39.

RE: Plsnning Panel Hearing - WA389 - 1221 -1249 Centre Road - Oakleigh South [SEC=UNCLASSIFIED]
Fyfe, Daniel (Doncaster) AUS
to:
Ian.McLeod@ecodev.vic.gov.au
26/10/2017 04:34 PM
Cc:
"david.wilson@ecodev.vic.gov.au", "Karen.Sonnekus@ecodev.vic.gov.au", "sanjive.narendranathan@ecodev.vic.gov.au", "Elisa De Wit (elisa.dewit@nortonrosefulbright.com)", "Vincent, Victoria (Sydney) AUS"
Show Details

1 Attachment

P1914 2016 Hillview Quarries Pty Ltd v Mornington Peninsula SC (jp 27041....doc

Ian
I have recalled our documents from archive and determined that Work Authority WA 389 is no longer a valid or current document.
The letter accompanying the Work Authority dated 20 December 2001 states that pursuant to Section 21 of the Extractive Industries Development Act 1995, this Work Authority remains in force for the period for which it is permitted under the relevant Planning Scheme, and until land owners consent is revoked, lapses or otherwise ceases to have effect.

The Planning and Environment Act Section 68 States:

PLANNING AND ENVIRONMENT ACT 1987 - SECT 68 When does a permit expire?

PLANNING AND ENVIRONMENT ACT 1987 - SECT 68

When does a permit expire?

(1) A permit for the development of land expires if—

(a) the development or any stage of it does not start within the time specified in the permit; or

S. 68(1)(aa) inserted by No. 128/1993 s. 17.

(aa) the development requires the certification of a plan of subdivision or consolidation under the **Subdivision Act 1988** and the plan is not certified within two years of the issue of the permit, unless the permit contains a different provision; or

S. 68(1)(b) amended by No. 53/1988 s. 45(Sch. 2 item 34) (as amended by No. 47/1989 s. 19(zj)).

(b) the development or any stage is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit or in the case of a subdivision or consolidation within 5 years of the certification of the plan of subdivision or consolidation under the **Subdivision Act 1988** .

(2) A permit for the use of land expires if—

(a) the use does not start within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit; or

(b) the use is discontinued for a period of two years.

(3) A permit for the development and use of land expires if—

(a) the development or any stage of it does not start within the time specified in the permit; or

(b) the development or any stage of it is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit; or

(c) the use does not start within the time specified in the permit, or, if no time is specified, within two years after the completion of the development; or

(d) the use is discontinued for a period of two years.

In the recent Hillview Quarries v Mornington Peninsula Shire VCAT Decision (attached in full) , VCAT Member **Judith Perlstein**
states:

> 7 With respect to the second issue, I find that the permit has expired either because the use of the land for extractive industry did not start within two years after the issue of the permit or because, once started, it was then discontinued for a period of more than two years.

Quite clearly there is no Planning Instrument that enacts the Work Authority.

On the issue of land owner consent, the property was divested by Consolidated Quarries around 2001 and Hanson and its related companies have not any ongoing right of access to the site.

Further, we would contest that the use of the site has specifically not been for the purposes of an Extractive Industry since that time.

Best Regards

Daniel Fyfe
Divisional Landfill & Development Mgr

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From: Ian.McLeod@ecodev.vic.gov.au [mailto:Ian.McLeod@ecodev.vic.gov.au]
Sent: Tuesday, 24 October 2017 4:43 PM
To: Fyfe, Daniel (Doncaster) AUS <daniel.fyfe@hanson.com.au>
Cc: david.wilson@ecodev.vic.gov.au; Karen.Sonnekus@ecodev.vic.gov.au; sanjive.narendranathan@ecodev.vic.gov.au
Subject: Plsnning Panel Hearing - WA389 - 1221 -1249 Centre Road - Oakleigh South [SEC=UNCLASSIFIED]

Hi Daniel,

Further to our discussions regarding this matter, this confirms that Earth Resources Regulation has been requested to attend and make submissions to Planning Panels Victoria on the 30 October 2017 regarding the above site.

The Panel has asked ERR for submissions regarding the status and obligations of the Work Authority WA389.

ERR seeks your consent to refer to and potentially provide copies of the Work Authority, Work Plan and associated documents at the panel:

Please advise if you consent to ERR providing these documents at the panel.

I have an electronic copy of the documents and could email them to you.....however, some of the documents are large and consequently, may need to be transmitted in several emails.

Regards,

Ian

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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1914/2016
PERMIT APPLICATION NO. P971656

APPLICANT	Hillview Quarries Pty Ltd
RESPONSIBLE AUTHORITY	Mornington Peninsula Shire Council
RESPONDENTS	Wathroad Pty Ltd, Mark Fancett, Wag Australia (MI) Pty Ltd, Peninsula Preservation Group
SUBJECT LAND	115-121 Boundary Road DROMANA VIC 3936
WHERE HELD	Melbourne
BEFORE	Judith Perlstein, Member
HEARING TYPE	Hearing
DATE OF HEARING	14 & 15 March 2017
DATE OF ORDER	27 April 2017
CITATION	Hillview Quarries Pty Ltd v Mornington Peninsula SC [2017] VCAT 573

ORDER

Declaration

1 Pursuant to section 124 of the *Victorian Civil and Administrative Act* 1998, I make the following declaration:

(a) Planning permit P971656 has expired because the use of the land for the purpose of extractive industry did not start within two years of the issue of the permit.

(b) In the alternative, if the use did start within two years of the issue of the permit, planning permit P971656 has expired because the use of the land for the purpose of extractive industry has been discontinued for a period of more than two years.

No amendment of permit

2 In application P1914/2016 the decision of the responsible authority is affirmed.

3 Planning permit P971656 must not be amended.

Dates vacated

4 The hearing scheduled at 10.00am on 13 June 2017 is vacated. No attendance is required.

5 The compulsory conference scheduled at 10.00am on 4 May 2017 is vacated. No attendance is required.

Judith Perlstein
Member

APPEARANCES

For Hillview Quarries Pty Ltd	Mr Jeremy Gobbo QC and Ms Emily Porter of Counsel, instructed by Meg Lee of Gadens. They called the following witnesses: • Mr Paul Nitas, Chief Executive Officer at Hillview Quarries Pty Ltd; and • Mr Brett Smith, horticulturalist.
For Mornington Peninsula Shire Council	Kate Morris, Solicitor of Maddocks.
For Wag Australia (MI) Pty Ltd	Mr Paul Chiappi of Counsel, instructed by Planning and Property Partners (Day 1 only).
For Wathroad Pty Ltd	Mr Mark Bartley, Solicitor, HWL Ebsworth.
For Peninsula Preservation Group	Associate Professor Janet Stanley, Ms Jacinta Banks. Mr Mark Fancett (Day 2 only).
Mark Fancett	In person.

REASONS[1]

WHAT IS THIS PROCEEDING ABOUT?

1 Planning permit P971656 (**permit**) was issued on 8 April 1998 and permits use of land for the purpose of extractive industry. The applicant has applied to amend the permit by deleting conditions 1.01(a)(iii) and 32.01 and amending condition 14.02.

2 Application P1914/2016 is an application under section 79 of the *Planning and Environment Act* 1987 (**PE Act**) to review the failure of the responsible authority to amend the permit.

3 At the Practice Day hearing on 28 October 2016, the parties requested a preliminary hearing to address the issue of whether the permit is still current such that it is capable of being amended.

4 The question of law for the Tribunal in this hearing has been framed as follows:

> To determine whether planning permit P971656 has expired and, if so, in respect of which formerly permitted activity.

5 There are two elements to consider. The first is whether the permit has expired by virtue of conditions containing expiry provisions. The second is whether the permit has expired because of section 68(2)(a) or (b) of the PE Act. Section 68(2)(a) provides that a permit for the use of land expires if the use does not start within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit. Section 68(2)(b) provides that a permit for the use of land expires if the use is discontinued for a period of two years.

6 I find that with respect to the first issue, permit conditions 1.01(a)(iii) and 32.01 provide that elements of the use must be discontinued by 23 March 2014, but the permit itself could still be extant.

7 With respect to the second issue, I find that the permit has expired either because the use of the land for extractive industry did not start within two years after the issue of the permit or because, once started, it was then discontinued for a period of more than two years.

8 I have made a declaration that the permit has expired and have ordered that the application to amend the permit be refused.

9 My reasons follow.

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[1] The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

BACKGROUND

The issue of the permit

10 The minutes of a Council Development Approvals Special Committee meeting held on 7 April 1998 included a report on 'Application for planning permit, Pioneer Quarry – proposed extension of time' (**Report**). The Report included the following background information:

a. Pioneer Concrete purchased the quarry site from Victorian Quarries in 1968.

b. In 1978, Extractive Industry Licence 98 was granted for a period of 15 years.

c. On 23 March 1994, planning permit P1322/93 was issued to allow use of land for extractive industry for a five year period.

d. On 16 December 1997, Pioneer Concrete applied for an extension to planning permit P1322/93 for the operational life of the quarry, which was estimated to be a further fifteen years.

e. In February 1998, Works Authority 380 was issued to allow continuation of extraction for the remaining life of the reserves.

11 The conclusion of the Report states that 'provided that the extended extraction period is subject to the same conditions as presently apply under P1322/93, there are no obvious reasons why the extraction period for the Pioneer quarry should not be extended to the period as requested'.

12 The Council Recommendation then follows:

> … the application for an extension of time for extraction at the Pioneer quarry in Boundary Road, Dromana, be approved and a permit issued subject to the same conditions as set out in permit P1322/93 but modified as required to limit the period of extraction to March 2014.

13 Permit P971656 was then issued on 8 April 1998 for the use of land for the purpose of extractive industry. The issue of a new permit, rather than extension to the existing permit, was required because of the minor amendments that were made deleting reference to a five year period and including the date of 23 March 2014 in the relevant conditions.

14 A letter to Council dated 19 February 1999 confirms that the site was purchased by Hillview Quarries Pty Ltd from Pioneer in April 1998.[2]

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[2] For the purposes of this decision, I will refer to Hillview as the owner of the land. In the affidavit of Mr Paul Nitas, he clarified that Hillview is a subsidiary of R.E Ross Nominees Pty Ltd, the trustee of R.E Ross Trust and that Hillview operates the quarry on land owned by the Trust. The certificates of title confirm that R.E. Ross Nominees Pty Ltd is the registered proprietor.

Construction of the permit

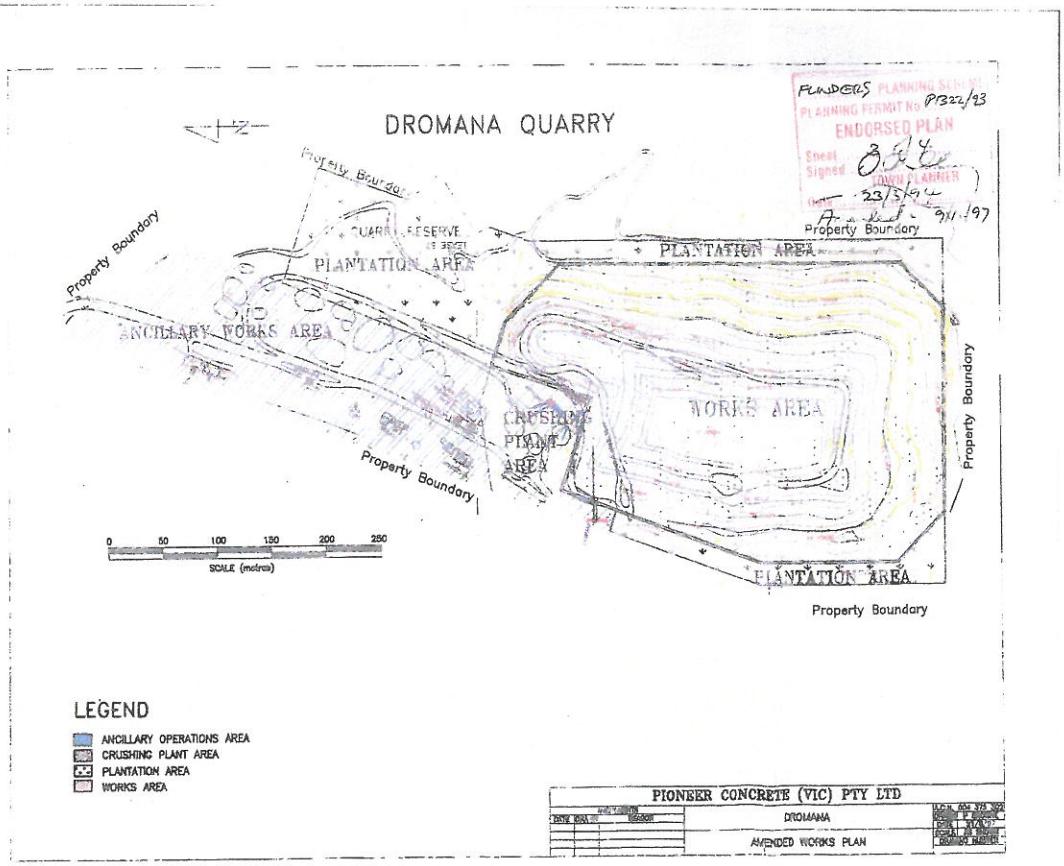
15 The permit allows the use of land for the purpose of extractive industry.

16 The permit is drafted in three parts. Following the statement as to what the permit allows, it is confirmed that conditions 1-33 apply to the permit.

17 These conditions are included at part 3 of the permit, while part 1 sets out definitions and part 2 provides a detailed description of the approved use and development.

18 Part 2 explains that the permit authorises the use and development only of the specified areas, being the ANCILLARY OPERATIONS AREA, the CRUSHING PLANT AREA, the PLANTATION AREA and the WORKS AREA as well as the road reserve for the purposes only of compliance with conditions 5.01 and 5.02. Each of these areas is defined by reference to the areas marked on the endorsed WORKS PLAN, which is defined as the amended plan endorsed to form part of the permit.

19 These areas are generally set out in the endorsed plan below.[3]



20 Although the plan was endorsed under the previous planning permit, Mr Nitas' affidavit refers to this plan as the plan endorsed under the current permit the subject of this application for review.

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3 Endorsed 'Amended Works Plan' to Permit P1322/93, dated 9 December 1997, attached to the affidavit of Mr Nitas at PN-9.

21 I note that the ANCILLARY OPERATIONS AREA is referred to as the Ancillary Works Area in this plan. All other areas share the same terms and the parties agreed that this plan was a correct illustration of the relevant areas. The title of the plan, 'Amended Works Plan' is also consistent with the current permit reference to WORKS PLAN.

22 Given the information in the Report described above that the permit includes the same conditions as the previous permit but modified as required, I accept that this is a correct illustration of the specified areas approved for use and development under this permit.

What is the relevant land the subject of the permit?

23 This application for review has been lodged in relation to land at 115-121 Boundary Road, Dromana.

24 The land is described in the permit as follows:

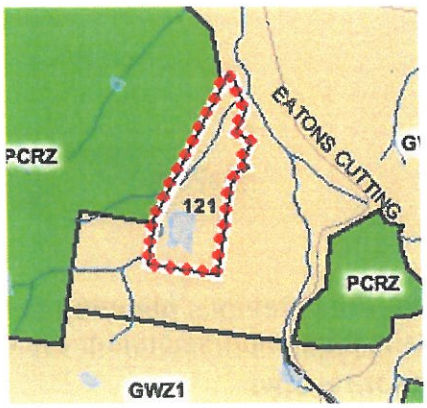
> Part CA.8A and Part CA.7, section 3, Parish of Kangerong (incorporating Work Authority 380), Boundary Road, Dromana.

25 I was provided with the certificates of title and Work Authority 380 dated 19 February 1998.

26 As explained above, the permit itself confirms that use and development is only permitted in the specific areas as described within part 2 and shown in the Works Plan.

27 Having regard to the evidence tendered in this hearing, the submissions of the parties and the address of the land supplied within the application for review, however, I find it necessary to have a referable property address to use when discussing the land the subject of the permit.

28 Planning property reports downloaded from the website of the Department of Environment, Land, Water and Planning include the following images to indicate the extent of the land referred to as 121 and 115 Boundary Road, Dromana, respectively.[4]



[4] services.land.vic.gov.au

29 The image of 121 Boundary Road is generally consistent with the title plans attached to the certificates of title, the plan of area included in Work Authority 380 and the form of the property shown in the Amended Works Plan. The image of 115 Boundary Road, Dromana shows that it abuts and surrounds the land at 121 Boundary Road.

30 I therefore find that the land the subject of the permit can be described as the land at 121 Boundary Road, Dromana.

31 Both the land at 115 and 121 Boundary Road are owned by Hillview and are considered to together comprise the 'Boundary Road site'.[5] Work Authority 380 was varied after 1998 to extend the work authority area to include both parcels of land.[6] As far as I am aware, however, there is no planning permission to use the land at 115 Boundary Road for the purpose of extractive industry.

32 Therefore, although the application for review was lodged in relation to both 115 and 121 Boundary Road, Dromana, this decision applies only to the land the subject of the permit, being 121 Boundary Road, Dromana.

WHAT IS THE EFFECT OF THE INCLUSION OF END DATES WITHIN THE PERMIT CONDITIONS?

Conditions including end dates

33 Condition 1.01(a) is drafted as follows:

> The uses allowed by this permit are authorised only:
>
> (i) Within the areas specifically relating to them;
>
> (ii) On strict compliance with each and every CONDITION;
>
> (iii) In the WORKS AREA for the period up until 23rd March 2014.

34 Condition 32.01 is drafted as follows:

> All rights of quarrying on the land under this permit will cease upon or by the 23rd March 2014.

Interpretation

35 Parts 1 and 2 of the permit do not include the conditions and are not operational elements of the permit. However, they do provide a context for understanding and interpreting the conditions that form part 3 of the permit.

36 The conditions cannot be read and understood without reference to the definitions in Part 1 and explanations of the specified areas in Part 2.

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5 As referred to in the affidavit of Mr Nitas.

6 This is clear from the plan attached to the variation of work authority dated 26 July 2000, attached to the affidavit of Mr Nitas at PN-3(d).

37 Although the address of the land is included at page 1 of the permit, Part 2 clearly explains that the permit authorises the use and development only of the specified areas, being those parts of the land which are 'the ANCILLARY OPERATIONS AREA, the CRUSHING PLANT AREA, the PLANTATION AREA and the WORKS AREA as well as the road reserve for the purposes only of compliance with conditions 5.01 and 5.02'.

38 Part 2 then explains that the permit only authorises the use of those specified areas for specifically identified uses which are then set out in a table[7], and in accordance with the relevant conditions.

Condition 1.01

39 Armed with this information, I find that condition 1.01(a)(ii) clearly states that the uses allowed by the permit are authorised only in the Works Area until 23 March 2014. Therefore, as at 23 March 2014, all use of the Works Area must cease. This does not constitute an expiry date for the permit as it does not affect use of the other parts of the land which are authorised by the permit, being the Ancillary Operations Area, the Crushing Plant Area, the Plantation Area and the road reserve for its particular purposes.

Condition 32.01

40 Condition 32.01 provides that all rights of quarrying on the land under the permit will cease upon or by the 23rd March 2014.

41 The permit was issued for use of the land for the purpose of extractive industry. While quarrying is the dominant aspect of extractive industry, the use also includes other ancillary activities. For the purposes of this particular permit, the wording within part 2 of the permit sets out the full list of uses to which the permit applies. It is clear that quarrying is just one of those uses.

42 Therefore, with respect to clause 32.01, having regard to the whole of the permit, it is clear that quarrying must cease in all areas covered by the permit by 23 March 2014.

Conclusion

43 Given the context of the entirety of the permit, I find that conditions 1.01(a) and 32.01, together require that all quarrying within the areas covered by the permit must cease by 23 March 2014. The permit itself, however, does not expire by virtue of these conditions and other uses within the permit land may continue.

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7 For example, the uses permitted within the WORKS AREA are described as 'QUARRYING; stockpiling materials; loading of vehicles; water storage; water treatment; RECLAMATION'.

HAS THE PERMIT EXPIRED DUE TO DISCONTINUANCE OF USE?

What are the key issues?

44 Section 68(2) of the PE Act provides that:

> (2) A permit for the use of land expires if—
>
> (a) the use does not start within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit; or
>
> (b) the use is discontinued for a period of two years.

45 During the hearing, no submissions were made concerning whether the use pursuant to the permit had started. It was generally assumed that the use had started, possibly due to the recognised use of the land as a working quarry by Pioneer prior to the sale to Hillview in 1998.

46 Submissions were made, however, that the land has not been used for the purpose of extractive industry pursuant to the permit during the entire period from 1998 until the present. All parties agreed that there has been no physical use of the land pursuant to the permit during this time.

47 I must therefore consider whether the use started within two years of the issue of the permit and, if started, has then been discontinued for two or more years. This is a mixed question of fact and law and requires a determination of what is meant by 'use' of the land and what constitutes start and discontinuance of the use.

48 The key questions for my consideration are as follows:

a. What constitutes use of the land pursuant to this permit?

b. Has there been physical use of the land for extractive industry pursuant to the permit? If so, did that physical use start within two years or was it discontinued for more than two years after it had started?

c. Has there been a passive use of the land for extractive industry pursuant to the permit? If so, did that passive use start within two years or was it discontinued for more than two years?

What constitutes use of the land pursuant to this permit?

49 As described earlier, the permit allows use of the land for extractive industry. Within the permit, the use and development is limited to specific areas within the land the subject of the permit, being the Ancillary Operations Area, the Crushing Plant Area, the Plantation Area and the Works Area and the road reserve to a more limited extent.

50 The permit also sets out the range of uses permitted within each area. For example, the uses permitted within the Works Area are quarrying, stockpiling materials, loading of vehicles, water storage, water treatment and reclamation.

51 The permit itself, therefore, provides a comprehensive description of the use permitted by the permit and it is not necessary to look to the planning scheme or other definitions of land use to understand the nature or extent of the permission granted.

Has there been physical use of the land for extractive industry pursuant to the permit? If so, did that physical use start within two years or was it discontinued for more than two years after it had started?

52 Use of land for the purpose of the permit would generally be determined by consideration of the physical activities carried out pursuant to the permit. One would expect to be told that granite had been extracted from the site and that the ancillary activities required to support the extraction had also taken place, such as maintenance of buildings, stockpiling of materials, transportation of materials and crushing, mixing and storing of materials, as well as reclamation, in accordance with part 2 of the permit and the conditions of the permit.

53 The applicant is not, in this case, claiming that the land has been physically used for extractive industry or any of its ancillary operations at any time since the grant of the permit in 1998. Its submissions are predicated on a passive use of the land being sufficient to comprise continuing use pursuant to the permit.

54 Mr Gobbo QC did not seek to rely on the affidavit material concerning physical activity that had occurred on the land as evidence of continuation of use pursuant to the permit. He submitted that there is no need for detailed scrutiny of the affidavit material as the question before the Tribunal is essentially whether maintaining ownership of the land over that period was sufficient to be considered continuing use under the permit.

55 However, evidence was tendered with respect to physical use and submissions made by the parties concerning activities carried out on the land. It is appropriate for me to consider whether the physical activities carried out on the land are sufficient to show that use of the land for extractive industry has started and, if started, has not been discontinued for two years or more.

56 The following facts are not in dispute:

a. the land was used for the purpose of extractive industry from 1963;

b. the land was purchased by Pioneer in 1968 and continued to be used for that purpose until the sale of the land to Hillview in 1998.

c. Pioneer applied to extend the planning permission already existing for extractive industry on the land. Rather than extending the previous permit, Council granted the current permit which was a new permit for extractive industry in 1998.

d. There has been no stone extraction from the land since 1998[8].

57 Since 1998, the land has generally been maintained to ensure the vegetation does not become overgrown and fences are in good repair for safety purposes. Both Mr Gobbo QC in submissions and Mr Nitas, in evidence, conceded that the maintenance activities that had been carried out on the site were correctly classified as routine maintenance carried out by a responsible land owner and were not undertaken in order to fulfil permit conditions or as part of use of the land for extractive industry.

58 Mr Nitas is the chief executive officer at Hillview. He prepared an affidavit confirming that Hillview operates two quarries at Dromana. Relevant elements of Mr Nitas' evidence include:

a. His affidavit provides information about a drilling program carried out in April 2002 to determine the quantity and quality of the resource at the 'Boundary Road Site'. In cross-examination it became clear that all of the drill hole locations were on 115 Boundary Road and not on the permit land.

b. Mr Nitas confirmed that during the period 2008 to 2013, the applicant considered utilising the quarrying pit area for the purposes of a landfill and applied to Council for a planning permit and the EPA for a Works Approval for this purpose. He acknowledged that works were limited during this period but that general maintenance continued[9].

c. Mr Nitas confirmed that water is no longer released from the quarry pit as the relevant water licence was surrendered on 7 April 2010. He provided evidence of water testing results from 2013 onwards[10] but confirmed that there were no invoices to show similar results prior to 2013.

d. In terms of plant and equipment, Mr Nitas confirmed in cross examination that the primary and secondary crushers were removed from the site in July 2006. He stated that the entire crushing plant was removed in 2006 because it was derelict and has not been replaced. All buildings on the site were then removed in April 2015. Mr Nitas did confirm that mobile facilities could be erected on the same site area when required for resumption of use, subject to council permission.

e. Mr Nitas' affidavit refers to rehabilitation plans for the site and attaches invoices from Carol Frank-Mas from 2003, 2006, 2011 and 2013. These invoices, however, refer to both quarry sites managed by the applicant and there has been no evidence of any work done with respect to the permit land or any rehabilitation plan

8 Affidavit of Mr Paul Nitas, at paragraph 14.
9 Ibid, at paragraph 25.
10 Ibid, at paragraph 18.

for the permit land other than that initially prepared and submitted with the permit application in 1997.

f. Mr Nitas also confirmed that there had been no reports prepared for Board meetings or minutes with respect to any plans or intended actions referable to the permit land.

59 Mr Smith is employed as a horticulturalist by the applicant and his role, as expressed in his affidavit, is to manage an onsite nursery at another quarry site owned by Hillview, to assist with preparations for eventual rehabilitation works for the quarries owned by Hillview.[11] He is also responsible for general maintenance of both quarry sites. In cross-examination, Mr Smith provided the following information:

a. He has collected seed of local tree species from the permit land 10-12 times since 1998 and stores and propagates these seeds in the nursery. He has not propagated any trees on the permit land.

b. The last significant weed spraying on the site was in 2013.

c. He is not aware of the rehabilitation management plan for the land, prepared pursuant to conditions of the permit.

d. His activity on the land is in the nature of general and routine maintenance as opposed to activities done pursuant to the permit. For example, he ensures that fences are repaired to avoid people becoming injured.

60 I find that the maintenance and works carried out on the land are correctly considered activities undertaken by a responsible owner of land as part of its ongoing ownership and are not directly referable to use of land pursuant to the permit and in accordance with permit conditions.

61 While it is the case that a number of activities that would indicate use of the land had already been completed prior to Hillview's purchase of the site, such as construction of access roads, levelling of land for stockpiling and ensuring an adequate water source and drainage system, there remain many ongoing activities that could constitute use pursuant to the permit. These would include maintenance and repair (rather than removal) of buildings, stockpiling of materials, transportation of materials and crushing, mixing and storing of materials, as well as reclamation and rehabilitation of parts of the site.

62 There was no evidence provided indicating that any physical activity has occurred on the land pursuant to the permit at any time since the issue of the permit in 1998, including the two years between 1998 and 2000.

63 I find that the physical use of the land for extractive industry pursuant to the permit did not start within two years of the issue of the permit. I acknowledge that the parties have not had an opportunity to directly address

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[11] Affidavit of Mr Brett Smith, at paragraph 3.

this issue. However, even if it were proven that the use started, I would find that the use has been discontinued for more than two years.

Has there been a passive use of the land for extractive industry pursuant to the permit? If so, did that passive use start within two years or was it discontinued for more than two years?

64 In the applicant's outline of submissions, it was asserted that 'the land was kept for the same purpose as before, without abandonment and without a definite change to any other use, so that quarrying might resume whenever required'. [12]

65 In his oral submissions, Mr Gobbo QC offered the following contentions, concerning the 'holding' of the land and the intent of the applicant,:

i At all times, the land has been kept available for the extractive industry use that was permitted.

ii The applicant has kept the land in a fashion that allows it to recommence use.

iii A demonstration of intention is needed and this is evidenced by the following:

- Not commencing an alternate activity;
- Works from time to time on site consistent with keeping the site safe and secure; and
- No evidence of abandonment.

iv The holding of the land over the period of time was the activity.

66 Aside from the oral submissions of Mr Gobbo QC, the applicant did not provide any documentation such as Board meeting minutes or resolutions that could indicate Hillview's intention to commence, to continue or to resume use of the land for extractive industry.

Consideration of relevant decisions

67 A number of authorities were tendered to the Tribunal to support propositions of the applicant that the holding of the land as described above was sufficient to constitute use of the land pursuant to the permit.

68 It is relevant to note that the majority of these cases concerned existing uses of land that would be prohibited unless they were considered to be continuing uses, in which case they were permitted to continue. This is to be distinguished at the outset from this situation where a use is permitted by a permit and subject to the conditions of that permit. This was recently highlighted in the decision of *Seers v Macedon Ranges SC*[13], where Deputy President Gibson found that the lawfulness of the use of the land was able to be established by reference to the provisions of the existing permit and

12 Outline of submissions on behalf of the applicant for review, at paragraph 15.
13 *Seers v Macedon Ranges SC* (Red Dot) [2016] VCAT 1198 (16 August 2016).

that it was unnecessary to consider whether existing use rights had been established. In that decision the Tribunal also had to consider whether the permit had expired due to cessation of use for a period of two or more years.

69 However, these decisions are relevant in considering the concept of use and particularly passive use of land.

70 I find that each of these decisions is distinguishable from the circumstances currently before me. In each of the cases there was either some use occurring on a part of the land, a passive use which still had a strong connection to the dominant use of the land, or intervening circumstances, such as a world war, in which it was clear at all times that the land owner was intending and attempting to use the land for its permitted purpose. I review the relevant propositions, and cases, in more detail below.

71 Many of these propositions are articulated in the decision of *Nunawading v Harrington*[14], which was tendered by Mr Chiappi during the hearing. Those particularly relevant are:

a. The use of premises for a given purpose is not necessarily interrupted when activities for that purpose are temporarily stopped.

b. If premises are unused they cannot be said to be used for a given purpose, notwithstanding an intention to do so.

c. Where land may properly be regarded as an integrated whole it is not necessary to show that all of it is used for the given purpose. Where part of the land is unused but part is used for the given purpose, the whole of the land may be regarded as used for that purpose.

d. Use of land does not necessarily mean physical use.

e. Land kept vacant for use as the needs of a business demand is not of necessity properly designated as land not in existing use but merely intended for future use. Much will depend on the extent of its integration with land in actual physical use and the nature of the business being conducted.

The use of premises for a given purpose is not necessarily interrupted when activities for that purpose are temporarily stopped.

72 *Nunawading v Harrington* concerned use of land for a bakery. During the relevant period considered by the Supreme Court, there was no baking carried out on the land. However, the plant and equipment required to do so was kept and maintained on the land, as well as bread crates and wrapping materials, flour and fuel for the ovens. The Court found that 'the subject

14 *City of Nunawading v Harrington* [1985] VicRp 64; [1985] VR 641 (29 March 1985)

land and improvements remained substantially in the same physical state, which may fairly be described as a bakery'. The Court considered that:

> The use to which land may be put and the activity on it may change, increase or decrease, so long as the same purpose is served. The mere fact that the ovens and plant were idle does not necessarily mean that the subject land on which they were kept was not in use.[15]

73 In *Rosenblum v Brisbane City Council*,[16] the Court had to decide whether the land was being used for any purpose on a given date. The Court clearly stated that 'use of premises for a given purpose is not necessarily interrupted whenever activities for that purpose are temporarily stopped'. The Court noted that most uses of land or buildings involve recurring activities rather than continuous activity and used the example of a building used as a grocer's shop and considered to be used as such even though is closed on Saturday and holidays. The Court considered that 'whether an interruption of activity puts an end to the user must always be a question of fact, and in resolving the question in each case that arises the circumstances of that case must necessarily be considered as a whole'.[17]

74 In *Eaton & Sons*, Stephen J succinctly described it as follows[18]:

> The holding of unused land for future business use, whether because no business has yet been commenced or because the existing business has not yet been commenced or because the existing business has not yet increased sufficiently to justify expansion onto an extended site, is not "use" for the purposes of cl. 30. Two cases illustrate the operation of this principle. In *Rosenblum v. Brisbane City Council* (1957) 98 CLR 35 , a case concerned with existing use in the context of a planning scheme ordinance, the appellant Rosenblum had paid three months' rent in advance in respect of premises once used as a social club but which had subsequently remained empty for some time, was planning to use them as a catering lounge and had, with that in view, consulted an architect and was proposing the incorporation of a company; nevertheless he was held not to have used the building in any sense. The Court said at pp 46-47:
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> > "Rosenblum was not using the premises as a catering lounge, for though he had paid three months' rent he had not entered into possession or taken any overt step concerning them, except that he had had a sketch prepared ... as the building had not been measured up the preparation of the sketch was only a step towards interesting persons in the proposed company or in starting a user through a company to be incorporated and was not itself a user of the premises ... Rosenblum was genuinely considering ways and means of using the premises for the purposes of a catering establishment, but it would be impossible

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15 Ibid at page 645.
16 *Rosenblum v Brisbane City Council* [1957] HCA 98; (1957) 98 CLR 35.
17 Ibid at page 46.
18 *Eaton and Sons v Council of the Shire of Warringah* [1972] HCA 33; (1972) 129 CLR 270 at pages 285-286.

> to make a finding that he had already commenced to use them for those purposes. His acceptance of the terms offered by the trustees and the payment he had made had merely gained him a period of time in which to float his company to alter the building, and to make the staffing and other arrangements without which the intended future use could not be commenced ... (the premises) were, in plain fact, unused for any purpose whatever."

75 In *R v City of Oakleigh*[19] , the relevant company used land for the purposes of extracting clay from a quarry and manufacturing bricks in a brick-making plant. It was held by the Court that although there had been interruption in operations over periods, the company had intended to resume operations as soon as commercial and financial conditions allowed, and there had been no abandonment of use. The use had ceased from about 1940 to 1945 due to wartime controls. The Court distinguished this situation from that of *Rosenblum* and *Schwerzerhof*, stating that this case required consideration of continuance of use, as opposed to abandonment of use[20].

76 In terms of continuance of use, between 1942 and 1945 when actual quarrying and brickmaking was unable to be carried out, the manager of the company regularly attended the premises and employees spent a number of hours a week pumping water from the quarry hole, crushing bricks in a machine to make tennis court material and maintaining the plant and equipment in working order. There was also sale of stored bricks during that time. Company reports indicated that the company maintained the property in such a condition that it would be able to resume operations whenever possible.

77 In the present application, significantly, no activities have been carried out on the land to indicate commencement of use or continuing use pursuant to the permit. There has been no quarrying, no reclamation or rehabilitation of any part of the land, no crushing or mixing of materials and no removal of already extracted material from the land.

78 There has been no maintenance or repair of plant and equipment. In fact, the crushers and entire crushing plant were removed in 2006, with the remainder of buildings on the land being removed in 2015. Although I accept that the buildings on the site were considered unsafe, the removal of the buildings without reinstatement is a physical act not consistent with continued use of the land pursuant to the permit. This has resulted in a situation where the land cannot now be used for extractive industry without the reestablishment of buildings and plant and equipment.

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19 *R v City of Oakleigh; ex parte New Gamble Brickworks Pty Ltd* [1963] VicRp 92; [1963] VR 679.

20 In *Schwerzerhof v Wilkins* [1898] 1 QB 640, the Court held that premises were used on the material date as a bakehouse, as even though they had been empty for four months, the owner was trying to re-let them as a bakehouse and had not abandoned the use.

79 There have been no steps taken to renew the EPA water licence or apply for planning permission to construct buildings or carry out works on the land. There has been no use of the existing stockpiled material for purposes other than routine maintenance and no company reports or minutes of meetings to indicate any intention to continue the previous extractive industry use.

If premises are unused they cannot be said to be used for a given purpose, notwithstanding an intention to do so.

80 Intention alone is not sufficient to indicate use of land for the purpose of the permit. While oral submissions have been made as to the intention of the applicant, there has been no evidence supplied to indicate this intention. The Tribunal has been asked to find that the purchase of the land and the continued ownership and routine maintenance of the land is sufficient to show intention of the applicant.

81 The above proposition, gleaned from *Rosenblum*, states that if a premises is unused, it cannot be said to have been used, even if it is accepted that there was a genuine intention to do so.

82 The applicant in this application has submitted that the land is not unused, because use of land does not necessarily mean physical use. This is discussed below.

Where land may properly be regarded as an integrated whole it is not necessary to show that all of it is used for the given purpose. Where part of the land is unused but part is used for the given purpose, the whole of the land may be regarded as used for that purpose.

83 The case of *Eaton and Sons*[21] concerned land physically used for the purpose of a timber reselling yard and *Brickworks*[22] concerned land which was physically used for the purpose of a quarry and brickworks. Additional adjacent areas of land in both cases had been acquired for the purpose of the relevant uses but had not been physically used for that purpose.

84 In *Brickworks*, the Court determined that if the whole of the land in question was acquired for and devoted to the purpose of quarrying and brickmaking, the whole may be held to have been used for that purpose although only part of it was physically used. As relevant to the present situation, Justice Gibbs made specific reference to the unique use of land for quarrying:

> Obviously where an expanse of land has been acquired for the purpose of quarrying it cannot, because of practical considerations, be excavated all at once, but this does not mean that the part which has not actually been dug up is not used for the purpose of quarrying. Similarly a farmer, who has acquired land for the purposes of an

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21 *Eaton and Sons v Council of the Shire of Warringah* [1972] HCA 33; (1972) 129 CLR 270

22 *Parramatta City Council v Brickworks Ltd* [1972] HCA 21; (1972) 128 CLR 1;

> orchard, may be said to use the whole of it for that purpose, although only part of it has been planted with trees.[23]

85 In *Brickworks*, it was clear that some of the land was physically used for the purpose of quarrying and brick-making and the Court determined that the whole of the land was used for the same purpose even if there were parts of the land not in physical use.

86 In the decision of *Eaton and Sons*, Justice Stephen also refers to the 'special case' of extractive industry and rubbish disposal activities[24]:

> In each case the process of consuming, or replacing with fill, the original site is necessarily a progressive one; when a site is selected it will only be used physically bit by bit but the use of the whole is predicated from the start and is not contingent upon any future expansion of trade; the whole of the land within the site constitutes in a very real sense land used for the purpose of the business.

87 In the present situation, there is no part of the land that is or has been used for extractive industry. If the applicant had been able to show that a portion or portions of the site were being progressively and continuously used for the relevant purpose, while others areas were left untouched, it would have been sufficient to establish use.

Use of land does not necessarily mean physical use.

88 This is the main proposition relied upon by the applicant. The *Royal Newcastle Hospital*[25] is significant in illustrating the nature of passive use that can be viewed as real and substantial use. This decision concerned whether rates were payable on a parcel of land owned by the hospital. Although the hospital owned 327 acres of land, only 36 acres were actively used by the hospital for buildings and surrounds. The remaining land was essentially bushland and was kept in its natural state. The hospital argued that the entire 327 acres was used for hospital purposes and therefore should not be subject to payment of rates. It was submitted that while there was no physical use of the land, the area of bushland ensured a clear atmosphere for the proper treatment of patients, that it barred the approach of buildings, particularly factories likely to emit smoke, fumes or dust, that it provided quiet and serene conditions having psychological advantages to patients, and that it gave opportunities for the future expansion of the hospital and establishment of allied activities.

89 It was determined by both the High Court of Australia and the Privy Council, on appeal, that the entirety of the land should be considered to be used as a hospital.

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23 Ibid at pages 22-23.

24 *Eaton and Sons* at page 288.

25 *Council of the City of Newcastle v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493; (1959) 100 CLR 1.