [175] – [189].

109. In exercising its discretion as to whether or not to grant such a permit, the Council (and VCAT if there was an appeal) would need to satisfy itself that a co-ordinated approach was being taken to the rehabilitation and development of the land. In particular, it would take into account the comments of the DSDBI and the EPA in relation to the rehabilitation proposed. We have referred above to the fact that the DSDBI would be a referral authority for any application made. The EPA is not a referral authority, and does not regulate the use of fill material. However, it may be prudent to provide the Council with an assurance that the EPA (or at the least the auditor) is satisfied that the proposal is acceptable, and that the fill is classified as clean fill in accordance with its guidelines.

110. [redacted]

111. [redacted]

112. [redacted]

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2 September 2014

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