

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1179/2025

PERMIT APPLICATION NO. PLN23/03

CATCHWORDS

Categorisation of contractors depot; greater level of detail required; use of AI generated material to determine Tribunal processes

APPLICANT

Bangholme Investments Pty Ltd

RESPONSIBLE AUTHORITY

Greater Dandenong City Council

RESPONDENTS

Noel Williams

	Alan Redford Hood
SUBJECT LAND	864 Frankston-Dandenong Road BANGHOLME VIC 3175
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	27 March 2025
DATE OF ORDER	3 April 2025
CITATION	Bangholme Investments Pty Ltd v Greater Dandenong CC [2025] VCAT 290

ORDER

1. Pursuant to [section 60\(1\)\(b\)](#) and (c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the following person is joined as a party to this proceeding:

Alan Redford Hood

2. The preliminary hearing is adjourned for administrative mention on **18 April 2025**. By that date, each party must advise the Tribunal in writing:

- . whether there remains any dispute as to the categorisation of the use asserted by the permit applicant and what that party's position is;
- . whether that party seeks to make further written or oral submissions in relation to the issue of characterisation of the use or whether it seeks any remaining dispute to be determined without the need for a further hearing;
- . whether a further practice day hearing or administrative mention is requested;
- . if that party is ready for a hearing;
- . any further procedural orders sought.

No attendance is necessary.

3. No later than **8 April 2025**, the applicant may file any request for further and better particulars of Alan Hood's statement of grounds.

4. By no later than **15 April 2025**, Alan Hood must file with the Tribunal and serve on all other parties further and better particulars of its statement of grounds to be relied upon at the hearing in response to any request made in accordance with Order 4.

5. The compulsory conference listed for **7 April 2025** is vacated. No attendance is required.

Sarah Porritt

Member

APPEARANCES

For Bangholme Investments Pty Ltd

Luke English, lawyer, DSA Lawyers

For Greater Dandenong City Council

Maria Marshall and Amelia Hunter, lawyers, Maddocks

For Noel Williams

Luke Dowdle, town planner, Nepean planning

For Alan Hood

Alan Hood, in person

REASONS

WHAT IS THIS PROCEEDING ABOUT?

1. Bangholme Investments Pty Ltd ('applicant') has made an application to review the Greater Dandenong City Council's ('Council') failure to decide a permit application for the use and development of land associated with current and proposed activities on the land ('application'). The applicant says the purpose of the use is as a contractors depot. The Council is unconvinced on the present material that it is a contractors depot and says it is a vehicle store or another use.
2. The answer to this question has implications for how and whether this application proceeds because one characterisation would require the applicant to engage with the cultural heritage management implications of the proposal – another characterisation would mean that those implications are not engaged.
3. The hearing commenced to undertake that characterisation exercise.
4. It became apparent that the application was brought about in response to the Council's inspection of the land which is documented in a letter to the occupier of the property dated 27 June 2023 which alleged the present use of the land was in breach of the Greater Dandenong Planning Scheme.
5. An application was made, and later amended, which appears to seek to regularise what was occurring on the land and to seek permission for further activity all of which is said to be consistent with the meaning of the term 'contractors depot' as understood from the relevant decided cases which address this term.
6. During the course of the hearing, additional information was provided which raised questions about the factual basis of the application and in particular about whether what was reflected in the application documents was either sufficiently detailed to enable the characterisation task to be carried out or whether it accurately encompassed what the applicant now proposes to do with the land.
7. An additional matter arose after the practice day hearing at which this matter was set down for a preliminary hearing. That is that Alan Hood, an original objector to the application, applied to be joined to the proceeding having lodged his statement of grounds outside the time required in the Tribunal's orders.
8. By order dated 23 March 2025, the Tribunal added consideration of whether Alan Hood should be joined to the matters to be considered at this preliminary hearing. I have dealt with that matter first in these reasons.

JOINDER OF ALAN HOOD

9. At the commencement of the hearing the Tribunal heard an application from Alan Hood to be joined to the proceeding.
10. Alan Hood lives close to the land and was an original objector to the application. He was given notice of the application for review lodged by the applicant in this proceeding. That notice included a copy of the Tribunal's order which stated that an

objector must complete a Statement of Grounds if they wish to become a party to the proceeding and pay the relevant fee. It also notified him of the date for the proposed compulsory conference and hearing of the matter.

11. Alan Hood did not lodge his statement of grounds and pay the prescribed fee by the date stated in the Tribunal's order dated 30 January 2025.

12. Alan Hood did not dispute that he received the initial correspondence nor that he should have lodged his statement of grounds by 30 January 2025, rather he says that he did not properly understand the process and that he was expecting that he would receive further information from the Council about the Tribunal's process.

13. As the date for the compulsory conference approached, Alan Hood became concerned that he had not heard anything further about the matter. He emailed the Council who told him that he was not a party to the application. He investigated further.

14. Alan Hood filed a number of documents with the Tribunal which explained his position and his reasons for filing his statement of grounds out of time. These included his correspondence with the Council and the results of an **artificial intelligence search** ('AI search') he conducted. He says the AI search inferred that the Council was supposed to notify objectors. It said:

AI Overview

Under Section 79 of the Planning and Environment Act, which refers to a "Failure to Determine" situation, the responsible authority (usually the council) is required to advise objectors if they fail to make a decision on a planning application within the statutory timeframe, meaning they must notify objectors that an appeal can be lodged with VCAT based on this failure to determine.

15. The result of the AI search is plainly incorrect. Alan Hood had already received notification of the application from the applicant including the information he needed about the steps he was required to take to become a party to the application. In hindsight, Alan Hood readily accepted the proposition that reading the documentation provided to him rather than conducting AI searches would have been a preferable course.

16. He emailed the Council having read the results of the AI search. The Council directed him to the Tribunal.

17. Alan Hood attended the front desk of VCAT at 55 King Street where he lodged his statement of grounds on 28 February 2025.

18. He then received correspondence from the Tribunal indicating that his statement of grounds was lodged out of time. He responded promptly indicating [in essence] that he wished to be joined to the proceeding out of time and that he thought that had already occurred.

19. On 23 March 2025, the Tribunal issued orders listing the joinder of Alan Hood as a matter to be considered at the preliminary hearing and requesting that he file and give to the other parties copies of any material, documents, or submissions he wished to rely upon at the hearing.

20. It follows that Alan Hood is not automatically a party to this proceeding because the statement of grounds was not lodged within the time specified in the Tribunal's Initiating Order and that I must consider whether he should be joined.

21. **Section 60 of the *Planning and Environment Act 1987* ('Vic') ('PE Act')** allows parties to be joined to a proceeding in the following circumstances:

- (1) The Tribunal may order that a person be joined as a part to the proceeding if the Tribunal considers that-
 - (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
 - (b) the person's interests are affected by the proceeding; or
 - (c) for any other reason, it is desirable that the person be joined as a party.

What are the party's positions?

22. No party to the proceeding opposed Alan Hood's joinder to the application.

23. Despite this consent position I am required to form a view as to whether Alan Hood satisfies one of the matters in (a) – (c) above and to exercise my discretion as to whether he should be joined.

24. Given that he is a person who would have been joined to the application and have remained a party had filed his application on time, I accept that, but for the late lodgement of the application, it is broadly desirable that he be joined as a

party in accordance with (c). In addition, given that he lives in the local area and has an interest in the regularisation of the use of the land in a prominent location in this area, I also consider that he satisfies the criteria in (b) above in this instance.

Other factors

25. The applicant was served with the correct documentation and did not properly read the material with which he was served including the Tribunal's orders which clearly set out what was required to be done.
26. Further the delay is relatively lengthy, not a mere day or so outside the time permitted. As the Tribunal observed in *Salarzadeh v Merri-bek CC*^[1] ('Salarzadeh'):

It is important that participants in planning disputes carefully read and review documents to ensure the proper administration of justice. The obligation rested with Susan Dombroski to be responsible for her interests with respect to the permit application and any application for review that may have followed to VCAT.

27. This observation applies equally in this case and is to be contrasted with relying on AI results which in this case provided information which was plainly in error.
28. In this case, the hearing of the case will be longer if Alan Hood is joined (by an hour on his estimate), however, his proposed grounds address some matters which are clearly within the scope of relevant consideration in this case. (The applicant has indicated that it wishes to request further and better particulars of some of Alan Hood's proposed grounds as set out in his statement of grounds, but did not oppose him being joined to the proceeding nor suggest that his grounds were not, at least in part, directed to relevant planning considerations.)
29. It is also relevant that this matter comes to the Tribunal as an application under section 79 of the PE Act, against the failure of the Council to make a decision and that there is already one objector party participating in the hearing. The application for review will need to be considered whether or not Alan Hood is a party, and his participation will not materially delay resolution of the matter.
30. Drawing these matters together I have exercised my discretion to join Alan Hood because:
 1. he has presented an adequate explanation of his reasons for delay in lodging the application which demonstrates that he intended to participate from the time of receipt of the application despite his delay in conveying this intention;
 2. the fact that the hearing will be required in any case;
 3. the relatively short period of 1 hour which he estimates his case will require;
 4. the proximity of his premises to the site;
 5. the fact that it is possible that the use has been undertaken without planning permission for a considerable time and that he is in a position to assist the Tribunal with an understanding of the impacts of the current/previous or future use;
 6. the fact that the matters he proposed to raise include appropriate matters to be agitated at the hearing.
31. As noted at the hearing, Alan Hood is fortunate that there is already a proceeding on foot and that this is an application for review of the failure of the responsible authority to decide an application. If this had been an application under section 82 of the PE Act for a review of a notice of decision to grant a permit the considerations would have been different. It is likely that a permit would have issued before Alan Hood had lodged his application. Even if it had not issued, it is likely that the Tribunal would have required further persuasion to look past the lateness of his engagement with the process where the applicant would otherwise have an expectation that it would be granted a permit but for a late application. That is, however, not this case.
32. I find myself in the same position as the Tribunal in *Salarzadeh*:

In conclusion, non-compliance with deadlines specified in Tribunal orders is not encouraged and not without risk. Each case will be considered on its facts and circumstances and the Tribunal will consider whether it is fair and appropriate to grant any joinder application.^[2]

33. Like the applicant for joinder in that case, Alan Hood is fortunate that circumstances weigh in favour of his application in this instance.

WHAT IS REQUIRED TO CHARACTERISE THE USE IN THIS CASE

34. The Tribunal's Orders dated 17 March 2025 state that the questions to be considered at the preliminary hearing are:

- (i) What is the correct characterisation of the proposed use of the Subject Land?
- (ii) Is a Cultural Heritage Management Plan ('CHMP') required in respect of the Permit Application?

35. It is uncontroversial that the answer to the second question is dictated by the answer to the first question.

36. The parties agree that if the use is properly characterised as a 'contractors depot,' then a CHMP is not required under the *Aboriginal Heritage Regulations 2018* (Vic) ('AH Regulations').

37. If the use is properly characterised as a 'store or a vehicle store' a CHMP is required under the AH Regulations. The requirement arises from regulation 46(1) of the AH Regulations because the use would result in significant ground disturbance and is for or associated with the use of the Subject land for a Warehouse^[3].

38. Where a CHMP is required for an activity, a permit cannot be granted unless a CHMP is approved for the relevant activity. Relevantly to this application, pursuant to 52(4) of the *Aboriginal Heritage Act 2006* (Vic), if a decision maker is required to grant a statutory authorisation such as a planning permit within a certain period that period does not commence until the decision maker received a copy of the CHMP.

39. It follows that if a CHMP is required the Tribunal would have no jurisdiction to approve the application.

4. No CHMP has been issued, so it follows that the outcome of this preliminary hearing will determine whether the Tribunal has jurisdiction to decide this matter unless there is some other basis to conclude that a CHMP is not required^[4].

41. The applicant has foreshadowed that it intends to file amended material in accordance with the Tribunal's Practice Note - PNPE9 – Amendment of plans and applications. It is appropriate that resolution of that matter awaits this material being circulated.

42. It is matter for the applicant as to the level of detail at which any additional material or changes are described. As a general proposition the more clear and consistent material the Tribunal has before it in completing a characterisation assessment the easier it will be for all parties to understand the basis of the characterisation sought.

43. The future course of the proceeding will be determined after the provision of the foreshadowed further material, noting that this may result in agreement as to the characterisation of the use or a situation in which the matter can be determined without the need for a further hearing.

44. I have vacated the compulsory conference scheduled for **7 April 2025** as there appeared to be little utility in that proceeding in advance of the filing of any further material sought to be relied upon by the applicant. The parties agreed to that course.

Sarah Porritt

Member

[1] [2024] VCAT 364 at [39]

[2] at [57].

[3] AH Regulations, r 46(1)(xxix)

4. [4] The applicant indicated that if the Tribunal were to find that a CHMP is required his client would wish to have time to consider whether there is any other basis to avoid the requirement for a CHMP such as the existence of 'significant ground disturbance.' That is a matter for consideration at the conclusion of any preliminary hearing although I note that there is no bar to the applicant making the necessary inquiries at this stage.