

ANDREW CRACK & ASSOCIATES PTY LTD
PLANNING CONSULTANTS

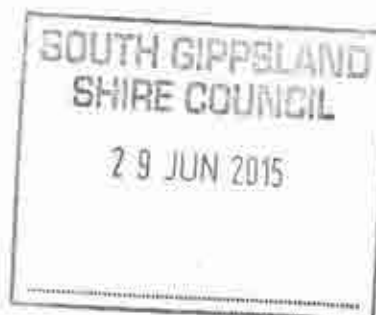
ACN: 109 175 457
ABN: 49 109 175 457

Andrew Crack B. App. Sc (Planning) LL.B Grad Dip Legal Practice

Our Ref: 15 Korumburra Sth Rd, Korumburra Sth
Telephone: 0422 469 405
Fax: (03) 9455 0514
Your Ref: 2006/541/C

25 June 2015

Daryl Baker
Co-ordinator Statutory Planning
Planning Department
South Gippsland Shire Council
Private Bag 4
LEONGATHA VIC 3953



Dear Daryl

Application for an Amendment to Planning Permit 2006/541/B
Rural Store and Proposed Contractors Depot at 15 Korumburra South Road, Korumburra South

We continue to act for Parito Quen Nominees Pty Ltd ("Parito Quen") who is the registered proprietor of land known as 15 Korumburra South Road, Korumburra South ("subject land") and now respond to the matters raised in your letter dated 21 January 2015.

Definition of the Use

We respectfully disagree with the Council that the proposed use should be classified as a 'store'. In support of the proposition that the use of *part* of the land is properly characterised as a 'contractors depot' and not a 'store' we rely on the decisions of the Victorian Civil and Administrative Tribunal ("Tribunal") in *T. A. Lindsay Pty Ltd v Benalla RCC* [2003] VCAT 1621; *Versteegen v Benalla RCC* [2011] VCAT 1603; and *Landforming to Perfection Pty Ltd v Wyndham CC* [2013] VCAT 1703.

In *Lindsay*, then Deputy President Horsfall determined a question of law in relation to the use of land zoned Rural Living for the purpose of a fence contracting business. More particularly, the issue in this case was whether the use of the land fell within an innominate use in Section 2 of the zone or was a prohibited use as falling within the prohibited uses of "industry", "materials recycling" or "store" pursuant to Section 3 of the zone.

The Council made submissions, *inter alia*, that the land was being used as a store to store goods, being the materials used in the fence contracting business, materials and vehicles such as trucks, tractors and other equipment.

Relying on the authorities of *District Council of Mallala v Bishop* [1997] SASC 6340 and on *De Hann v Casey City Council*, a decision of the Tribunal [2002] VCAT 644 dated 17 May 2002 very similar to this case, Deputy President Horsfall determined that the appropriate characterisation of the use of the land was as a contractor's depot.

Andrew Crack & Associates
PO Box 8033 Camberwell North 3124
M 0422469405 F +613 9455 0514
acrack@ozemail.com.au

The Tribunal found it evident from the statement of facts that the Applicants intended to use the land for a purpose broader and more dominant than the more simple purposes of drilling fence posts, servicing vehicles, and storing fencing equipment and recyclable material, and the dominant purpose of the land was as a base or depot for the conduct of the Applicant's business as a fencing contractor from the land and the main activities of the business take place away from the land. Relevantly, the Tribunal went on to make observations of earlier Tribunal findings on whether land in the cases referred to was properly characterised as a 'store' at Paragraphs 36 & 37:

36 I refer to the comments of the Tribunal member in *De Hann* at page 31 where he said:

"Store" is within the "warehouse" group in the planning scheme's nesting diagrams. It implies that its land is used for storage or keeping of goods in some way for future use or shipment etc. Now whilst it is arguable that the parking of vehicles may be considered to be a form of storage, it seems to me that what is being proposed here is more consistent with the garaging of vehicles on an overnight basis. They come in, they get parked, and they leave the following day. Equipment is used on an as needed basis. I am somewhat unconvinced that "store" is a proper categorisation of this particular use.

37 Likewise the attempted characterisation of the land as a store met the same fate in *De Hann*. The Tribunal was unconvinced that the use of the land fell within the definition of a store. The Tribunal member said at paragraph 29:

"...it seems to me that the use which is being conducted on the land is more properly categorised as a type of 'depot', which is not dissimilar to the permission originally granted by the Responsible Authority [ie. works machinery depot]. I say this because it seems to me that a "depot" typically operates as a base where staff come to work or pick up vehicles and machinery, where administrative functions are carried out, where vehicles are parked and kept, where equipment and materials are kept and other ancillary functions, such as the repair and maintenance of vehicles and equipment occurs. For example, this is the type of activity that occurs in a municipal depot. This is typically what I would call a "depot"."

The Tribunal determined the question of law that the use of the land was for a contractor's depot, that that use was a Section 2 permit required use in the zone and that a permit may issue for that use (however no comment was made on the determination of the merits of whether or not a permit should issue).

In *Versteegen*, Deputy President Dwyer addressed the distinction between a 'store' and a 'contractor's depot' on the facts of that particular case:

8 As I indicated at the hearing, I consider the use is properly characterised as a "contractor's depot". The daily movement of vehicles, machinery and materials, albeit limited, is such that the operation is not strictly that of a "store", nor is it possible for Mr McCall to reasonably conduct the use (e.g. the loading of vehicles, and the storage of some materials) solely within a shed. Although not defined in the planning scheme (although perhaps it should be), the land use term of a "contractor's depot" is well-accepted in planning, and has (albeit belatedly) been correctly applied by the responsible authority to the use proposed here. Here, the outdoor component of the operations can be satisfactorily regulated by permit condition.

We submit that the term 'contractor's depot' continues to be a well-accepted land use term in planning. That the use is not defined at Clause 74 of the planning scheme does not make it less acceptable.

In *Landforming to Perfection* there was a contest in that case as to whether "earthmoving contractor's depot" was the correct and appropriate designation or characterisation of the land use for which permission was being sought. A permit application had been made "To use the site for storage of farm machinery and for sub-contractor based repairs and maintenance on the machinery". Relevantly, in characterising the use of land as an "earthmoving contractor's depot" and not a "store", Senior Member Byard said at Paragraphs 41-44:

That might be a fair enough lay person's attempt at formulating a statement of the proposed purpose for which the land was to be used. However, professional town planners assisting the objectors Mr & Mrs Pearce suggested several times that this was an incorrect description and that the land use should be characterised as earthmoving contractor's depot. I am quite satisfied that these planners were perfectly correct in saying that.

Since then however, representatives of the Pearce objectors and the responsible authority have tried to argue that the correct characterisation of the use is as industry. There have been quite a number of past cases in which the characterisation of this sort of activity have been discussed. Many were cited in argument. They include my own decision in *Andsand Pty Ltd v Kingston CC (No. 2)*.¹ There is also discussion of the concept of "depot" as a land use in the glossary section of *Planning and Environment Victoria* see [435,665.93] therein. That annotation refers to there being various types of depot including contractor's depot, cartage contractor's depot, earthmoving contractor's depot, municipal depot, etc.

Most commonly, the controversy has been as to whether a particular use should be regarded as a "store" as opposed to some form of depot. In this particular case, the suggestion is that the use ought to be regarded as "industry". It has not escaped notice that industry is a prohibited use in this zone for which planning permission could not be granted, whereas earthmoving contractor's depot would be a so-called "innominate"² use. In other words it is an unspecified use within section 2 of the Table of Uses relating to the Green Wedge Zone. Uses in section 2, including innominate uses, can be granted planning permits.

I am satisfied that the understanding given in the *Andsand* case and other cases is correct and that this current activity is an accurate example of just what is meant by an earthmoving contractor's depot. Such depots are now well recognised as a land use. They are a land use that can be clearly distinguished from industry.

In summary, it is submitted that:

- Chapman Grain Services Pty Ltd currently uses the land for the storage of grain within silos. This use is properly characterised as a Rural Store. Relevantly, the amendment application proposes the construction of additional silos to provide added grain storage capacity. A bucket elevator with pit and associated works is also proposed to assist in the loading of grain into the silos. The use will continue to involve the transport of grain to and from the subject site; the storage of grain within the silos; the use of the weighbridge and other facilities provided on the land.
- Ross Chapman Cartage and Earthmoving Contractors seeks to use the land as a Contractors Depot. Whilst much of the existing business would (does) properly fit within the definition of Rural Store, there are aspects of the business that would not. In particular, this business seeks to cart and store a range of materials unrelated to agriculture, but used widely by businesses based in the South Gippsland Shire and beyond. The materials would include gravel, crushed rock, sand, pebbles, soft rock, soil, mulch and similar products with an accumulative total of no more than 3000 cubic metres. By way of example, this includes materials used for the construction and maintenance of roads. To characterise the use as a 'Store' would be an incorrect characterisation.

The use of the land for a contractor's depot is clearly consistent with the purpose of the Farming Zone and an appropriate use subject to reasonable permit conditions. These conditions are addressed below in the context of potential amenity impacts.

Alterations to operating hours and potential amenity impact

Operating hours currently permitted (rural store use) are between 7.00am and 7.00pm Monday to Friday and 7.00am and 2.00pm Saturday. It is proposed to extend these hours by permitting a commencement time of 6.30am on Monday through to Friday (half an hour earlier) and by allowing the use(s) to operate until 4.00pm on Saturday (two hours later).

Delivery times (including waste collection) are currently restricted to the permitted operating hours and it is proposed to extent these to the same extent of the expanded general operating hours as outlined immediately above.

¹ [2009] VCAT 2506

² Innominate means unnamed

Additionally, it is proposed to amend the permit to allow the use of the rest room, office administration area, shower and kitchen facilities together with the refuelling of vehicles, the parking of vehicles on site and use of the weighbridge to be restricted to staff and vehicles under the control of the permit holder and/or contractors engaged by the permit holder and that this may only occur between the hours of:

- 6.00am to Midnight Monday to Friday
- 7.00am to 8.00pm Saturday and
- 12.00pm to 8.00pm Sunday

The amendment proposes a 'secondary consent' provision such that requests to vary the above could be made to the Council from time to time. This does not imply that all such requests would be granted, the Council may determine that some requests could appropriately be addressed under the secondary consent process, whilst others may be considered to be beyond the scope of the secondary consent process and more properly dealt with under s 72 or s 87A of the Act.

It is also proposed that access to the site for the purpose of carrying out general maintenance (including landscaping maintenance) and the servicing of machinery and any plant associated with the permitted uses may occur outside of the above times.

There are essentially three parts to the request in respect of the extended operating hours that are being sought. Firstly, the earlier commencement time of 6.30am Monday to Friday aims to facilitate the varied needs of both uses in operating more efficiently, including trucks entering/leaving the site from this time. Similarly, the additional two hours on Saturday (from 2.00pm until 4.00pm) are required to meet the needs of two successful businesses that are experiencing increased demand for their respective services.

Secondly, use of the rest room, office administration area, shower and kitchen facilities together with the refuelling of vehicles, the parking of vehicles on site and use of the weighbridge between the hours outlined above is primarily aimed at meeting health and safety requirements for the drivers of trucks that return to the site late evening to then depart the site the following morning. It is intended that drivers would simply park their trucks in the designated area (no loading or unloading to take place outside of the main operating hours) and make use of the facilities before resting. It is essential that access to these facilities be made available to drivers as 'truck rest stops' are few and far between on the routes that the drivers use and there are strict requirements imposed on the businesses in respect of the health and wellbeing of the drivers which in turn is concerned with the safety of all road users. Refuelling and the use of the weighbridge would also be permitted within these extended operating times, however in practice, this would be infrequent. Further, despite that the permit currently allows the weighbridge to be used for commercial purposes unrelated to the permitted use by no more than six vehicles per day Monday to Friday, the reality is that the weighbridge is rarely used by 'external' vehicles.

Additionally, use of the office administration area within these times is considered to be somewhat benign and it is intended that any staff member could carry out office type activities such as bookkeeping in circumstances where a particularly busy period may give rise to such need. Clearly, this would be an ancillary activity to both uses rather than a separate use in its own right and is therefore not prohibited.

The third element of the amendment application that seeks extended operating hours relates to the maintenance of the land and facilities/machinery located thereon. It is envisaged that from time to time, maintenance such as the pruning of vegetation, weed management, mulching and the like may occur outside of the permitted operating hours, such as on a Sunday morning where suitable weather may be conducive to such maintenance in circumstances where previously inclement weather has not made this possible during operating times. Similarly, the site may need to be accessed on an infrequent basis to undertake limited routine maintenance of plant and machinery that may not be possible during the main operating times due to their use.

The starting point in assessing any amenity impacts is to go back to the purpose of the Farming Zone. Relevantly, this includes:

- *To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.*
- *To ensure that non-agricultural uses, including dwellings, do not adversely affect the use of land for agriculture.*

- *To encourage the retention of employment and population to support rural communities.*

It is relevant to this application that the provisions of the Farming Zone have been amended since the permit was originally granted for the use of the subject land for a Rural store. Amendment VC103 amended all rural zones on 5 September 2013 as part of the zone reform process undertaken by the LNP Government at the time. The reasons for the changes brought about by VC103 are set out in the explanatory report to the amendment:

Amendment VC103 is required to give effect to the government's commitments to amend existing rural zones. The reformed zones aim to ensure that Victoria's planning zones are relevant and reflect the aspirations of all Victorians.

Reformed rural zones aim to respect the rights of farmers, provide greater flexibility, reduce requirements for use, development and subdivisions, facilitate business and tourism uses, and improve the zone purpose statements.

It is noted that the range of Section 1 uses increased under the amendment and that the condition applied to a number of Section 1 uses within the Farming Zone is that they must not be within 100 metres of a dwelling in separate ownership. Rural industry (other than Abattoir and Sawmill) is one such use where this condition applies (along with a number of other conditions).

Despite that rural store continues to be a Section 2 use in this case and that Contractor's depot is an innominate Section 2 use, the 100 metre threshold distance is a useful reference in assessing potential amenity impacts.

A review of aerial photography highlights that the nearest dwelling is at 10 Korumburra South Road, approximately 90 metres from the northwest corner of the subject land (to the dwelling's south-eastern corner) and some 100 metres from the vehicle access point to the subject land. This distance increases to approximately 130 metres to the northern end of the existing silos; approximately 195 metres to the admin/facilities building; approximately 150 metres to the hard-stand area where materials are stored; and approximately 200 metres to the proposed overnight truck parking area.

Whilst off-site amenity impacts are a relevant consideration, it is equally relevant that 'rural-residential living' is not generally compatible with the purpose of the Farming Zone, whereas facilitating business was one of the reasons behind the reformed Farming Zone.

Relevantly, the vision for the Shire as it relates to economic development is set out at Clause 21.04-2 of the planning scheme includes:

- *Population growth and employment are facilitated through investment and development*
- *Ingenuity and innovation exist in both private and public sector development*
- *Diversity in the region's agricultural base to enhance the Shire's status as one of the key agricultural regions in Australia*
- *Prominence of service and value-adding industries relevant to the rural sector*

Clearly, the proposal is consistent with this vision and the corresponding relevant objectives and strategies set out at Clause 21.11 *Economic Development*.

Visual amenity impacts

The aerial photography also highlights that the dwelling at 10 Korumburra South Road is orientated towards the east, with an outlook to the adjacent Fishers sawmill site, filtered by extensive vegetation within the boundaries of the dwelling site and the road reserve. Whilst there are some views available to the subject site, its elevated position to the south east, combined with extensive landscaping and mounding works undertaken within its boundaries, distances to the nearest sensitive use(s) and the sensitive siting, finish, colour and typically low rise form of the buildings, means that there will be no unreasonable loss of visual amenity arising from the proposed use and development. In respect of lighting, it is not proposed to erect any additional lighting on the site and it is noted that existing lighting is limited to the minimum required for basic security purposes. Variations to the operating hours as sought would not require extended periods of lighting, as vehicles entering the site during non-daylight hours would be relying on their headlights to navigate their way to the dedicated parking area at the southern end of the site. In summary, there will be no direct light spill from lighting erected on the subject land onto adjoining land (other than the public road) and glare from headlights will also be largely contained within the site's boundaries.

Acoustic and vibration impacts

Parito Quen relies on the Acoustic Assessment Report prepared by Acoustical Advisory & Consulting Services dated 12 June 2015 ("Acoustic report").

The acoustic report provides information regarding the existing acoustic environment in proximity to the closest neighbouring dwelling (10 Korumburra South Road) based on the activities which are currently occurring. Relevantly, the report notes there is a saw mill operation closer to this dwelling and that the saw mill shares a boundary with the subject site.

Relevant noise data is set out in the acoustic report with reference to the EPA Noise from Industry in Regional Victoria (NIRV). Levels were recorded approximately 200 metres from the nearest dwelling, in a line of sight both to the dwelling and to the South Gippsland Highway.

Vibration measurements were recorded adjacent to the west boundary to determine the magnitude of earth vibration generated by activities occurring at the site, particularly associated with heavy vehicle movements and loading/unloading of materials.

Activities identified which currently occur on the site and/or may be included in any future operation which have the potential to generate significant environmental noise include the following.

- Truck and delivery vehicle ingress and egress from the site,
- Refrigerated vehicles domiciled overnight,
- Loading and unloading of products and bulk materials, crushed rocks and the like,
- Use of front end loaders, excavators, forklifts and the like,
- Mechanical services such as refrigeration and air conditioning compressors,
- Raised voices.

The acoustic report concludes that no vibrations from the use(s) were equal to or exceeded the relevant level. It can therefore be concluded that there will be no unacceptable vibration impacts associated with the proposal.

With reference to the EPA – Noise from Industry in Regional Victoria (NIRV), - the Background levels of the area due to the location with its proximity to the South Gippsland Highway is considered by the report to be a 'background – relevant area' which means a noise-sensitive area where background levels may be higher than usual for a rural area. This includes areas where highway traffic is a significant noise source.

Using NIRV as the guide for determining the appropriate acceptable planning zone levels for the nearest sensitive receptor being the nearest dwelling, taking into consideration these higher than usual background levels, the following values for the NIRV planning zone level have been determined by Acoustical Advisory & Consulting Services to be 52 dB(A) for the day period, 46 dB(A) for the evening period and 36 dB(A) for the night period.

The guidelines require the noise associated with the proposed extended operating hours of the use(s) to comply with these planning zone levels.

The report highlights that bearing in mind the environmental noise levels already exceed these planning zone levels, most probably due to traffic noise and/or other environmental noise sources, a strategy is to be put in place in the event of a change in operational hours to ensure that the following average noise levels (L Aeq) are not exceeded as a result of the change in hours:


- Day period: 56 dB(A)
- Evening period: 53 dB(A)
- Night period: 44 dB(A)

As a change in operational hours is indeed proposed, it is submitted the strategy referred to is best addressed by way of permit condition(s). In this regard it is suggested that a new condition of permit should be included that requires the use(s), to the extent of the extended hours only, to not result in noise levels that exceed the stated levels. The new permit condition(s) may also require periodic monitoring of the noise levels to ensure that the stated levels are not being exceeded and if necessary, allow for remedial action to bring noise levels back within the required levels.

As the acoustic report concludes that the existing operation is considered to be operating within the NIRV parameters in that the recorded Sunday day period levels when the operation is closed are almost identical with those recorded during the day period throughout the week and further, that it is the considered opinion of Acoustical Advisory & Consulting that any extension in operating hours may be carried out on the basis that the existing noise levels remain at a very similar value to those currently assessed as set out in their report, there is no valid planning reason why the amendments should be refused.

Please do not hesitate to contact this office should any clarification be required.

Yours faithfully



Andrew Crack

Andrew Crack & Associates