

Email Letter

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From
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2/10/2007

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To
Nicole Maloney
Att: Nick Wimbush

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Our Ref MYM:MOS:5172424

Dear Ms Maloney

East Gippsland Shire Council
Ocean Access Boat Ramp, Bastion Point, Mallacoota

We refer to the letter of Mr Wimbush (Inquiry Chair) of 1 October 2007 in relation to the above matter and now respond to that letter.

Background

Before responding to the matters raised in that letter, it is necessary to set out a number of matters by way of background.

1. When the EES process began, East Gippsland Shire Council was asked to undertake the process as though it were "the proponent". It reluctantly agreed to do so at the insistence of the then Minister for Planning. Though the Council has been supportive of a proposal to improve ocean access at Mallacoota generally, it was reluctant to pursue the project in the shoes of the "proponent" in an EES process, but agreed to do so in order to provide a forum for the resolution of this issue in the absence of any other party (State Government or private developer) stepping forward to conduct

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the necessary investigation in the interests of the broader community;

2. The Council has committed significant resources to that role to date;
3. From the commencement of the process the Council has committed itself to the EES process that lead to exhibition and the adoption of the position contained in the statement placed on public exhibition;
4. The statement contained in the exhibited EES was arrived at following lengthy consultation with a range of government agencies brought together by DSE, who chaired the Technical Reference Group;
5. Some of the government agencies consulted are or will be ultimately responsible for approval of the project under various pieces of separate legislation;
6. From the Council's perspective, the purpose of that period of consultation was to investigate and resolve issues of fundamental concern to the extent possible as between the "proponent" and any approval agency subject to anything that might emerge during the Panel hearing or that might be recommended by the Panel following its consideration of third party submissions;
7. On 12 September 2007 the Council was made aware of the DSE submission for the first time – at the Panel hearing;
8. The Council agreed, through its barrister Mr Finanzio, that despite its lateness, the Panel was probably obliged to consider the submission and raised no objection, advising that the Council would consider its position in relation to the letter;
9. In substance, the DSE letter raises matters of fundamental objection to the proposal relating to:
 - Site selection; and
 - Level of construction.
10. It is accepted that some of the discrete matters raised by the DSE letter were raised during the course of consultation with the Department. That said, the only reason that the draft EES was exhibited in its current form was that it was understood by the Council that the proposal contained in it enjoyed, at the very least, in principle support from the range of government agencies who might later be called upon to grant approvals under various other legislation, in particular the DSE as a result of their responsibilities under the *Coastal Management Act 1995 (Vic)*;

11. In other words, had the objections now raised by the DSE letter been openly held at the time, the draft EES would either not have been exhibited in its current form or not have been exhibited at all. To be absolutely clear, we are instructed that this is not a case where the "proponent" has wilfully disregarded the advice of departmental officers and attempted to "go it alone" by exhibiting the draft EES in a form suitable to it with a view to aggressively litigating the question with the departmental officers.

As a consequence of these circumstances, Council has now been placed in an invidious position.

Council's position

On 12 September 2007 the Council received notice from a government department and ultimate approval authority which is to the effect that it has fundamental problems with the proposed development in its current location and form.

The Council has already committed considerable human and economic resources to the EES process up to and including the Directions hearing on 12 September 2007.

To properly prepare for and meet the case that has been advanced by third parties, the Council is about to incur considerable further cost.

The Council has no desire to embark upon the process of preparing for a full scale panel hearing in defence of a proposed form of development (and incurring the costs associated with that process) if the proposed development is opposed at a fundamental level by a government department and ultimate approval authority at this stage.

The Council needs an opportunity to further consult with DSE, to properly understand the nature of the objection, and to determine whether it should continue to pursue the project at all in light of the comments made by the DSE in its letter. The Council is unwilling to commit to the costly process of presenting a thorough case before the Panel until such time as these fundamental issues are clarified.

Council has written to DSE seeking to explore the matters raised in the DSE letter. Council has now received a response from the Department agreeing that further discussions should occur between the Council and the Department regarding the Department's submission to the Panel. We are not in a position to know what the results of those discussions will be or how long they will take. Obviously, whatever the result of those discussions, it will have a bearing on the Council's position with respect to if, and if so, what case it will present at any future hearing. As you may appreciate, the Council is unwilling in the short term to commit the resources

required to prepare for a case that may not happen at all. If the case does proceed, the Council is keen to ensure that it does not waste any resources.

The time required to explore these matters fully with the DSE is unknown. This is a case where both the proponent and the DSE are government bodies with reporting structures that are required to be observed. If experience is any measure, the time taken could be considerable.

Having set these matters out, we turn to Mr Wimbush's letter of 1 October 2007.

The Panel's letter dated 1 October 2007

Mr Wimbush correctly summarised the basis upon which our client has requested an adjournment. We trust that the above summary sets out in more detail the background to the situation.

Mr Wimbush stated in his letter that "no parties should make any assumptions at this stage as to whether the adjournment will or will not be granted" until presumably after the scheduled procedural hearing on 11 October 2007.

This observation presents Council with considerable difficulty.

The Council is understandably unwilling to commit resources to the preparation of evidence or any legal work that might be required in readiness for a hearing about the merits of the proposed development until it is certain that the expenditure of such resources will not be wasted. That cannot occur until after further consultation with DSE. Consultation with DSE is unlikely to be commenced, let alone completed, by 11 October 2007. In order to make the deadlines required by the Panel's current orders about the exchange of expert material, that work needs to have started already.

We note that Mr Wimbush has suggested the possibility of a late exchange of witness statements, but it is the Council's view, on advice, that this is unacceptable. The suggestion does not take account of any other commitments of the various experts and legal advisers which they may have in the two days prior to the hearing. Secondly, in a case where there are to be 16 opposing experts witnesses called against the Council case, more than a few days will be required to adequately review the material in order to open the case in any meaningful way.

Mr Wimbush says in his letter that the Panel would be interested to know whether the Council's request for an adjournment is made to either:

- Develop the arguments in support of Option 3 to refute in principle the issues raised in the DSE submission; or

- Consider the development of additional options or undertake additional work with DSE to resolve any points of disagreement and, if so, whether there will be a need for further exhibition.

In answer to the Panel's request the Council says that:

- Council does not intend to assume the responsibility of "the proponent" or pursue the project at all if, following further discussions, the DSE maintains its objections to the proposal in principle as Council considers that such a course would likely amount to a futile waste of its resources; and
- It is impossible at this stage to know the result of discussions between Council and DSE, but it is possible that as a result of discussions, there may be a need for further exhibition of material. Again, it is impossible to know the extent of any such material at this stage.

The Council appreciates the concern of the Panel and other parties to keep this process moving. That said it is to be borne in mind that the Council in this case is the proponent, reluctantly or otherwise. Without the proponent there can be no Panel hearing. The request for an adjournment has been made because the proponent/Council has taken the view that fundamental matters raised at a late stage by an approval authority need to be resolved one way or the other before it is prepared to commit human and economic resources to the preparation of any hearing. With respect, this is neither uncommon nor unreasonable.

It is for all of these reasons that the Council sought an adjournment of the hearing at the earliest possible time, and has suggested that there be a further directions hearing in November this year in order to address the future conduct of the matter – once more is known.

Since making its request for an adjournment, the Council has been publicly criticised by those against the proposed development for attempting to complicate the proceedings and make them more expensive. We hope that this letter clarifies that this could not be further from the truth.

We note that the Panel has set this matter down for a short directions hearing on 11 October 2007 and invited parties to indicate whether they propose to attend. By this letter we indicated that the Council will be represented by Mr Finanzio at the forthcoming directions hearing, should it proceed.

We maintain, for the reasons set out above, that it is unlikely that anything meaningful could be decided as to the future conduct of the case on that day, and that as such it will expose the parties to unnecessary expense.

We therefore respectfully repeat our original request for an adjournment of the substantive hearing of the EES in November 2007 to a date to be fixed, and further

request that any further directions hearing as at the future conduct of this matter occur in mid-November 2007.

Yours faithfully
Maddocks

A handwritten signature in black ink, appearing to read 'mmarshall'.

Transmission authorised by:
Maria Marshall
Partner