

**12.9 PLANNING APPLICATION PA 2018/4962 - EXTENSION OF TIME TO AN
EXISTING PERMIT AUTHORISING EARTHWORKS INVOLVING THE PLACEMENT
OF CLEAN FILL TO RE-GRADE AN EXISTING TRAINING TRACK AT 379
PLUMPTON ROAD, DIGGERS REST****Author: Joseph Oyelowo - Development Planner
Presenter: Bob Baggio - Manager Planning Services****PURPOSE OF REPORT**

To consider and determine the above extension of time request in relation to an existing planning permit.

RECOMMENDATION:

That Council refuse to extend the expiry date of the permit subject to the grounds outlined in **Appendix 3** of this report.

REPORT**1. Background****Executive Summary**

Applicant:	Planning Studio on Peel
Proposal:	Request for an extension of time to an existing permit for earthworks
Existing Land Use:	Existing single storey dwelling and horse training track
Zone:	Green Wedge Zone
Overlays:	Public Acquisition Overlay Schedule 3 Melbourne Airport Overlay Schedule 2
Number of Objections:	Nil (request not required to be advertised)
Key Planning Issues:	Breach of the planning permit issued and plans endorsed A new application should be lodged and assessed appropriately
Recommendation:	Refuse to grant permit extension

The Land and Surrounding Area

The subject site has an area of 100.3ha and the entry into the site is located on the eastern side of Plumpton Road, Diggers Rest. Other features of the site are as follows:

- The site is an L shaped allotment.
- It contains an existing horse training track, single storey dwelling and outbuildings located in the north of the site.
- Significant land filling works have been conducted on the site over a number of years.

Land use and development in the area is mainly agricultural, with scattered dwellings.

Refer to **Appendix 1** for a locality plan.

Site History

In September 2013, Council issued a planning permit (PA2012/3705) for the placement of clean fill on the subject land, with the intent of the works to regrade an existing horse training track. The permit was a temporary permit and expired two years after the permit was issued.

The works authorised by the above permit were not completed, and so a further planning permit (PA2015/4962) was applied for and issued in March 2016, with works needing to be completed by March 2018, or else the permit again would have expired. The extent of the earthworks approved were to place fill on 4 metres outside the track to a maximum height of 0.60 metres and to the inside 2 metres of the track to a maximum height of 0.30 metres. Council Officers recommended approval with the understanding and agreement that the earthworks would be confined to the alignment of the existing horse track where it would not encroach upon areas of native vegetation. The owner at that time advised and agreed that no native vegetation will be removed or destroyed as a result of the application.

Since the second permit was issued in March 2016, there have been a number of allegations made by adjoining landowners that the permit applicant has not complied with the conditions of the permit, since the area of works carried out has exceeded what was originally approved. Subsequent investigations by Council Officers have confirmed that there appear to have been breaches of the permit, and Council Officers have commenced enforcement proceedings against the landowner.

It is worth noting that most of the fill placed on the land appears to be outside of the area previously approved. This is contrary to the intention of confining the works areas to areas on the land that would not encroach upon areas of native vegetation. Representatives of the landowner have indicated that a new planning application will be lodged shortly for another permit for the placement of clean fill on the land to reflect current works and proposed additional works on the land. This will enable the works already carried out to be legalized, offsite amenity impacts and further native vegetation removal can then be controlled via permit conditions.

The Application

The application proposes the consideration of a request to extend the time on planning permit PA2015/4962. The approved proposal under this planning permit can be described as follows:

- Upgrading of horse training track by raising surface level of track by 600-800 mm with imported clean fill, spreading and consolidating, and placing 100-150 mm crushed rock followed by 50-100 mm clean sand topping.
- Objective is to improve safety and period during which training can be undertaken. The track width will be about 12 metres with a grassed batter on each side.
- Cartage of filling and pavement materials will be along the existing access drive from Plumpton Road. The track will be watered to avoid dust and regularly graded while cartage is underway.

Refer to **Appendix 2** for site layout and cross-sectional plans.

Planning Controls

Zone	Clause 35.04 – Green Wedge Zone	Permit required for earthworks
Overlays	Clause 45.01 – Public Acquisition Overlay Schedule 3	Permit not required for earthworks.
	Clause 45.08 – Melbourne Airport Overlay Schedule 2	Permit not required for earthworks.
Particular Provisions	N/A	N/A
Planning and Environment Act 1987	Section 69	Before the permit expires, or within six months afterwards, the owner or occupier of land may ask the Responsible Authority to extend the permit. Given that the request to extend time was received by Council prior to the permit expiry date, the request has been submitted within the relevant statutory timeframe.

Is the land affected by a Restrictive Covenant?

The land is not affected by a Restrictive Covenant; however it is encumbered by a Section 173 Agreement. The proposal does not breach any of the requirements of the Section 173 Agreement.

Is the land of Cultural Heritage Sensitivity?

The land is not considered to be of cultural heritage sensitivity under the *Aboriginal Heritage Regulations 2007*.

2. Council and Wellbeing Plan Reference and Policy Reference

The Melton City Council 2017-2021 Council and Wellbeing Plan references:

3. A well planned and built City: A City with a clear vision to manage growth in a sustainable and accessible way.

3.1 *A City that strategically plans for growth and development.*

3. Financial Considerations

No Council related financial considerations are involved with the application.

4. Consultation/Public Submissions**Public notification of the application**

The application was not subject to notification given that the proposal is for the extension of a pre-existing permit.

Referral of the application

The application for the extension of time was not required to be referred to any other government agencies.

5. Issues

Criteria for extending the time of a permit

Section 69 of the *Planning and Environment Act 1987* enables the owner or occupier of the land to which a planning permit applies to apply for an extension of time prior to the permit expiring or within six months afterwards. The request to extend the permit has been received within the relevant statutory time frame.

The Act generally envisages a time limit be imposed on planning permits. The time limit condition that was originally imposed on the subject permit is consistent with most planning permits related to earthworks. The reason for imposing a time limit on planning permits is to ensure that permit holders do not 'warehouse' planning permits. The time limit enables Responsible Authorities to reconsider planning permits, where they have not been acted upon, taking into account any new policy or control that may have been introduced in the intervening period.

In considering the request for the time extension to the permit, it is necessary for Council to act reasonably and to base its decision on any relevant matters. The Supreme Court decision in *Kantor vs Murrumbidgee Shire* is the most comprehensive statement of matters to be taken into account as to whether or not to allow a request for an extension of time. The principles of this case law in respect to the treatment of an extension of time request are that the Responsible Authority:

- Should treat the applicant as being obliged to advance some reason or material in support of the grant of an extension.
- May rightly consider as a factor in favour of an exercise of discretion, that there has been no change in planning policy (including the planning scheme legislation) – but it does not follow that, absent a change in planning policy, an extension should normally be granted.
- Consideration as a factor tending against the grant of an extension, any material suggesting that an owner of land is intending to "warehouse" a permit – ie obtain a windfall by selling the land together with the benefit of an unused permit.
- Consideration of any intervening circumstances, such as if in seeking an extension of time, whether steps have already been taken to develop the land in accordance with the permit, this will count in favour;
- Consideration of the total amount of time which has elapsed when a request to extend is being considered. If a permit has been long held and not acted upon, this will tend against an application for an extension of time, particularly where other possible developments nearby are being stultified. The philosophy of the *Planning and Environment Act 1987* that a permit should not be unlimited as to time must also be borne in mind here.
- Consideration as to whether the time limit originally imposed was adequate in all the circumstances.
- Consideration as to whether the permit casts a considerable economic burden on the owner of the land, making it necessary for him or her to proceed slowly, whilst always intending to proceed with the development; and
- Consideration as to the probability that if a request to extend time were refused and a fresh application lodged, it would be granted. This factor would be particularly relevant where planning policy has remained unchanged and it is improbable that potential objectors to a fresh proposal will be able to raise any new considerations.

Change in circumstance

The owner has not taken steps to carry out the earthworks in accordance with the permit. Council received information that the works carried out on the subject land were not in accordance with the permit issued and plans endorsed. The application for the extension of time was put on hold because of the planning enforcement investigation to ascertain the validity of this claim.

The outcome of the planning investigation, reveals that areas of soil which were placed upon the track are between 85 metres and 165 metres wide, being up to 10 times the approved width. This fill is mostly on average 1 metre in height, and considered to change the rate of flow of water across the boundary due to the existing and previous natural contours of the land. Based on the above comments, the time under this permit should not be extended because the majority of the works carried out on the subject land is contrary to that which were approved under PA2015/4962. It is considered that this breach of the planning permit issued and plans endorsed is a change in circumstances of sufficient significance to suggest that the permit is no longer appropriate. Consequently a new application should be lodged and assessed appropriately.

The merits of the works carried out contrary to the permit issued require extensive consideration on the basis of factors not considered at the time the original application was lodged and approved. It is worth noting that the applicant is making an effort to lodge a fresh new application which will include both the works carried out on the subject site and any outstanding works, and this new application should go through the proper assessment process, including public notice.

6. Options

Council can either support the application by extending the life of the permit or not support the proposal by not granting an extension.

7. Conclusion

The application has been assessed against the State Planning Policy Framework, Local Planning Policy Framework, Zone/Overlay provisions, Clause 65 of the Melton Planning Scheme and the relevant case law.

It is considered that the proposal does not comply with the relevant requirements of the relevant case law.

Therefore, it is recommended that the application be refused as outlined in **Appendix 3**.

LIST OF APPENDICES

1. Locality Plan - dated 16 January 2019
2. Site layout and cross-sectional plans - dated 18 April 2016
3. Grounds for refusing to extend the life of the permit - undated

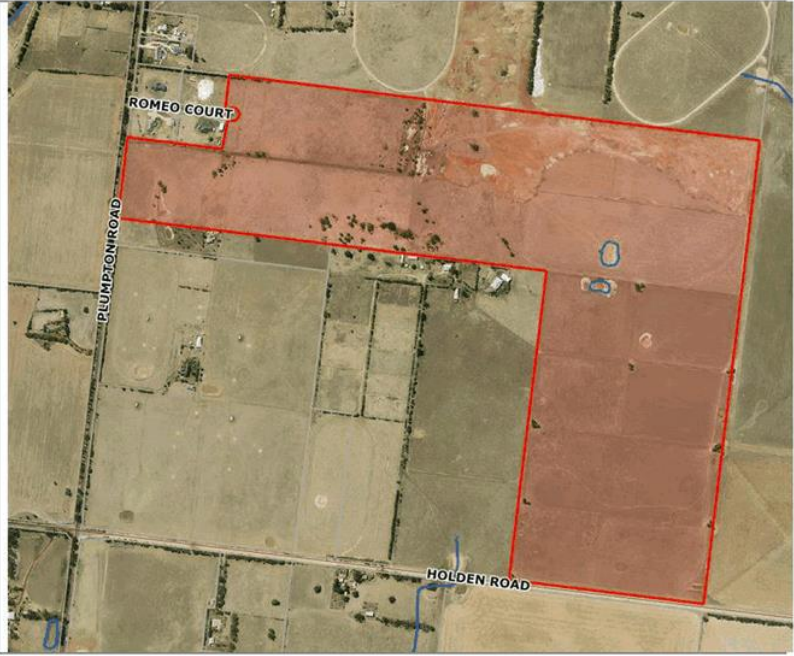
ORDINARY MEETING OF COUNCIL



4 FEBRUARY 2019

Item 12.9 Planning Application PA 2018/4962 - Extension of time to an existing permit authorising earthworks involving the placement of clean fill to re-grade an existing training track At 379 Plumpton Road, Diggers Rest

Appendix 1 Locality Plan - dated 16 January 2019

No:	PA 2015/4962/1
Address:	379 Plumpton Road Diggers Rest, Victoria, 3427
Proposal:	Earthworks involving the placement of clean fill on the land to re-grade an existing horse training track
Ward:	Watts



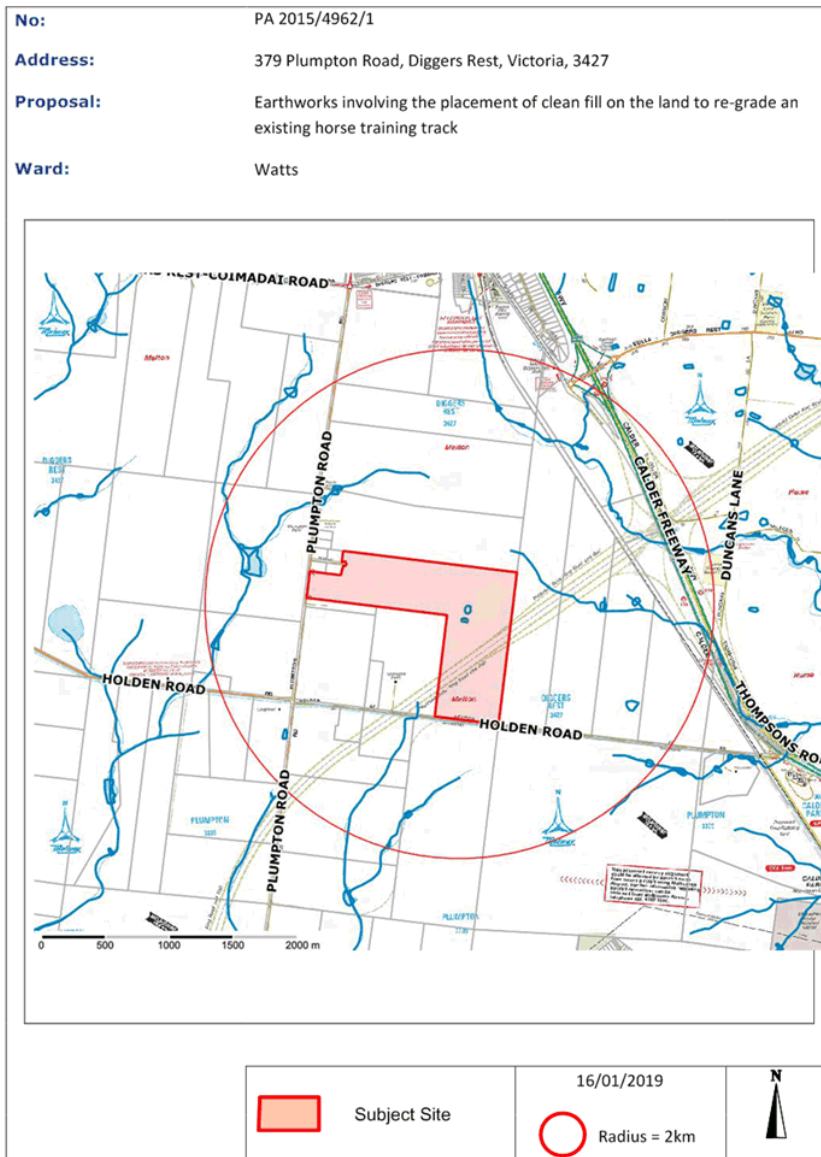
 Subject Site	16/01/2019	
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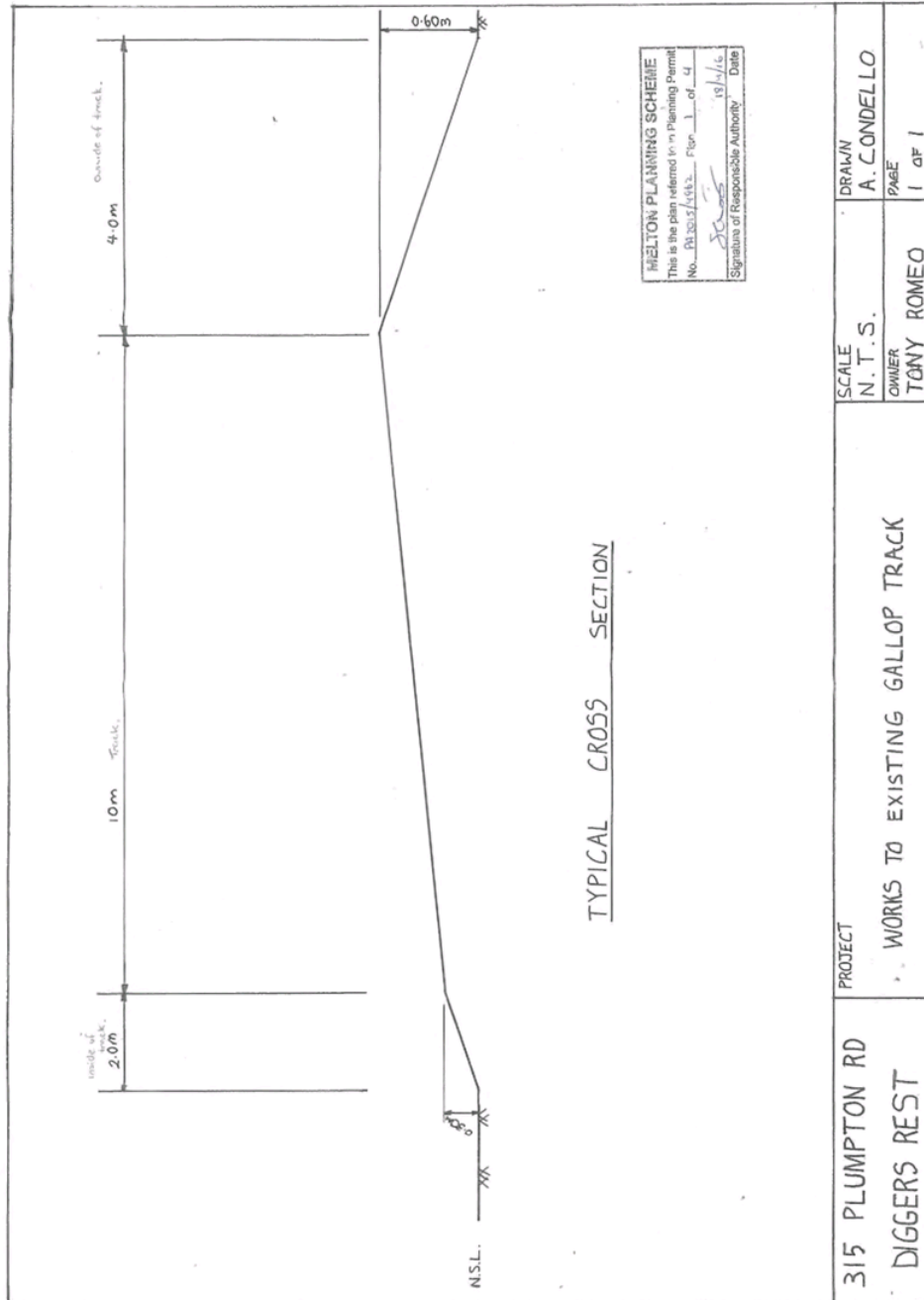


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Appendix 2 Site layout and cross-sectional plans - dated 18 April 2016



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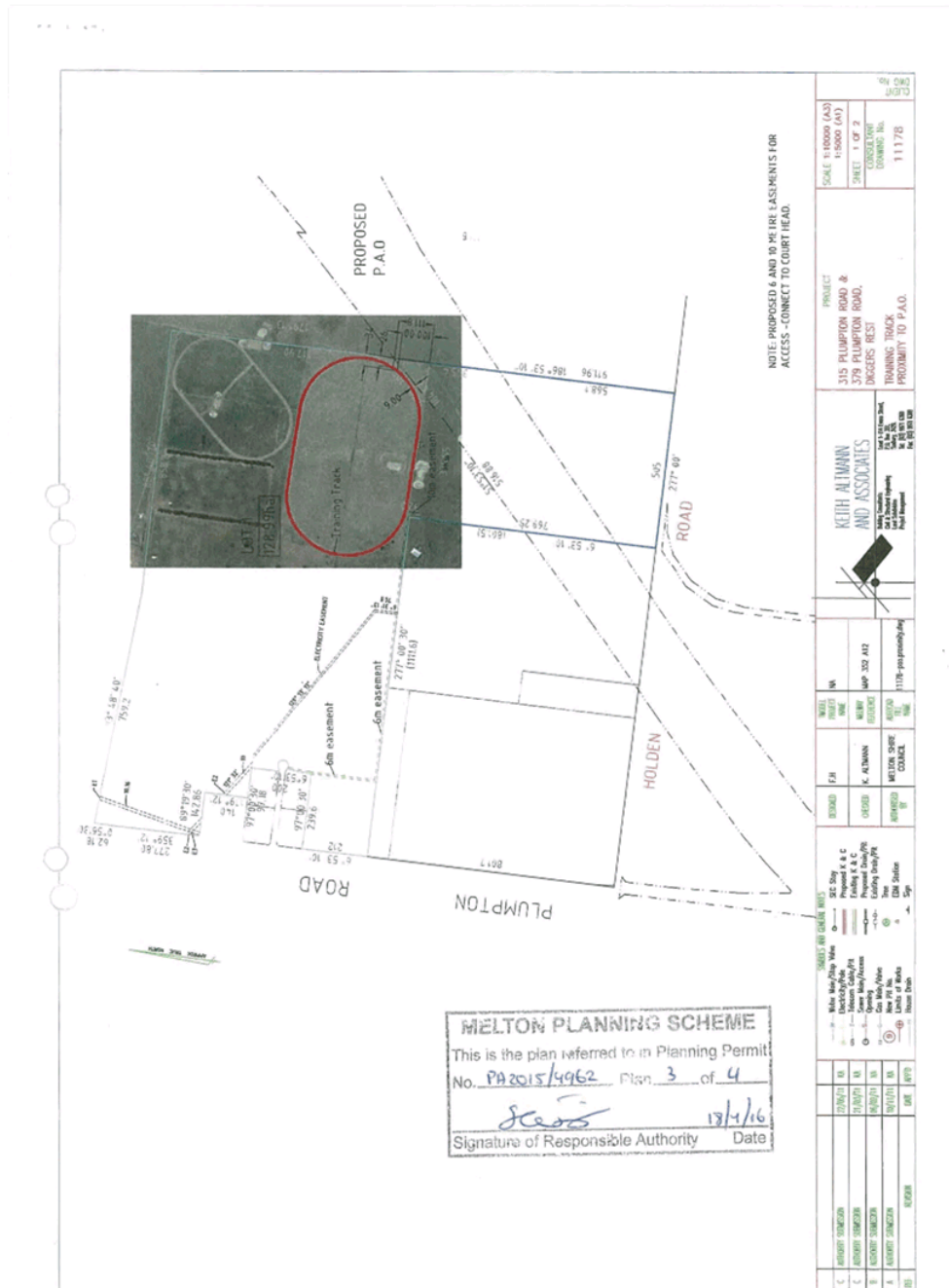


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Appendix 3 Grounds for refusing to extend the life of the permit - undated

Appendix 3 – Grounds for refusing to extend the life of the permit

- (1) The earthworks and fill carried out on the subject land is inconsistent with planning permit (PA2015/4962) issued and granting an extension of time permit will not result in an acceptable outcome.
- (2) There appears to have been no attempts made to enact the permit in accordance with the endorsed plans.
- (3) The time limit originally imposed on the permit have given sufficient time for the permit to be enacted, and the works to be completed.