

18th December, 2017.

Ms. Jenny Moles,
Panel Chair,
Planning Panels Victoria,
Department of Environment, Land, Water and Planning,
GPO BOX 2392,
MELBOURNE VIC. 3001

Via email also: planning.panels@delwp.vic.gov.au

Dear Ms. Moles,

**MONASH PLANNING SCHEME AMENDMENT C129
REZONING OF FORMER QUARRY SITE AT 1221-1249 CENTRE ROAD
OAKELIGH SOUTH**

We refer to your letter to us dated 4 December 2017 wherein you stipulated Further Panel Directions, regarding the supply of information by certain timeframes to the Hearing parties, ("Further Panel Directions").

As stipulated in the Further Panel Directions, we provide the following responses to the further information supplied to us:-

Urbis Legal Advice

We advise that on 5th December 2017, we received an email from Mr. Rory O'Connor of Norton Rose, attaching the following letter and document:-

1. Letter addressed to the Panel Coordinator from Norton Rose dated 4th December 2017 enclosing the document noted below and an explanation as to why legal professional privilege subsists in the Legal Advice to Urbis, but that notwithstanding this, the redacted legal advice was provided.
2. Redacted Memorandum of Advice from Jim Delany QC and Juliet Forsyth of Counsel dated 2 September 2014 entitled:-

"In the Matter of 1221-1249 Centre Road Oakleigh
Former Sand Quarry – Rehabilitation for Residential Development
Planning Questions"

In relation to the above redacted legal Advice, we were only given copies of pages 1,3, 4, 6, 7, 8, 11, 17, 18, 19 and the last page being page 26. All the pages provided to us have redactions, except for page 7 (which contains no legal advice, only historical information) and the last page 26 which contains only the authors' details and the date of the advice.

It is clear from the heading of the Memorandum of Advice that it related to "Planning Questions", but the redacted legal advice only shows a limited amount of the legal advice provided by Counsel regarding question 3, namely:-

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

We are of the view that, as a minimum, the whole legal advice relating to question 3 should be disclosed and no part redacted, as it is impossible to know if Counsel had other concerns or provisos to the advice they have given in answer to question 3 and specifically regarding the characterisation of the planning application.

In relation to what has been disclosed, we note that the redacted legal advice states at paragraph 21 the following:-

"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 (DSBI) and Environment Protection Authority (EPA) (and/or any environmental auditor) as to the rehabilitation proposed."

The above paragraph suggests to us that Counsel was of the view that the Work Authority 389 is still valid, as Counsel refers to its "existence" as not being a "legal impediment to obtaining a planning permit". This is also repeated at paragraph 67. Perhaps the other parts of the redacted legal advice contained advice regarding the status of the Work Authority and Work Plans, which is relevant to the legal advice given by Counsel regarding the characterisation issue?

Furthermore, the redacted legal advice states again at paragraph 109 that the planning applications must be referred to DSDBI, (the 2014 State Government Department that included Earth Resources) as it is a referral authority. In addition, it states that the planning application should be referred to the EPA as a precaution to check that the fill is classified as clean fill in accordance with its guidelines even though the EPA is not a referral authority. This would ensure that in exercising its discretion as to whether or not to grant the

planning permit, Monash Council would take into account the comments of both the DSDBI and the EPA. Whilst Monash Council referred the planning applications to the EPA, (which was not a referral authority), it did not refer them to Earth Resources.

Since Urbis knew about this legal advice, the Work Authority, the approved Work Plans and the fact that Earth Resources was a referral authority, did Urbis advise the Council of these important facts? If it did not disclose these facts to Council or having disclosed them, Council decided to conceal them, then in our view either of these scenarios amounts to a material concealment of fact in relation to the planning applications, which in our view is a valid ground for an application to the Victorian Civil & Administrative Tribunal for cancellation of the permits by an affected person or an objector under section 89 of the Planning & Environment Act 1987 or by Earth Resources, as the referral authority under section 87 of the Act.

The Planning Report to the Monash Council Meeting of 28 April 2015 (which is document 50 on the Hearing Document List), on page 37 states that there were 4 objections to the backfilling permit and 5 objections to the stockpiling permit. Page 53 of document 50 states as follows:-

“Objections expressed concern that use of the site as proposed is not permitted under the Special Use Zone, on the basis that it includes activities that are listed at clause 52.10 being ‘soil conditioning and blending’ and ‘treatment of aqueous waste’. The permit applicant (Urbis) has submitted the following response with respect to this issue....”

The Urbis response that follows on pages 43 and 44 includes the reference to the legal advice that contradicts the above characterisation by objectors of the proposed use of the 2015 planning permits.

We do not know how many objections raised the issue of the characterisation of the use under the Special Use Zone, as we do not have copies of all the objections. However, our office lodged an objection dated 18th December 2014 to the planning applications TPA43336 and TPA43337 (the “2015 planning permits) on behalf of Angelo Valente and Leondina Valente regarding, (amongst other things) the characterisation issue. We enclose a copy of this objection. You will note from this objection, that we characterised the use that was described in the advertised documentation as an industrial use in both the Special Use Zone and the General Residential Zone of the site. A detailed perusal of our file shows that the advertised documents at that time did not include the approved Work Authority and Work Plans and no mention was made of these documents in the planning report by Urbis lodged with the applications. Therefore, we were not aware of the existence of these documents at the time the objection was lodged and accordingly, we were not aware that Earth Resources was a referral authority.

The release of the legal advice by Urbis at that time was successful in its ultimate aim, as none of the objectors lodged an application for review at the Victorian Civil & Administrative Tribunal and Council issued the planning permits.

Therefore, we do not agree with the reasons given by Norton Rose in its letter to the Planning Panel dated 5 December 2017 that legal professional privilege subsists in the whole advice because:-

“The advice was not referenced for the purpose of seeking to obtain some advantage in proceedings. It was simply referenced to give the Council some comfort in its assessment of the application that what was being applied for, i.e. “back filling and site rehabilitation”, was appropriate”.

In order to confirm our analysis as detailed above before writing this response to the Panel, we requested Monash Council representatives who are involved in Amendment C129 via email on 11 December 2017 if we could inspect the above planning files in order to obtain copies of the correspondence regarding what and when the legal advice was disclosed, but we have been advised that the files will not be made available to us for inspection.

If it assists the Panel, we request that the Panel direct that Monash Council release to the Panel and circulate to the Hearing Parties all the correspondence on these planning files together with copies of all the objections, the endorsed plans and documents for both planning permits, in order that the Panel can make an informed decision regarding whether or not there has been a waiver of legal professional privilege of the whole legal advice.

Our view is that without the whole legal advice which relates to “Planning Questions” or at the very least the whole legal advice relating to the answer to question 3, the redacted legal advice cannot be relied upon regarding the characterisation issue relating to 2015 planning permits.

With respect to the current planning permits for the site, the use permitted is described as follows:-

- Planning Permit TPA/43336 allows “Backfilling and Site Rehabilitation of the Former Quarry” and
- Planning Permit TPA/43337 allows “Use and Development of the land for stockpiling of earth, treatment of existing on site slimes, sediments and uncontrolled fill material and associated earthworks to facilitate the backfilling of the former quarry”.

Both permits were issued on 1 June 2015 and condition 32 of both permits state that the permits will expire if the development and use are not started before 2 years from the date of issue of the permit.

We are of the view that both the above planning permits have expired as the works pursuant to each permit did not commence before 1 June 2017. These permits can be found in the folder of documents numbered 2 on the Hearing Document List. At the site inspection with the Panel and others on 9 August 2017, it was clear to us that that the backfilling permit had expired as no works had been undertaken associated with the backfilling of the quarry. In relation to the stockpiling permit, we could not conclude from our inspection whether the stockpiling works had commenced before 1 June 2017, although we had subsequently been advised by adjoining residents that the stockpiling works had commenced in July 2017.

However, we have now been provided with a copy of an email dated 8th December 2017 from the Proponent's Project Manager, Mr Glen Slimmon of Sinclair Brook, addressed to the members of the Community Consultative Committee, (set up pursuant to condition 4 of the 2015 planning permits) and others confirming that the stockpiling works commenced in July 2017. We enclose a copy of this email which states under the heading "Stockpiling" that:-

"Stockpiling works commenced in July 2017 following the completion of site preparation and establishment (installation of site sheds, parking etc.)"

We submit that works associated with the completion of site preparation and establishment are not works that require a planning permit and therefore they are not works that trigger the commencement of the stockpiling planning permit. This is reinforced by condition 25 of the stockpiling permit which states that:-

"Before the use and development permitted starts, areas set aside for parked vehicles and access lanes as shown on the endorsed plans must be a) constructed to the satisfaction of the Responsible Authority".....

After making a telephone inquiry from Monash Council on 12th December 2017, we were advised that an application had been lodged for an extension of time to the backfilling permit on 26th November 2017 and that this application was still being considered by Council. However, Council advised us that no extension of time application had been lodged for the stockpiling permit. Our view is that unless there is documentary evidence that the stockpiling permit had commenced before 1 June 2017, then this permit has also expired and the works that are currently being undertaken on the site should cease.

As a result of the above, we wrote a letter to Monash Council on 13 December 2017 requesting that Council make urgent inquiries from the owner of this site to provide documentary evidence that the stockpiling works commenced before 1 June 2017 by providing to us copies of the following:-

- Documentation from the contractor Lantrak confirming the date that clean fill was imported onto the site; and
- Test results showing that the fill material brought onto the site has met the specifications contained in the EPA publication IWRG621, Soil Hazard Categorisation and Management 2009 or as amended, in accordance with condition 18 of the stockpiling permit.

We have requested that Monash Council advise us regarding the status of the stockpiling permit as a matter of urgency, because if the permit has expired, then the current works out on site should cease. This is important not only to us, but to the residents who live within close proximity to the site, especially those residents who have a direct abuttal to the site. We have been advised by some residents, (who have also advised Council), that the current works have allegedly breached some of the conditions of the stockpiling permit regarding the following:-

- Emission of noise and smells contrary to condition 9;
- Operating outside the hours permitted by condition 7;
- Removal of vegetation within 30 metres from the boundary of the land which is contrary to the approved plan;
- The soil mounds within 40 metres from back fences being more than 3 metres above natural ground level, which is contrary to the approved plan, as can be seen from the attached photographs;
- The height of the stockpiles are higher than 3 metres above the natural ground level contrary to the provisions of conditions 14 and 15 of the planning permit, as can be seen from the attached photographs;
- Given the height and location of the stockpiling on the site, including the installation of settlement monitoring datums throughout the site, it is obvious to the residents that the current works relate to preloading, which is not approved by the stockpiling permit.

Furthermore, in our letter to Monash Council dated 13 December 2017, we have respectfully requested that in exercising its discretion, that Council should refuse the application for an extension of time to the commencement date of the backfilling planning permit for the following reasons:-

1. The original planning permit was not referred to Earth Resources as a result of not being advised of the Work Authority and Work Plan;
2. Planning permit TPA/40514 dated 28th February 2013 relating to the adjacent land at 1213-1217 Centre Road Oakleigh South allowing the development of a five storey building comprising 137 dwellings with semi-basement level carparking was also not referred to the Department of Mineral Resources in accordance with clause 66 of the Monash Planning Scheme. As this five storey apartment building with basement is almost complete, the backfilling permit should not be extended as the proposed works that have been approved did not take

into consideration this apartment building, which may pose a risk to the structural stability of that building.

3. Given that the original backfilling permit was not assessed against the various Codes and Guidelines published by Earth Resources such as:-
 - a. The Code of Practice for Small Quarries;
 - b. Guidance Material for the Assessment of Geotechnical Risks in Open Pit Mines and Quarries;
 - c. Management of Tailings Storage Facilities;

the Council in our view cannot be satisfied that the health and safety of workers on the site is protected and that there is no probability of slip failure occurring that would put the safety of the general public at risk along Huntingdale Road and the abutting apartment building site.

The response from Council regarding the above so far is that it is waiting for the legal advice from Earth Resources before it can respond to the matters raised by us. Monash Council has advised us that it has contacted the Panel and requested that a proper legal advice be obtained by Earth Resources as the advice from Earth Resources dated 21 November 2017 regarding the status of the Work Authority was inconclusive.

In this regard, we have not been circulated any email or correspondence to the Planning Panel from Council, (if there is any) in accordance with its direction dated 4 December 2017 and we seek that this be done as soon as possible.

Earth Resources Regulation legal Advice

On the 8 November 2017, the Planning Panel directed at item 9 that by a certain date Earth Resources provide the Panel with:-

“Copy of legal advice to Earth Resources Regulation Branch concerning status of Work Authority and Work Plan for the site.”

On the 4th December 2017, the Planning Panel Co-Ordinator emailed to us a copy of a letter dated 21 November 2017 from Ms. Erica Paddle, Acting Director Statutory Authorisation and Technical Services Earth Resources Regulation Branch to the Planning Panel, which states at paragraph 2 of that letter:-

“In respect of item 9, the following legal assessment relating to the status of the Work Authority (WA) and Work Plan is provided below.”

Our view is that the legal assessment made by Ms. Paddle is not legal advice to Earth Resources as requested by the Panel. It is an internal legal assessment made within the office of Earth Resources by an Acting Director, who may not be a qualified Lawyer.

We interpreted the direction of the Panel to mean that Earth Resources was to obtain legal advice from external Lawyers such as from the Victorian

Government Solicitors' Office or from a Barrister with expertise in this area given that the Panel needs to assess:-

- The Proponent's unsigned legal advice noted generically in the footer as "© Norton Rose Fulbright Australia" regarding the status of the Work Authority and Work Plan, which is in the folder numbered 29 on the Hearing Document List; and
- The legal advice from Mr. Daniel Fyfe of Hanson Construction provided in an email to Ian McLeod of Earth Resources dated 26 October 2017 and copied to Elisa de Wit of Norton Rose Fulbright, which is document 41 on the Hearing Document List ; and
- The legal assessment provided by us to the Panel on 30 October 2017, (document 49 on the Hearing Document List) which was based on the limited documentation disclosed to us by Norton Rose regarding the Work Plan and Work Authority in the folder numbered 29 on the Hearing Document List.

In relation to the legal assessment made by Ms. Paddle, we note that it is inconclusive regarding the status of the Work Authority and Work Plan. As this is now an important issue regarding the 2015 planning permits and this rezoning application, we submit that the Panel consider requesting the Secretary of the Department administering the Mineral Resources (Sustainable Development) Act 1990 to obtain independent legal advice regarding this important issue in order to assist the Panel.

Earth Resources Western Australian Examples of Construction on Slimes

On 8th December 2017, we received via email a letter addressed to the Planning Panel from Mr. Tony Robinson, Director Regulatory Compliance, Earth Resources Regulation Branch dated 8th December 2017. It refers to the "*Western Australia examples cited by the Earth Resources Regulation Branch at the hearing*" as being the following:-

1. Thomas Mews Development situated at Feldspar Parade Gwelup Western Australia.

We have googled "Feldspar Parade Gwelup Western Australia" and identified that this site was originally known as Lots 500 & 501, 459-463 North Beach Road Gwelup. We also confirmed the identification of this property from the Google map provided by Mr Robinson in his letter. Our research then found a Local Structure Plan for this site that was approved by the City of Sterling on 6th October 2014, which is 256 pages long.

The Geotechnical Report regarding this site is reproduced in the Local Structure Plan for this site from pages 113 to 156. We enclose the Site Plan & Cross-Section from the geotechnical report, which is page 121 of the Structure Plan. The cross-section diagram summarises the bore log results of

the geotechnical report prior to any development. Please note the following from this diagram:-

- The site has a 6 metre fall from North Beach Road to the rear of the site;
- The site generally has varying depths of fill material from 1 to 2 metres;
- The rear one third of the site has natural sand at approx. 3.5 metres in depth. Over this natural sand, there is 1.5 metres of peaty soil and the balance is 2 metres of fill material.

The fill material is categorised in the bore logs of the soil report as being sand and no reference is made to putrescible waste or slimes or other material. This description of the fill material is reaffirmed at paragraph 4.3 of the geotechnical report under the heading “results of investigations”, at page 116 of the Structure Plan.

However, Mr. Robinson describes this site on page 2 of his letter as follows:-

“This site was previously an uncontrolled landfill going back to early 20th century, within which peat, sand and other putrescible waste was deposited and subsequently remediated to construct single and double storey residential developments”.

Therefore, the description of the fill material as noted by Mr. Robinson is not in accordance with the geotechnical Report of this site.

Should the Panel or any other party require a full copy of the Local Structure Plan for this site, please contact us and we can make it available.

2. Longford Road Beaconsfield Western

Mr. Robinson states that this site was developed on a former Class 1 landfill and the reference noted by him to a link of this site did not disclose to us any relevant information regarding the type of fill on this site.

Further research regarding the above address shows a former quarry on the corner of Longford Road and Lefroy Road Beaconsfield. We also confirmed the identification of this property from the Google map provided by Mr Robinson in his letter.

This former quarry known as “Lefroy Road Quarry” has a Local Structure Plan adopted by the City of Fremantle in October 2011, which we enclose.

This Structure plan states at paragraph 2.1 the following:-

“Until 1978, the site was a limestone quarry. From the 1970s onwards to the present day, the land has been progressively filled with municipal landfill comprising mostly soil and inert waste.”

We enclose pages 3 and 4 of the Structure Plan for this site. As can be seen, the above description of the landfill does not provide the Panel with any reassurance regarding the remediation of slimes to allow housing development. In any event, no buildings or dwellings have been constructed on this site.

Should the Panel or any other party require a full copy of the Local Structure Plan for this site, please contact us and we can make it available.

Mr. Robinson's letter also refers to the site at 346-348 Warrigal Road Oakleigh South as an example of a site that had a previous Work Authority and has been fully rehabilitated. However, from our knowledge of the history of the site, this former clay quarry was filled with clean fill material excavated from the extension works to the Chadstone Shopping Centre site at that time and it was not filled with putrescible waste and slimes. As can be seen from the Google map of this site, it was then developed as a shopping centre and the carparking area was specifically located predominately over the fill material. Curiously, we could not find any information regarding the previous history of this site in any of the rezoning applications for this site.

Accordingly, given that the Expert Evidence and now Earth Resources have not provided the Panel with any examples in Australia of where former sand quarries, filled with putrescible waste, uncontrolled fill and slimes have been successfully remediated to allow housing construction or any type of construction, we are of the view that this rezoning application should not be approved.

Furthermore, we submit that, if necessary, the Planning Panel give consideration to recommending that the Minister responsible for the administration of the Mineral Resources (Sustainable Development) Act 1990 refer this matter to the Technical Review Board as specified by us in our written submission to the Panel on 30 October 2017, (which is document 49 on the Hearing Document List).

Proforma Submissions

We submit that the Planning Panel should consider all the 341 pro-forma submissions as being objections to this rezoning application. As stated in our first submission to the Panel on 11th August 2017, (which is document 16 on the Hearing Document List), the documents originally exhibited with C129 were not comprehensive. Apart from the notice and instruction sheet, the documents exhibited with this amendment were only the following:-

- the explanatory report
- Residential development – overview (21.04-1)
- Residential development and character policy (22.01)
- Schedule 2 to the Comprehensive Development Zone
- Schedule to Clause 81.01
- Map 19 Comprehensive Development Zone – Schedule 2
- Map 19 Environmental Audit Overlay
- Former Talbot Quarry & Landfill Comprehensive Development Plan 2016 Exhibition

After 5 days of hearing this matter together with further post hearing directions and documents, we submit that it's fair to say again that:-

- some of the above exhibited documents lacked relevant information so that the public could not fully comprehend the scale of the proposed development: and
- documents relevant to the assessment of this Amendment were not exhibited at all.

Even though they are pro-forma submissions, they are all signed and some include additional comments. These submissions also indicate to the Panel that once the community were given even some of the relevant information, that they were able to come together and advise the Council and the Panel of their thoughts regarding this proposed rezoning and the draft Monash Open Space Strategy.

Supplementary Submissions

We submit that the Planning Panel should consider all the 86 written submissions that have been lodged with the Panel.

Our view is that the 341 pro-forma submissions together with the 86 supplementary submissions is evidence to the Panel that this Planning Scheme Amendment was not properly exhibited and that it should be abandoned. The submitters have not been given the opportunity of being involved with the hearing process from the start and accordingly have not been given the opportunity to hear all the submissions of Monash Council, the EPA, the Proponents' legal team, the Expert Evidence, including the opportunity to question the proponent's expert witnesses.

Alternatively, should the Panel not agree to abandon this amendment based on the above, then we are of the view that given the lack of information that was exhibited with this application originally, that all the persons who lodged a Supplementary Submission to the Planning Panel should be invited to be given an opportunity to be heard before the Planning Panel.

As can be seen from some of these supplementary submissions, there are eye witness accounts of the unregulated and uncontrolled fill that has been placed in the former quarry pits on this site, including the Harris Train Carriages together with other relevant information.

Many of the Supplementary Submissions detail the history of the site. For example, late submitter 55 has referred the Panel to the Victorian Hansard dated 7 September 1995 which includes the Second Reading speeches on the Extractive Industries Development Bill. We urge the Panel to read these speeches especially from page 127, the speech from Dr Gerard Vaughan, the then State Member of Parliament for the seat of Clayton, who details the problems with this particular quarry site, the conduct of the quarry operator/owner and the attitude of the Department of Minerals at that time.

Furthermore, given that Monash Council has not been able to provide the Panel, (which it requested), the historical information regarding the s. 173 agreement entered into by the previous City of Oakleigh, together with other historical information regarding the uncontrolled fill that was placed in these former quarries, it may be beneficial for the Panel to hear from these Supplementary Submitters if they wish to be heard.

We thank the Panel for giving us the opportunity to respond to the above matters. Should you have any queries or require further clarification, please do not hesitate to contact Silvana Valente of our office.

Yours faithfully,

A. & S. VALENTE & ASSOCIATES PTY. LTD.

Per: Silvana Valente B.Ec. LL.B. (Mon)