VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P867/2020 |

|  |  |
| --- | --- |
| APPLICANT | Huntingdale Estate Nominees Pty Ltd |
| responsible authority | Monash City Council |
| SUBJECT LAND | 1221 - 1249 Centre Road OAKLEIGH SOUTH VIC 3167 |
| WHERE HELD | Melbourne |
| BEFORE | Michelle Blackburn, Member |
| HEARING TYPE | Practice Day Hearing |
| date of hearing | 31 July 2020 |
| DATE OF ORDER | 20 August 2020 |
| citation | Huntingdale Estate Nominees Pty Ltd v Monash CC [2020] VCAT 899 |

# Order

### Proceeding struck out

1. The proceeding is struck out under section 75(1) *Victorian Civil and Administrative Tribunal Act 1998* on the basis that the application is misconceived.
2. The hearing scheduled to commence at **10:00am on 24 March 2021** is vacated. No attendance is required.

|  |  |  |
| --- | --- | --- |
| Michelle Blackburn  **Member** |  |  |

# Appearances

|  |  |
| --- | --- |
| For applicant | Ms Emily Porter, barrister, instructed by Rory O’Connor of Hall & Wilcox. |
| For responsible authority | Ms Louise Hicks, by direct brief. |

# Reasons

## What is this practice day hearing about?

1. The applicant has been developing the site under two planning permits issued by the responsible authority on 1 June 2015. One permit, TPA/43336, allows the backfilling and rehabilitation of the site from its former quarry use. The other permit, TPA/43337, allows the 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. While conditions of the permits provide for its expiry on 1 June 2019, separate proceedings before this Tribunal seek to extend this expiry date of the two permits.[[1]](#footnote-1)
2. On 1 February 2019, the applicant applied to the responsible authority to amend one of the permits – TPA/43337 (**the** **permit**) – to allow the construction of a temporary boundary venting trench along parts of the north western boundary of the site. The purpose of this trench is to assist in managing the risks of landfill gas migration arising from the stockpiling works authorised under the permit.
3. On 1 March 2019, the responsible authority requested further information from the applicant about its amendment application. This request indicated that if the further information was not provided by 3 May 2019 the application would lapse.
4. On 1 May 2019 the applicant asked the responsible authority to extend the time for the provision of further information by two months.
5. Subsequent to this request, there has been correspondence between the responsible authority and the applicant. Ultimately the applicant provided the further information to the responsible authority on 27 March 2020.
6. On 3 June 2020 the applicant lodged an application for review with this Tribunal under section 79 of the *Planning and Environment Act 1987* (**Act**) in respect of what it says is the responsible authority’s failure to determine its application to amend the permit within statutory timeframes.
7. The responsible authority says that based on the communications between it and the applicant and the relevant statutory provisions, the application lapsed because the further information was provided after the 3 May 2019 lapse date. The responsible authority also says that because the application lapsed, no application can be properly brought before this Tribunal in respect of it.
8. The applicant says that the application has not lapsed as certain communication from the responsible authority has to be interpreted as extending the date for the provision of the further information.
9. A practice day hearing was listed before me on 31 July 2020 to consider this issue.
10. There were also other purposes of the practice day hearing relating to:

* Future conduct of the proceeding; and
* To a dispute between the parties as to the extent of notice which should be given of the amendment application.

1. Having considered the relevant regulatory framework, the submissions of the parties and the documents filed with the Tribunal, I have concluded that:

* The application to amend the permit has currently lapsed; and
* The proceeding should be struck out on the basis that there is no jurisdiction for the Tribunal to consider the application for review.

1. The reasons I have reached these conclusions follow.
2. Given these conclusions there is no need for me to consider the other purposes of the practice day hearing.

## Has the permit application lapsed?

### What is the broad regulatory framework?

1. Section 54 of the Act allows responsible authorities to require a permit applicant (including applicants seeking to amend permits) to provide more information before it deals with the application.[[2]](#footnote-2)
2. If the requirement for further information is made within the timeframe set by the *Planning and Environment Regulations 2015* (**the** **Regulations**) – which for non-VicSmart applications is 28 days after receipt of the application – then this has some consequences for the application and for rights of appeal to this Tribunal.
3. In summary, these consequences are:

* Provisions of the Act relating to the lapsing of applications apply, with the result that the application will lapse if the further information is not provided by a certain date.
* The prescribed time period that the responsible authority has to decide the application (which is 60 days for non-VicSmart applications) only starts on the date that the further information is given to the responsible authority. This affects the date on which the applicant is able to lodge an application for review with this Tribunal under section 79 of the Act of the failure of the responsible authority to grant the permit within the prescribed time.

### Do the provisions of the Act relating to lapsing of applications apply in this instance?

1. The key provisions of the Act relating to the lapsing of applications and the issues in dispute this proceeding are sections 54(1A), 54(1B), 54(1C), 54A, 54B and 81(2).
2. Section 54(1A) says that a request to an applicant to provide further information must be made by giving notice in writing setting out the information to be provided.
3. Section 54(1B) says that when a notice is issued under section 54(1A) within the prescribed time, it must also state that the application will lapse on the ‘lapse date’ specified in the notice if the required information is not given before that date. Section 54(1C) says that the ‘lapse date’ has to be at least 30 days after the date of the notice.
4. Sections 54A(1) and (2) allow an applicant to ask the responsible authority to extend the date by which it has to give the further information. The applicant has to make this request before the lapse date specified in the further information notice.
5. There is no dispute as to the applicability of sections 54(1A), 54(1B), 54(1C), 54A(1) and (2) to the circumstances of this case. It is common ground that:

* A request for further information was made by the responsible authority within the prescribed 28 day time period. The application was received by the responsible authority on 1 February 2019 and the request for further information was made by the responsible authority by email on 1 March 2019, which is 28 days after the application was received.
* The request for further information specified a lapse date of 3 May 2019 in accordance with section 54(1B) of the Act.
* The applicant asked the responsible authority to extend the date for providing the further information on 1 May 2019, which was before the lapse date of 3 May 2019 in accordance with section 54A(2) of the Act.

1. The main issue in contention in this proceeding is how to understand the responsible authority’s response to the applicant’s request to extend the date for providing the further information in the context of the provisions of the Act relating to the lapsing of applications.
2. Sections 54A(3) to (6) of the Act relate to the decision of the responsible authority on whether to extend the time to provide the further information. These provisions say that:

(3)     The responsible authority may decide to extend the time to give the required information or refuse to extend that time.

(4)     The responsible authority must give the applicant written notice of its decision under subsection (3).

(5)     If the responsible authority decides to extend the time, the notice must set out a new lapse date for the application.

(6)     If the responsible authority decides to refuse to extend the time and, at the date of the decision, the lapse date has passed or will occur within the next 14 days, the notice must set out a new lapse date that is 14 days from the date of the decision.

1. The parties agree that the responsible authority has not provided the applicant with written notice which clearly sets out its decision on the applicant’s request to extend the further information date, and which sets out a new lapse date.
2. Rather, after the request from the applicant to extend the date for providing the further information:

* The applicant followed up its request numerous times by email and phone.
* On 1 June 2019 the permit itself expired.
* On 5 March 2020 the applicant made contact with a planner of the responsible authority about the matter. That planner sent an email to the applicant which stated:

I understand the Section 72 amendment is still live, and has not lapsed.

We cannot approve the Section 72 amendment currently as there is no live Permit. However, we could refuse the application if the information provided sufficiently satisfies the request for further information. It is our view that the hearing for the extension of time should be kept separate to the amendment application. It is our preference that the application be kept on hold until a decision is made for the extension of time appeals.

* The applicant provided the further information requested by the responsible authority on 27 March 2020.
* The applicant filed the application which is the subject of this proceeding with the Tribunal seeking review of the responsible authority’s failure to determine the application on 3 June 2020.
* On 4 June 2020, the responsible authority emailed the applicant indicating that considered the application to amend the permit to have lapsed on 3 May 2019 as the further information had not been provided by that date. The email also discussed the separate proceedings before the Tribunal to consider the extension of the permit itself and reiterated the responsible authority’s view that it should not process the current application until the status of the permit is resolved.

1. Section 54B(1) of the Act sets out when an application will lapse. It says this occurs on the ‘final lapse date’ for the application.
2. The ‘final lapse date’ is explained in section 54B(2). It says that the ‘final lapse date’ is the last of the following

(a)     the lapse date specified in the notice under section 54(1A);

(b)     the new lapse date set out in a notice under section 54A, if applicable;

(c)     if the applicant has made an application to the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) under section 78(b) in respect of the requirement for more information and the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) has confirmed or changed the requirement, the new lapse date determined by the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) under section 85(3);

(d)     if the applicant has made an application to the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) under section 81(2) in respect of the refusal or failure of the responsible authority to extend the time to give the information and the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) extends the time, the day after the end of the extended time;

(e)     if the applicant has made an application to the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) under section 81(2) in respect of the refusal or failure of the responsible authority to extend the time to give the information and the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) refuses to extend the time, the day that is 14 days after the day on which the [Tribunal](http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s3.html#tribunal) makes its determination.

1. Section 81(2) of the Act, referenced in section 54B, allows appeals to be lodged with this Tribunal in respect of a decision of the responsible authority to refuse to extend the time for the provision of further information.
2. I note that section 54B(2) seems to contemplate that an applicant is able to lodge an application with the Tribunal to resolve a situation where a responsible authority does not respond to a request to extend the lapse date for providing further information. However, section 81(2) in only referring to refusal, does not make the basis for such a proceeding clear. In addition neither the Act or Regulations set out a timeframe by which the responsible authority must make a decision on the request of the applicant to extend the date for providing further information. This makes it difficult to ascertain when a responsible authority is to be considered to have ‘failed’ to extend the further information date. It also means that provisions in section 4(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT** **Act**) which say that a failure to make a decision under an enactment within the period specified by that enactment is deemed to be a refusal, do not apply.
3. The matters set out in section 54B(2)(a)-(e) relate to the current application as follows:
   1. the lapse date specified in the notice under 54(1A) was 3 May 2019.
   2. while a request had been made to extend the lapse of 3 May 2019, the responsible authority has not given notice of its decision on this request in accordance with section 54A(5) or 54A(6) as it has not issued a notice which specified a new lapse date.
   3. The applicant did not make an application to the Tribunal under section 78(b) in respect of the requirement for more information.
   4. There has been no application to the Tribunal under section 81(2).
4. I do not agree with the submissions of the applicant that the responsible authority made a decision to approve the request to extend the further information date in the email sent by its officer sent on 5 March 2020. In my view, that email simply indicates the view of the responsible authority that the lapsing of the permit means that the application can only be put on hold or refused. The email does not suggest that the responsible authority is wanting to progress the application in any way by setting a new date for the provision of the further application. On the contrary, the email indicates the responsible authority’s preference for the proceeding to be put on hold. To read the email of the 5 March 2020 as approving the request to extend the date for the provision of the further information is to stretch its meaning too far.
5. My interpretation of the email of 5 March 2020 is reinforced by the subsequent email of 4 June 2020 which reiterated the view of the responsible authority that the application should not progress in any meaningful way while the question of the expiry of the permit was undecided.
6. In addition, the 5 March 2020 email was not in the form of a decision on the request to extend the further information date required by section 54A(5) of the Act. I do not consider the discretion under clause 62 of Schedule 1 of the VCAT Act to disregard failures to comply to be available or if available should be exercised in circumstances where I do not consider a decision to have been made. Furthermore, the fact that the 5 March 2020 email is not in the required form and does not specify any timeframe for the provision of the further information seems to me to be a further indication that it should not be interpreted as being a decision by the responsible authority to extend the time to provide the further information.
7. It follows from the above that I find that the responsible authority has not made a decision on the request for further information, which means that the final lapse date for the purposes of clause 54B is currently 3 May 2019. As the permit application is currently lapsed, I find that there is no ability for the applicant to bring the current proceedings and I have made orders striking it out.

Michelle Blackburn

**Member**

1. Proceedings P2311/2019 & P2312/2019. [↑](#footnote-ref-1)
2. There is an exception to this for classes of permits exempted by the planning scheme from the requirements of clause 54. The application in this case is not in such a class. [↑](#footnote-ref-2)