# RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

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## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2424/2015

**IN THE MATTER OF** Anthony and Suzanne Seers v Macedon Ranges Shire Council

**BEFORE** Helen Gibson, Deputy President

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| **NATURE OF CASE** | Existing use rights |
| **LOCATION OF PASSAGE OF INTEREST** | Paragraphs [67] – [96] |
| **REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE** | |
| **LAW – issue of interpretation or application** | Consideration of whether existing use rights arise under clause 63.01 or an existing unexpired permit |
| **LEGISLATION – interpretation or application of statutory provision** | Application of section 28(2)(e) of the *Interpretation of Legislation Act 1984* |

## SUMMARY

This proceeding was an application for declarations regarding the right to continue to use land for purposes for which a planning permit was granted in 1996. Whilst much of the hearing and evidence concerned whether the use had ceased for a continuous period of two years or more, the Tribunal found that the use had not stopped and consequently the permit had not expired pursuant to section 68(2)(b) of the *Planning and Environment Act 1987*.

The decision is of significance because of its discussion about when it will be necessary to rely upon clause 63.01 to establish existing use rights or when it will be sufficient to rely upon the provisions of the planning scheme or a permit. The Tribunal notes that the starting point for any enquiry about whether existing use rights can be established should always be to enquire why it is necessary to establish existing use rights. Ordinarily this will only become relevant because the use of land does not comply in some way with the current planning scheme. If the use of land fully complies with the planning scheme – for example, it is a section 1 use and all conditions are complied with, or a permit has been issued under the provisions of the current planning scheme – the issue of existing use rights will not be relevant. The lawfulness of the use of the land will be able to be

established either by reference to the provisions of the planning scheme or to a permit.

In circumstances where the use commenced before the approval date pursuant to a validly issued permit and the permit has not expired, the permit continues to have force and effect under section 28(2)(e) of the *Interpretation of Legislation Act 1984*. In this circumstance, although it could be said that the use was lawfully carried out immediately before the approval date pursuant to the first dot point of clause 63.01, it is not necessary to do so. The right to continue to use the land in accordance with the permit arises under the permit, not under clause 63.01.

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## CATCHWORDS

Section 149B *Planning and Environment Act 1987* – assessment of competing evidence – characterisation of use – consideration of whether use has stopped for a period of two or more years – existing use rights – consideration of clause 63.01 of the planning scheme – consideration of need to establish existing use rights under clause 63.01 when there is an existing permit that allows the use – section 109 *Victorian Civil and Administrative Tribunal Act 1998* – whether it is it fair to make an award of costs – consideration of relevant factors

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| **APPLICANTS** | Anthony and Suzanne Seers |
| **RESPONSIBLE AUTHORITY** | Macedon Ranges Shire Council |
| **SUBJECT LAND** | 124 Three Chain Road<br>CARLSRUHE VIC 3442 |
| **WHERE HELD** | 55 King Street, Melbourne |
| **BEFORE** | Helen Gibson, Deputy President |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 17 and 18 May 2016 |
| **DATE OF ORDER** | 16 August 2016 |
| **CITATION** | Seers v Macedon Ranges SC (Red Dot) [2016] VCAT 1198 |

## ORDER

1 Pursuant to section 149B of the *Planning and Environment Act 1987*, I make the following declarations:

   a The land has been used in accordance with Permit P96-0488 since the issue of the permit in 1996 for the purpose of gallery, accommodation and functions.

   b This use has been continuous and has not ceased for a period of two years or more since the issue of the permit.

   c As a result of the continued use of the land in accordance with the permit, the land enjoys rights to be used in accordance with the permissions provided by the permit. Use of the land can continue pursuant to the permit.

2 No order as to costs.

**Helen Gibson**
**Deputy President**

## APPEARANCES:

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|---|---|
| For Anthony and Suzanne Seers | Mr David Vorchheimer, solicitor, of HWL Ebsworth. He called the following witness who gave sworn evidence:<br>• Suzanne Seers |
| For Macedon Ranges Shire Council | Mr Darren Wong, solicitor, of Maddocks. He called the following witnesses who gave sworn evidence:<br>• Robert Szymanski, senior statutory planning coordinator, Macedon Ranges Shire Council<br>• Leanne Jane Davey, coordinator, Macedon Ranges Shire Council |

## INFORMATION

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|---|---|
| Nature of Proceeding | Application for declaration under Section 149B of the *Planning and Environment Act 1987* |
| Zone and Overlays | Macedon Ranges Planning Scheme<br>Farming Zone<br>Environmental Significance Overlay (ESO4) |
| Land Description | The subject land, known as hedge Farm and comprising Crown Allotments L & M, Section 4 Parish of Carlsruhe, has an area of 8.094 ha. It includes a substantial Victorian era house in an attractively landscaped garden setting. The property contains a number of outbuildings, including two former railway carriages, a cottage and gallery/functions area complex. |

## REASONS

### WHAT IS THIS PROCEEDING ABOUT?

1 The applicants, Anthony and Suzanne Seers (the Seers) currently own Crown Allotments L and M Section 4 Parish of Carlsruhe at 124 Three Chain Road, Carlsruhe, known as Hedge Farm. They have applied for a declaration under section 149B of the *Planning and Environment Act 1987* in the following terms:

> 1. The land has been used in accordance with Permit P96-0488 **(Permit)** since the issue of the Permit in 1996.
> 2. This use has been continuous and has not ceased for a period of two years or more since the issue of the Permit.
> 3. As a result of the continued use of the land in accordance with the Permit for a period of more than nineteen years, the land enjoys rights to be used in accordance with the permissions provided by the Permit.
> 4. Accordingly, the Applicant seeks a declaration pursuant to section 149B of the *Planning and Environment Act 1987* (Vic) that the use of the Lands can continue pursuant to the Permit.

2 The Seers purchased the subject land in 2009. They currently use the land for the purpose of accommodation (including bed and breakfast), a gallery and function centre (the activities) pursuant to planning permit P96-0488 (the permit). They say they have existing use rights to conduct these activities and use the land for these purposes.

3 Macedon Ranges Shire Council (the Council) has formed the view that the subject land does not enjoy existing use rights on the basis that, in council's view, the evidence provided has not been sufficient to establish such rights. According to the council's statement of grounds:

- Council does not agree that the uses and activities undertaken on the subject land are in accordance with the permit since its issue in November 1996.
- Council cannot agree that the use of the subject land for anything other than a dwelling satisfies the requirements of clause 62 (and specifically clause 63.11 of the Macedon Ranges Planning Scheme as it relates to existing uses.
- The use of the subject land for anything other than a dwelling ceased for a continuous period of 2 years and 7 months from February 2007. As a result of the cessation of the uses in February 2007, existing use rights pertaining to the permit have been extinguished.

4 Hedge Farm, comprising Crown Allotments L and M, were originally part of a larger property known as West Rock Farm comprising Crown

Allotment K, L, M and N. Planning permit P96-0488 was issued on 4 November 1996 for crown allotments K, L, M and N, which allowed:

> Use as a Gallery, Bed and Breakfast and Receptions.

5 Plans were endorsed under the permit. Sheet 1 shows the layout of various buildings and the main house on part of the property comprising crown allotments L and K. Sheet 2 shows the layout of the main house.

6 At the time the permit was issued, West Rock Farm was owned by Athol Guy.[1] There is no dispute that West Rock Farm was used for the purposes allowed by the permit up until February 2007. By that time, ownership of the four crown allotments had split. The four crown allotments comprising West Rock Farm were purchased by Colleen Lethbridge and Leanne Davey in 2003. In 2006, they sold various of the crown allotments but continued to occupy and use crown allotments L and K for the activities. The Seers purchased crown allotments L and K in 2009 by way of a mortgagee auction. Since their purchase, the Seers have personally conducted the activities on the subject land to the date of this present proceeding.

7 It is the use of the subject land between February 2007 and the Seers' purchase of the land in 2009 that is in dispute. The Seers say that the weight of evidence demonstrates that the land continued to be used for the activities during this period. The council says that during this time the use stopped. Because it stopped for a continuous period of two years or more, any existing use rights under the permit have expired.[2]

8 The dispute between the council and the Seers about whether the subject land enjoys existing use rights under the permit has subsisted for a number of years. It is clouded by the fact that both Colleen Lethbridge and Ms Leanne Davey were unsuccessful bidders at the mortgagee auction at which the Seers purchased the subject land, and the fact that Ms Leanne Davey is an employee of the council as is Ms Colleen Lethbridge's daughter, Ms Kylie Lethbridge. The Seers feel that they have been unfairly treated over the years by the council in their endeavours to use Hedge Farm commercially for the activities allowed by the permit, that information about the permit has been withheld from them and that the council has failed to apply the correct test for establishing existing use rights by applying a 'beyond reasonable doubt' test, rather than a 'balance of probabilities' test.

9 Despite any grievances felt by the Seers and Ms Leanne Davey (who gave evidence on behalf of the council), they are not relevant to my decision. The establishment of existing use rights is to be shown on the balance of

[1] The land was in fact owned by a company controlled by Athol Guy, Macedon West Rock Properties Pty Ltd. The council submitted a detailed schedule of the ownership of the various parcels of land – exhibit RA-14. It is not necessary for the purposes of this proceeding to recount all the details of the various changes in ownership. I have referred only to those changes in ownership that I consider to be relevant to the dispute in this proceeding.

[2] Clause 63.06 Macedon Ranges Planning Scheme

probabilities based on the facts and evidence available to the Tribunal.[3] Whilst certain activities associated with a land use may cease without the use stopping, ultimately the question of whether the use has stopped is a question of fact.[4]

10 Clause 63.01 of the planning scheme provides as follows:

> **Extent of existing use rights**
>
> An existing use right is established in relation to use of land under this scheme if any of the following apply:
>
> - The use was lawfully carried out immediately before the approval date.
> - A permit for the use had been granted immediately before the approval date and the use commences before the permit expires.
> - A permit for the use has been granted under Clause 63.08 and the use commences before the permit expires.
> - Proof of continuous use for 15 years is established under Clause 63.11.
> - The use is a lawful continuation by a utility service provider or other private body of a use previously carried on by a Minister, government department or public authority, even where the continuation of the use is no longer for a public purpose.

11 The Seers rely upon the second dot point in clause 63.01. They rely upon the permit and say they have existing use rights for the uses allowed by the permit.

12 If the Seers were claiming existing use rights in respect of any other uses than those allowed by the permit, they would need to rely upon the fourth dot point – proof of continuous use for 15 years under clause 53.11. However, I do not understand that they are doing this.

13 Whilst the council referred to clause 63.11 in its statement of grounds and this was addressed by Mr Vorchheimer, on behalf of the Seers, in his submission, this only becomes relevant if it is perceived that there is any distinction between the use allowed by the permit of 'Gallery, Bed and Breakfast and Receptions' and the use characterised by the Seers for 'accommodation (including bed and breakfast), a gallery and a function centre'.

14 I will deal further with the way in which the use should be characterised after dealing with the evidence. I will also deal with another issue I consider to be relevant, namely whether the rights claimed by the Seers arise under the permit or are properly characterised as existing use rights under clause 63.01, which are independent of the rights and obligations arising under the permit.

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[3] *Wellington & Ors v Surf Coast SC (Includes Summary) (Red Dot)* [2011] VCAT 2317 at [41]
[4] *Dunning v Yarra Ranges SC (Includes Summary) (Red Dot)* [2014] VCAT 1287 at [17]

15 However, the first issue to be dealt with concerns the question whether the use stopped for a period of two years or more between February 2007 and September 2009. This is relevant both in the context of clause 63.06 regarding existing use rights and section 68(2)(b) of the *Planning and Environment Act 1987*, regarding expiry of the permit.

16 Clause 63.06 of the planning scheme provides:

> **Expiration of existing use rights**
>
> An existing use right expires if either:
>
> - The use has stopped for a continuous period of 2 years, or has stopped for two or more periods which together total 2 years in any period of 3 years.
> - In the case of a use which is seasonal in nature, the use does not take place for 2 years in succession.

17 Section 68(2)(b) of the Act provides:

> **68 When does a permit expire?**
>
> …
>
> (2) A permit for the use of land expires if—
>
> …
>
> (b) the use is discontinued for a period of two years.

## HAS THE USE STOPPED FOR TWO OR MORE YEARS?

### Evidence by the Seers

18 The Seers presented an extremely detailed array of evidence arranged chronologically and covering every year from 1996 until 2015. The evidence comprises documents and statutory declarations by people associated with the use of the land over this period. In addition, Ms Suzanne Seers gave evidence.

19 Further evidence was tabled at the hearing[5] comprising more recent statutory declarations[6]; a letter from the agent in charge of selling the property in 2009[7]; other correspondence; and images of West Rock Farm website from August 2007 to April 2008, which describe it as an indigenous art gallery open every Sunday from 10:00am until 4:00pm with the opportunity to enjoy a selection of regional wines or tea and coffee with cake.

20 I do not intend to recount or summarise all this evidence. The evidence is summarised in the written submission on behalf of the Seers for the period

[5] Exhibit A-17
[6] Statutory declaration of Ms Dianne Elizabeth Padgham 2 March 2016 and 3 December 2015; Statutory declaration of Ms Eileen Ballangarry 15 March 2016; Statutory declaration of Mr Tony Attard 26 April 2016; Statutory declaration of Mr Glen Higgins 27 April 2016; Affidavit of Ms Suzanne Seers 29 April 2016; Affidavit of Anne Conway 30 April 2016 and Affidavit of Roland Schaedle 20 April 2016
[7] Letter from Ms Jan McColl 17 August 2015

from 2000 to 2015.[8] I accept this as an accurate summary of the evidence presented on behalf of the Seers. The effect of the evidence is to establish that the subject land was used continually from 1996 until 2016 and did not stop between 2007 and 2009.

### Evidence on behalf of council

21 The council relied upon evidence given by Ms Leanne Davey and Mr Robert Szymanski.

22 Mr Szymanski's evidence related to a conversation between himself and Ms Kylie Lethbridge (Manager Economic Development and Tourism for Macedon Ranges Shire Council) with the Seers at the subject land on 10 February 2012. It was his evidence that previous known uses of the property as a gallery, for music afternoons and other functions were discussed. He says he advised Ms Seers that 15 years of continuous use would need to be demonstrated for existing use rights to be established. Ms Seers "clearly stated in her own words existing use rights could not be established as the previous uses had ceased for more than two years". She was advised to apply for a planning permit for place of assembly, which she did. A planning permit, PLN/2012/204 to use 124 Three Chain Road, Carlsruhe as a place of asesmbly was issued by council on 14 May 2013 and remains current.

23 Ms Davey gave evidence about her former ownership of West Rock Farm with Colleen Lethbridge and the use of the property. She gave evidence about the sale of the four crown allotments, then their lease back of crown allotments L and M and continued occupation of this land. She said that:

> …due to the sale of the properties, continuation of our business became unviable. We ceased to operate our business namely the Gallery and Cultural Centre at 124 Three Chain Road, Carlsruhe in February 2007…

24 She also said that they continued to reside at the property and pursued business interests and employment away from the property. Their intention was to buy back the property but due to circumstances outside their control the property was sold in August 2009 and they vacated the property in September 2009. Ms Davey also gave evidence that she was made bankrupt in late 2006.

25 In respect of the period between February 2007 to September 2009, Ms Davey conceded in cross examination that during this period the art gallery remained stocked; art was sold via consignment; and Ms Conway's CDs were sold from the property.[9]

[8] Exhibit A-15 paragraphs [6.7] – [6.45]
[9] Ms Conway is an aboriginal artist who had performed at West Rock Farm.

## Assessment of the evidence

26 The critical issue is whether use of the land stopped for a period of two or more years between 2007 and 2009. I must make a decision whether I prefer the evidence of Ms Davey, who was an occupant of the subject land during the contested period and, as the council says, has direct knowledge of what occurred on the land during this period, and the cumulative weight of evidence to the contrary presented by the Seers.

27 In terms of whether use of the land ceased during the period February 2007 to September 2009, I prefer the evidence of the Seers that the use did not cease for the following reasons.

28 I did not find Ms Davey to be a credible or reliable witness. I found her responses to questions to be vague, self-serving and, at times evasive.

29 In addition, my attention was drawn to the fact that during the lunch break on day 1 of the hearing, whilst still on oath and under cross examination and despite my specific direction to her not to speak to any council officer or solicitor, which would mean having a solitary lunch, Ms Davey nevertheless had lunch with a council officer who was attending the hearing. Whilst Ms Davey said she did not understand my direction and only spoke about general things, I nevertheless consider that her disregard of my explicit direction lessens her credibility and the weight to be placed on her evidence.

30 On behalf of the Seers, Mr Vorchheimer suggested that Ms Davey had a motive in asserting that the business of the Gallery and Cultural Centre ceased in February 2007 because she had been declared bankrupt and was not supposed to be conducting any business activity during the period of bankruptcy. Statements by Ms Colleen Lethbridge to similar effect may have been made for a similar reason.

31 For example, the council tendered a file note from Mr Mukul Hatwal, team leader planning, dated 8 October 2007[10], which describes a meeting with Colleen Lethbridge at 124 Three Chain Road, Carlsruhe to inspect the property and discuss a permit application for a proposed dwelling on Lot M. It includes the following:

- Colleen detailed the business they ran on the property since purchase that was now closed since earlier in the year due to financial reasons.
- Discussion in regard to business activity, she advised not financially viable and proposes to reside at the property to breed horses.

32 However, both this statement and Ms Davey's statement in her affidavit each refer to the fact that the *business* they had run was now closed, which was the business of the Gallery and Cultural Centre. In a consideration of

[10] Exhibit RESPONSIBLE AUTHORITY-9

existing use rights, the question is how the land was being used, not whether there was a business being run.

33 I am prepared to accept that indeed Ms Lethbridge and Ms Davey did cease to operate their business when their two companies, Equus Promotions Pty Ltd and West Rock Property Pty Ltd, were deregistered.[11] However, I do not accept that all activities comprising use of the land for the purpose of gallery, accommodation (including bed and breakfast) and function centre necessarily ceased when the business ceased. In my view, there is a distinction to be drawn between operating a business and using land for a certain purpose.

34 Whilst conduct of land for a business may be evidence of use of the land for a certain purpose, it is always the objective use of the land that must be considered. Intentionally or not, the statement attributed to Ms Lethbridge and the statement of Ms Davey in her affidavit both quite explicitly refer to the fact that their business ceased to operate, namely the Gallery and Cultural Centre, at 124 Three Chain Road, Carlsruhe.

35 Ms Davey in her affidavit states that this was in February 2007. No explanation is given by the council as to the significance of February 2007 or whether this was associated with the time at which their two businesses were deregistered.

36 I do not accept the council's contention that a clear statement by the occupier of the subject land during the contentious period should be given more significant weight compared to other evidence to the contrary. In cases where a person has a potential motive for establishing a given set of facts, it is relevant to look at other independent evidence about what has occurred.

37 Here, all independent evidence points to the fact that whilst activities related to use of the land for gallery, accommodation and functions slowed right down, there were activities relating to each of these uses that occurred within the period of February 2007 to September 2009 when the Seers purchased the land and started using it, which would mean that the uses had not altogether stopped. This evidence comes from the affidavits of Athol Guy, Eileen Ballangarry, Roland Schaedle, Anne Conway and Dianne Padgham who variously attest that aboriginal art and CDs were being sold, functions were being held with food and alcohol supplied and accommodation on the land was being provided during the relevant period albeit at a reduced scale compared to prior use. This evidence is supported by the fact that the website for West Rock Farm continued to be displayed during this period promoting it as an indigenous art gallery, which was open every Sunday, where refreshments were available.

[11] Exhibit RA-1 paragraph [78], submission on behalf of the responsible authority although it does not say when.

38 I am not persuaded by Mr Wong's submission that all these matters can be explained away by saying, for example:

- The website was simply not taken down when the business was discontinued.
- The aboriginal art was simply kept on the property for convenience.
- The use of the land for parties or social events was consistent with its residential use.
- Maintaining the setup of the land for accommodation (with bunk beds), commercial kitchen facilities, function areas and gallery accoutrements, and its presentation for sale as a going concern for these purposes did not mean it was in fact used for those purposes.

39 I consider that when taken together, on the balance of probabilities, the land was being used for these purposes. There are simply too many factors attested to by too many independent people that would need to be discounted to make it likely that the land was not being used during this period. In other words, the weight of evidence persuades me that it was still being used although at a much reduced level of activity.

40 The evidence of Leanne Davey that all use had ceased is at odds with her evidence that the property remained setup as a gallery and for accommodation and functions, and was presented during the marketing period as a going concern. It is also at odds with her concessions that there had been some sale of art on consignment during the period and sales of CDs.

41 I therefore find that on the balance of probabilities, the use of the land did not stop for a continuous period of two years between February 2007 and September 2009.

42 The evidence of Robert Szymanski does not change my conclusion.

43 Mr Szymanski has no direct knowledge of what occurred on the property during the relevant time between February 2007 and September 2009. His evidence related to a conversation he had with Ms Seers on the property in 2012 regarding future use of the property. He says that the issue of existing use rights was discussed and Ms Seers clearly stated in her own words that "existing use rights could not be established as the previous uses had ceased for more than 2 years". This statement is contradicted by Ms Seers.

44 I find that the evidence as presented by Mr Szymanski to be quite vague and nonspecific. He tended to speak in broad generalisations, which were then clarified and sharpened when a specific point was put to him. I do not doubt that his affidavit of evidence represents what he thinks was said and discussed at the meeting. However, when I take into consideration Ms Seers' recollection of this meeting, I consider that the discussion may have been interpreted differently by someone who was a non-planner and not familiar with the concept of existing use rights.

45 For this reason, I place little or no weight on the evidence of Mr Szymanski in establishing whether use of the land had stopped for a continuous period during 2007 – 2009 as neither he nor Ms Seers had any direct, personal knowledge of what occurred on the land during this time.

## HOW SHOULD THE USE BE CHARACTERISED?

46 The use allowed by the permit was for a gallery, bed and breakfast and receptions. Conditions in the permit restrict the bed and breakfast to a maximum of eight guests without further consent of the responsible authority, and likewise receptions are restricted to a maximum 100 guests.

47 During the period when West Rock Farm was operated by Athol Guy from 1996 until sale to Ms Lethbridge and Ms Davey in December 2003, the property was used for the purpose of accommodation (in the main house and the cottage), as a gallery selling art by various artists and exhibiting "Seekers" memorabilia, and for functions of various kinds including weddings, music afternoons, luncheons for bus tours, and many meetings and allied functions for the regional tourism organisation and other local organisations. There is no evidence about the number of people accommodated or who attended the functions.

48 Following purchase of West Rock Farm by Ms Lethbridge and Ms Davey, use of the land continued for the purpose of accommodation, functions and as a gallery. The gallery focussed on indigenous art and there was more emphasis on equine activities.

49 Since purchase by the Seers, the land has continued to be used for the same purposes, although with more emphasis on accommodation and functions.

50 The application seeks declarations that the land enjoys rights to be used in accordance with the conditions provided by the permit. The question is whether there is any distinction to be drawn between what the permit allows and the way in which the land has, in fact, been used. Further, should the use of the land allowed by the permit be characterised as an integrated use or did the permit allow three separate and distinct uses?

51 In characterising existing use rights, clause 63.02 provides as follows:

> **Characterisation of use**
>
> If a use of land is being characterised to assess the extent of any existing use right, the use is to be characterised by the purpose of the actual use at the relevant date, subject to any conditions or restrictions applying to the use at that date, and not by the classification in the table to Clause 74 or in Section 1, 2 or 3 of any zone.

52 At the time the permit was issued, neither gallery, bed and breakfast or receptions were uses defined in the planning scheme. This means the words should be given their plain ordinary meaning. However, in my view, rather than focussing on the meaning of the terms allowed by the permit or

comparing them to the same terms now found in the planning scheme, it is more relevant to focus on what the purpose of the actual use has been.

53 There is no dispute that the land has been used for the purpose of accommodation since the permit was granted. People, who are not residents, have been variously accommodated in the main house, the cottage, and two railway carriages on the land. The style of accommodation has varied from guest house style during Athol Guy's ownership, bunk house accommodation offered by Leanne Davey and Colleen Lethbridge to the boutique accommodation offered by the Seers.

54 Whilst the definition of 'bed and breakfast' in the current Macedon Ranges Planning Scheme means *dwelling used, by a resident of the dwelling, to provide accommodation for persons away from their normal place of residence*, it does not appear that the accommodation has always been offered by a resident of the dwelling. When Athol Guy operated the use, he did not live on the property. This was something known by the council when the permit was granted.

55 In the absence of a definition in the planning scheme in 1996 of 'bed and breakfast' requiring the accommodation to be offered by a resident of the dwelling and having regard to the council's knowledge of the circumstances of the provider of the accommodation at the time when the permit was granted, I find that use of the term 'bed and breakfast' in the permit does not limit the accommodation to provision by a resident of the property. The relevant date for this purpose is the date of the permit. Therefore, I find that the permit allows use of the land for the purpose of accommodation.

56 With respect to use of the land for the purpose of a gallery, the present definition of 'art gallery' in the planning scheme refers only to *display of works of art*, whereas in my view the broader term 'gallery' implies both the exhibition and sale of art or craft, or the display of historical, cultural or other works or artefacts. In this sense, the term 'gallery' includes elements of the current definition of 'exhibition centre' in the planning scheme. However, that is not relevant having regard to clause 63.02.

57 Before West Rock Farm was purchased by Athol Guy, it was known as 'The Gallery Carlsruhe' and was operated as a gallery by the previous owners, Pat and Bill Ross (Rospat Pty Ltd).[12] Having regard to the activities that have taken place on the land since the permit was issued, art has been displayed and sold on the land, and cultural memorabilia associated with the Seekers has been displayed. Although this memorabilia is no longer displayed, the land has continued to be used for the purpose of the exhibition and sale of works of art or craft, CDs and for art workshops.

[12] It was also used for accommodation, functions and tea rooms, although there is no evidence whether a permit was ever granted for such use. A planning permit was granted in 1993 (Permit PA9143) for a sign on the land for "The Gallery Carlsruhe". The endorsed plans show house, gallery complex and The Cottage.

58 For similar reasons to my interpretation of the meaning of the term 'bed and breakfast', I find that the relevant date for interpreting the term 'gallery' is the date of the permit. Having regard to the way in which the land was then being used, was intended to be used, and continued to be used, I find that use of the term 'gallery' in the permit includes the display and sale of art, craft, artefacts and memorabilia.

59 In terms of whether the land has been used for the purpose of receptions or functions, the council submitted that the ordinary meaning of the term 'receptions' implies a degree of formality, which it is apparent has not always characterised the functions undertaken on the land. The evidence demonstrates that the range of activities undertaken on the land by Athol Guy, Colleen Lethbridge and Leanne Davey, and the Seers have included music afternoons, weddings, other parties and social functions, seminars, meetings, workshops, conferences, seminars, school visits, visits by bus tour groups, and the provision of drinks and refreshments to visitors. It is also evident that from the time the permit was applied for and granted, use of the land for the purpose of functions has always been contemplated, as this was a previous use of the property when Athol Guy purchased it and he intended to continue this use.

60 For example, the original application for planning permit P96-0488 described the current use of the land as: *Galleries, Tea Rooms, Functions, B & B Cottage*. The proposal was described as: *Guest House Permit for main house (formerly "The Gallery Carlsruhe")*. A council file note related to the permit application dated 5 September 1996 states:

> Discussed proposal with Athol Guy. He has decided to alter the application to allow for small scale receptions. This will reduce the accommodation in the house to 3 bedrooms.

61 A letter from Athol Guy to the council in connection with the permit application dated 26 September 1996 discusses proposed changes to the layout of the homestead. He states that the definition of Guest House for what he wants to do no longer applies. He goes on to describe the use envisaged as:

> "Homestead Reception Centre, Tea Garden and Gallery. B & B Accommodation for family or friends."
>
> I trust the above is sufficient to define the most appropriate permit in conjunction with existing permits and the overall utilisation of West Rock Farm as a major attraction in our region.

62 Another council file note dated 18 October 1996 states:

> I inspected the site with applicant. Effectively there will be little increase in the existing use of the property. It has been operating as a gallery, bed and breakfast and catering for receptions for many years. The location of small receptions within the complex will vary with the majority being relocated to the sun room of the main house. The fact that it is only 3.2 x 8.1 m restricts the size. The gallery will display

> works of local artists. The bed and breakfast will have nil effect outside the property. It is isolated and extremely well screened behind hedges.

63 In my view, it would be unduly pedantic to attempt to draw a distinction between use of the land for the purpose of functions and use of the land for the purpose of receptions. I am not sure what details would distinguish the two sorts of activities or what purpose would be served by doing so. Neither use was defined in the planning scheme at the time the permit was granted. Having regard to the circumstances surrounding the grant of the permit, its existing use and the use of the land since the permit was granted and in reliance upon it, which occurred with full knowledge of the council, I find that the term 'receptions' allowed by the permit includes functions.

64 Therefore, based on all the material before me, I find that the land has been used for the purposes of accommodation, gallery and functions since the permit was granted in 1996. Whilst specific activities associated with this use may have changed over time depending on the focus of the owners and operators from time to time, and the intensity of the activities may have changed over time, I am satisfied that there has been continuous use of the property for these combined purposes since the permit was granted.

65 I am further satisfied that the permit was for an integrated use comprising these combined purposes, rather than a permit for three separate and distinct uses. The property, both when it was operating as West Rock Farm and, more recently, as Hedge Farm, has always operated as a single destination offering a variety of activities with combined elements of accommodation, gallery and functions depending on the needs of particular users, the type of events being catered for or the attractions being promoted or offered by the proprietors at different times.

66 It is also evident that different activities associated with the various purposes have occurred in different buildings and in different locations on the land from time to time. Despite submissions to the contrary by the council, I do not consider that this has any relevance to the existence of existing use rights in respect of the land as a whole. Existing use rights attach to land, not particular buildings on the land. 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.[13] Where land is an integrated whole, which is used for a particular purpose, the use cannot be regarded as being confined just to one area where an activity is being undertaken. [14] Equally, activities may move around on a parcel of land without affecting the continuation of existing use rights for that parcel of land. If a permit requires that certain activities can only take place in a particular building or location and they occur elsewhere, there may be a breach of the permit, which may give rise to grounds for an enforcement order application, but

[13] *City of Nunawading v Harrington* [1985] VR 641 at 645
[14] *Danieli v Campaspe SC & Ors* [2009] VCAT 963; *Simpkin v Mansfield SC & Ors* [2015] VCAT 701

that will not affect the existing use rights which attach to the land as a whole.

## DO EXISTING USE RIGHTS ARISE UNDER CLAUSE 63.01 OR THE PERMIT?

67 The final question to determine is how existing use rights in respect of the land arise under clause 63.01 or indeed whether it is necessary to rely upon clause 63.01 at all in establishing the Seers' right to continue to use the land for the purpose set out in the permit.

68 Clause 63.01 provides as follows:

> **63.01 Extent of existing use rights**
>
> An existing use right is established in relation to use of land under this scheme if any of the following apply:
>
> - The use was lawfully carried out immediately before the approval date.
> - A permit for the use had been granted immediately before the approval date and the use commences before the permit expires.
> - A permit for the use has been granted under Clause 63.08 and the use commences before the permit expires.
> - Proof of continuous use for 15 years is established under Clause 63.11.
> - The use is a lawful continuation by a utility service provider or other private body of a use previously carried on by a Minister, government department or public authority, even where the continuation of the use is no longer for a public purpose.

69 The Seers seek a declaration that existing use rights arise under the permit, although they refer to the first, second and fourth dot point of clause 63.01 in support of their claim.

70 The council has focussed on the fourth dot point referring to continuous use for 15 years pursuant to clause 63.11.

71 In my view, the starting point for any enquiry about whether existing use rights can be established should always be to enquire why it is necessary to establish existing use rights. Ordinarily this will only become relevant because the use of land does not comply in some way with the current planning scheme. If the use of land fully complies with the planning scheme – for example, it is a section 1 use and all conditions are complied with, or a permit has been issued under the provisions of the current planning scheme – the issue of existing use rights will not be relevant. The lawfulness of the use of the land will be able to be established either by reference to the provisions of the planning scheme or to a permit.

72 The need to establish existing use rights will most commonly arise when there has been a change to the planning scheme since the use commenced that would mean the use would not now be permitted or would now require a permit under the planning scheme (as amended) and no such permit has been granted.

73 Fundamentally, the concept of existing use rights is one of fairness. It would be unfair if a use which was operating lawfully one day either under a planning scheme or permit could be rendered unlawful the next day because of an amendment to a planning scheme, which made the use prohibited or subject to conditions. For this reason, section 6(3) of the *Planning and Environment Act 1987* provides that nothing in any planning scheme shall:

> (a) prevent the continuance of the use of any land upon which no buildings or works are erected for the purposes for which it was being lawfully used before the coming into operation of the scheme or amendment (as the case may be); or
>
> (b) prevent the use of any building which was erected before that coming into operation for any purpose for which it was lawfully being used immediately before that coming into operation; or
>
> (c) prevent the use of any works constructed before that coming into operation for any purpose for which they were being lawfully used immediately before that coming into operation; or
>
> (d) prevent the use of any building or work for any purpose for which it was being lawfully erected or carried out immediately before that coming into operation; or
>
> (e) require the removal or alteration of any lawfully constructed building or works.

74 However, it is not section 6(3) of the Act that confers protection on existing use rights. Rather, it is the planning scheme that does this.[15] It is the planning scheme that, under section 6(2)(b) of the Act, may regulate or prohibit the use or development of any land. Section 6(3) simply places constraints on this power.

75 Thus it is under clause 63 of the planning scheme that existing use rights are governed. Clause 63 goes further than section 6(3) in establishing when existing use rights are established; for example, by proving continuous use for 15 years under clause 63.11.

76 Clause 63 also goes beyond the ambit of protection directed by section 6(3) in terms that whilst section 6(3)(b) and (c) protect use of any *building or works* erected or constructed before an amendment for any purpose for which they were lawfully being used immediately before the amendment came into operation, clause 63 talks about existing use rights being established in respect of *land*, not just the use of buildings and works. It

[15] *Kraan v Cardinia SC* [2006] VCAT 1629 at [29]

avoids the complications that might arise if the exact words used in section 6(3) were used in the planning scheme relating to *use of buildings and works*, rather than *use of land*, although it provides that a permit for any new buildings or works is required.[16]

77 Having regard to the fundamental reason why existing use rights should be protected and the scheme for doing so that is established under the Act and the planning scheme, I therefore return to the question previously posed as to why it is necessary in this particular case to rely upon clause 63.01 at all in establishing the Seers' right to continue to use the land for the purpose set out in the permit.

78 Both parties have assumed that this is a case involving existing use rights arising under clause 63.01, but I am not persuaded that this is so.

79 In the circumstances of the present case, the Macedon Ranges Planning Scheme has changed since the permit was granted in 1996. The approval date of the Macedon Ranges new format planning scheme was 8 June 2000.[17] However, introduction of the new format planning scheme did not make the use of land for which the permit was granted unlawful. It did not prohibit the use or impose conditions or further controls that would have required a further permit for the use.

80 It is not disputed that the permit was lawfully granted under the planning scheme as it was before this date. Nor is there any dispute that use of the land commenced pursuant to the permit. I have already found that the permit has not expired pursuant to section 68(2)(b) of the Act because it has not been discontinued for a period of two years. Therefore if the permit has not expired under the provisions of the Act, and there is nothing in the Act or the planning scheme that would indicate a clear intention that previous permits should no longer have any force or effect, it is a clear case where the provisions of section 28(2)(e) of the *Interpretation of Legislation Act 1984* apply. Section 28(2) provides as follows:

> (2) Where a subordinate instrument or a provision of a subordinate instrument—
>
> (a) is repealed or amended; or
>
> (b) expires, lapses or otherwise ceases to have effect—
>
> the repeal, amendment, expiry, lapsing or ceasing to have effect of that subordinate instrument or provision shall not, unless the contrary intention expressly appears—
>
> …
>
> (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;

[16] Clause 63.05
[17] Schedule to clause 61.04 Macedon Ranges Planning Scheme

81 The planning scheme is a subordinate instrument. A permit issued under the planning scheme creates a right to use land under that subordinate instrument. Consequently, I conclude that the Seers have an ongoing right to use the land in accordance with the permit and there is no need for them to rely upon existing use rights established under clause 63.01 in order to do this.

82 This accords with the view expressed by Deputy President Macnamara in *Lakkis v Wyndham CC*[18] where he says:

> [29] It is noteworthy that the Planning and Environment Act appears to treat existing uses in general separately from pre-existing permits. It may be that the draftsman of the State Section of the present Scheme - Clause 63, dealing with existing uses runs the two together and assumes that existing uses of both types are to be dealt with in the same manner. The provisions of Clause 63.01 with the exception of the second bullet point are a reproduction of what appears in Section 6(3) of the Planning and Environment Act. In my view the scheme of the Planning and Environment Act is to treat existing uses which are the subject of permit rights separately from other existing uses such as those which were carried on before a scheme existed at all or those which were "as of right" under a repealed scheme. Permits are specifically dealt with in Section 68 and 208 of the Planning and Environment Act. Permits create substantive rights. Changes to the substantive law are presumed not to operate retrospectively. See Maxwell v Murphy [1957] HCA 7; (1957) 96, CLR 261, 267 per Dixon CJ. Where a subordinate instrument such as a planning scheme expires, lapses or ceases to have effect, the expiry, lapsing or ceasing to have effect does not affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision (Section 28(2)(e) of the Interpretation of Legislation Act 1984). In my view these principles preserve the operation of Permit No. 745 and it is not dependant at all for its preservation on Clause 62 [*sic*] of the current Scheme or on Section 6(3) of the Planning and Environment Act.

83 Likewise in *Popular Pastimes Pty Ltd*[19]*,* Deputy President Dwyer expressed similar views where he said at [55]:

> - …There is nothing in clause 63 that indicates that the permit lapses or becomes inoperative when the existing use right is established, or is replaced by some alternative concept. The basis for the continuing existing use right is still the pre-existing permit.
> - There is also a sound public policy basis for this continuation of the accrued right existing in a permit in an on-going and

[18] [2001] VCAT 1046
[19] [2008] VCAT 1184

> operative manner. A permit is a document of some value, relied upon by many persons dealing with the permit holder, including contractors and financiers, and has been held in some respects to be almost equivalent to a document of title in the provision of security.

84 My conclusion on this issue therefore means that I do not need to analyse all the arguments raised by the parties regarding whether existing use rights arise under the various provisions of clause 63.01 because the use rights continue under the permit. Nevertheless, for the sake of completeness, I will comment on each of the provisions the parties relied upon.

### Use lawfully carried out immediately before the approval date

85 The first dot point of clause 63.01 provides that an existing use right will be established if the use was lawfully carried out immediately before the approval date. It does not make any reference to a permit for the use.

86 A use may be lawfully carried out if there is no permit for the use but when it commenced it was a section 1 use and any conditions in the planning scheme at that time were met. Alternatively, a use that is now prohibited may be lawfully carried out if it commenced pursuant to a valid planning permit but that permit has expired subsequent to the approval date. There are various scenarios when the first dot point of clause 63.01 may be relevant to the establishment of existing use rights.

87 However, in the present case, for the reasons previously set out, where the use commenced before the approval date pursuant to a validly issued permit and the permit has not expired,, the permit continues to have force and effect under section 28(2)(e) of the *Interpretation of Legislation Act 1984*. In this circumstance, although it could be said that the use was lawfully carried out immediately before the approval date pursuant to the first dot point of clause 63.01, it is not necessary to do so. The right to continue to use the land in accordance with the permit arises under the permit, not under clause 63.01.

### Permit for use granted immediately before the approval date

88 The Seers also referred to the second dot point of clause 63.01 but I do not consider this is relevant. It provides that an existing use right is established if a permit for the use had been granted immediately before the approval date and the use commences before the permit expires.

89 In my view the particular words of this provision must be considered in deciding whether it is applicable. It is not a catch-all provision for any situation where someone relies on a permit to establish an existing use right. The second dot point will only apply if the permit has been granted *immediately* before the approval date, but the use does not commence before the approval date, and the amendment makes the use prohibited. In those circumstances, so long as the use commences before the permit expires, even though after the approval date, an existing use right will be

established. If this was not so and it applied to any circumstance where a permit was relied upon to establish an existing use right, then the question arises as to why there would be a need for the second dot point. In my view, the word *immediately* must be given some work to do in the interpretation of this provision, which is what leads me to my conclusion about the meaning of this provision.

90 In the present case, the permit was not granted immediately before the approval date of 8 June 2000 with the use not commencing until after this date but before the permit expired. Rather, the grant of the permit and the commencement of the use in accordance with the permit both occurred in 1996, well prior to the approval date. Accordingly, I find that the second dot point of clause 63.01 is not relevant in this case.

### 15 years continuous use

91 Finally, both the Seers and the council referred to the third dot point of clause 63.01. It provides that an existing use right is established if proof of continuous use for 15 years is established under clause 63.11. Clause 63.11 requires that the use has been carried out continuously for 15 years prior to the date of the application or proceeding.

92 Based on my findings in this proceeding, the use has been carried out continuously for 15 years prior to the date of this application, which was 20 November 2015. However, I do not consider it is necessary to rely upon this provision when the permit can be relied upon.

93 Clause 63.11 is a very useful provision when it cannot be established that the use was lawfully carried out immediately before the approval date. This may be because the use commenced unlawfully without a permit or, through the effluxion of time, it may not be possible to establish when or in what circumstances the use commenced. Sometimes, though, there is a tendency on the part of practitioners to assume that once a use has been established for 15 years, even though it commenced lawfully pursuant to a permit or the provisions of the (then) planning scheme, the establishment of an existing use right under clause 63.11 supersedes an existing use right established under the first dot point of clause 63.01 (use lawfully carried out immediately before the approval date) or a right under an ongoing permit. One implication of this assumption is that this renders the provisions of clause 63.05 inapplicable.[20] In other words, the implication is that even

[20] Clause 63.05 provides:

> **63.05 Sections 2 and 3 uses**
>
> A use in Section 2 or 3 of a zone for which an existing use right is established may continue provided:
>
> - No building or works are constructed or carried out without a permit. A permit must not be granted unless the building or works complies with any other building or works requirement in this scheme.
> - Any condition or restriction to which the use was subject continues to be met. This includes any implied restriction on the extent of the land subject to the existing use right or the extent of activities within the use.

though a use commenced lawfully under a permit, once it has been going for 15 years, the conditions of the permit can be ignored because an existing use right is established under the alternative provision of clause 63.11.

94 This cannot be right. It would make a mockery of the whole scheme of the *Planning and Environment Act 1987* which provides that planning permits granted under a planning scheme and in accordance with the Act are a key means of regulating the use and development of land in Victoria.

95 Clearly, there will be circumstances where a use has commenced lawfully under a permit but, over time, the use has expanded beyond what is allowed under the permit or has transformed into a different use. In those cases, the establishment of existing use rights may depend on either or both the first and fourth dot points of clause 63.01, depending on the characterisation of the use or uses. However, unless there is a reason for needing to rely upon clause 63.11 (15 years continuous use) in preference to the first dot point (the use was lawfully carried out immediately before the approval date), I do not consider reliance should necessarily be placed on clause 63.11 and the fourth dot point rather than the first dot point of clause 63.01 or, as in this case, on an existing valid permit.

96 Because of the existing permit and for the reasons previously given, I find that clause 63.11 is not relevant in the present case.

## CONCLUSION

97 For all these reasons, I find that:

- The land has been used for the purpose of gallery, accommodation and functions since the permit was granted in 1996.
- Use of the land for the purpose of gallery, accommodation and functions is allowed by planning permit P96-0488 and this purpose falls within what the permit allows, namely Gallery, Bed and Breakfast and Receptions.
- The permit is for an integrated use for these combined purposes, not for three separate uses.
- So long as the integrated use has not stopped for a continuous period of two years, even though the activities have slowed and contracted, the permit will not have expired pursuant to section 68(2)(b) of the *Planning and Environment Act 1987*.
- Use of the land has not stopped or been discontinued for a continuous period of two years between February 2007 and September 2009 therefore the permit has not expired.

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- The amenity of the area is not damaged or further damaged by a change in the activities beyond the limited purpose of the use preserved by the existing use right.

- Use of the land for the purposes allowed by the permit may continue pursuant to the permit.

98 Accordingly, I consider it is appropriate to make the declarations applied for with a minor modification with respect to the third declaration requested, which is:

> 3. As a result of the continued use of the land in accordance with the Permit for a period of more than nineteen years, the land enjoys rights to be used in accordance with the permissions provided by the Permit.

99 I consider this blurs the distinction I have drawn between the right to use land pursuant to an ongoing valid permit and the right to use land pursuant to existing use rights established under clause 63.01. There is no need in the present case for the Seers to rely upon existing use rights at all. It is therefore not necessary to refer to nineteen years continuous use. They have rights to continue to use the land pursuant to the permit and I will make a declaration to this effect.

## COSTS

100 At the conclusion of the hearing, the Seers made an application for costs. The council was provided with an opportunity to respond.

101 Essentially, the Seers claim council's carriage of this matter has been inappropriate and has caused them significant financial and emotional hardship. They rely upon section 109(2) and 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* to say that the Tribunal should award costs where it is satisfied that a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding.

102 In support of this contention, they claim that the council lacked transparency in its dealings with the Seers and previously refrained from bringing the permit to their attention. This was despite repeated discussions with them regarding the use of the subject land and how the parties should move forward. The council applied the wrong test for determining whether existing use rights could be established and failed to bring relevant evidence, which it relied upon at the hearing, to the Seers' attention. Further, they submitted that the relationship of several council officers – Ms Leanne Davey and Ms Colleen Lethbridge's daughter, Kylie Lethbridge – with the council may have affected the judgement of council officers in their assessment of their claim for existing use rights.

103 The council refutes the Seers' claim for costs, especially in circumstances where the application was made before the outcome of the proceeding was known. It strenuously denies the allegations regarding council's conduct and handling of the Seers' claim for existing use rights.

104 Further correspondence was sent to the Tribunal by the parties objecting to various matters raised in the other's submissions about costs. I have not had regard to this material because I do not consider it is relevant having regard

to the conclusion I have reached that in this proceeding each party should bear their own costs.

105 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* governs the award of cost in proceedings at VCAT. Relevantly, it provides as follows:

> **109 Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

106 The starting point is always that parties bear their own costs. Only if the Tribunal finds that it is fair to do so should it make an award of costs. Relevant matters to consider in deciding whether it would be fair are set out in section 109(3). I am not satisfied that any of the matters identified in section 109(3) justify an award of costs in the present case.

107 The Seers fundamentally feel 'hard done by' on the part of the council in terms of the council's failure to disclose the existence of the permit at a much earlier stage in their dealings with the council following their purchase of the land in 2009. They feel that they should not have been led down the path of applying for a separate permit for a place of assembly in 2012. Generally they feel they have been deceived.

108 However, all these matters arose prior to this proceeding being commenced. There has been nothing in the council's conduct of this particular proceeding that has unnecessarily disadvantaged the Seers. The council has not been responsible for prolonging unreasonably the time taken to complete the proceeding. Whilst the Seers have been successful in their application for declarations and I have found in favour of their claim that the land has rights to continue to be used under the permit, the analysis of the evidence and the issues arising have not been straightforward. The council's case has not been without substance. I do not consider that just because the proceeding has been complex or the council has been unsuccessful in circumstances where there has been real doubts about the evidence, this alone should justify an award of costs.

109 In terms of suggestions that the council has been unduly influenced by the role of Ms Leanne Davey and Ms Kylie Lethbridge as officers of the council, I cannot form a judgement about this. The Seers referred this very issue to the Ombudsman in 2015 who responded that there was –

> …insufficient information that indicates that Ms Davey, Ms Lethbridge and/or Ms Lethbridge's daughter influenced your existing use rights claim and planning permit application. In this regard, I cannot form an opinion that the council has acted in a way that is unlawful, unreasonable or wrong under the Ombudsman Act…

110 In these circumstances, I do not consider these claims of undue influence should be a factor influencing or favouring a decision to award costs.

111 I can understand that the Seers feel that the council has not assisted them to establish their existing use rights claim or provided all the documents that have emerged over time, such as the permit and the council's file with documents relating to the initial grant of the permit in a timely, or even particularly competent, way. However, some of the responsibility for the uncertainty that has arisen rests with the Seers who appear to have purchased the land without undertaking a thorough due diligence with respect to relevant permits and authorisations to operate the business they thought they were purchasing. As lay people, without particular experience in planning, they appear to have relied upon council officers for all their planning guidance and information. It does not appear that they have sought independent professional planning advice until 2014 when they engaged a planning consultant to apply for a copy of all planning permits pertaining to the land and the permit was produced by the council for the first time. There is a proper procedure for obtaining copies of permits, which it does not appear the Seers followed until relatively recently. If they had sought

professional advice earlier, the existence of the permit and the question of existing use rights might not have taken so long to resolve. This delay may have caused the Seers financial and emotional hardship over a number of years prior to the proceeding, but an award of costs should not be regarded as tantamount to an award of damages.

112 In my view, this is a classic case of *caveat emptor* – buyer beware. By choosing to finally apply for these declarations, the Seers have brought finality to the uncertain status of existing use rights for the land. They have invested a great deal of effort into assembling all the evidence presented at the hearing and they have been successful in their application. But having regard to the parameters of section 109, I am not satisfied that it would be fair to make an award of costs against the council.

113 On this basis, there is no need for me to address the issue of what basis any award of costs should be made.

**Helen Gibson**
**Deputy President**