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In-House Memo
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Permit Conditions or s173 Agreements

Section 173 Agreements ('S173') are complex and often inappropriately sought or challenged, however they are a useful and powerful tool to secure long term planning objectives, we consider some cases that discuss how s173's apply.

A S173 is mechanism which allows Councils to enter agreements with land owners to, broadly, restrict the use and development of the land. A creature of the *Planning and Environment Act 1987* (Vic) S173's operate somewhat like a restrictive covenant, by applying to the Title of land, to serve as notification or warning to potential purchases that restrictions apply to the use or development of the land.

As he then was President of VCAT and Victoria Supreme Court Judge Morris noted in *Solid Investments Australia Pty Ltd v Greater Geelong CC*[1] that a S173 agreement:

> *"… may provide for various matters concerning the use and development of land or indeed any matter intended to achieve or advance the objectives of planning in Victoria."*[2]

Councils generally use S173 agreements sparingly and usually where a permit condition cannot achieve the desired outcome or as a site specific requirement before issuing a permit or approving plans. For example, applying a S173 for major 'Greenfields' development involving provision of large scale new roads or infrastructure. However a S173 may be unnecessary or excessive when applied to small scale developments.

In *Rose v Mornington Peninsula SC*[3], VCAT Member Leshinsky noted that:

> *"the requirement to enter into a section 173 agreement* [is] *onerous in circumstances where the outcomes to be achieved by the agreement are either unrelated to the use and development proposed or are adequately achieved by permit conditions."*[4]

However there is some lingering uncertainty or confusion about whether use and development conditions ought to be or could be stipulated using a S173 agreement on sensitive sites or whether they should merely be secured via permit conditions.

In *Taras Nominees Pty Ltd v Mornington Peninsula SC*[5], Member Keaney noted that:

> *"a section 173 agreement is more of a "last resort" tool than a first strike weapon. It is for special purposes and specific outcomes when an ordinary condition might not be able to deliver the certainty*

[1] [2004] VCAT 2356
[2] Ibid, at [45]
[3] [2013] VCAT 38
[4] Ibid, at [6]
[5] [2012] VCAT 1889

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that is required. It is best applied to a tailored outcome determined by the merits of nuances of a case."[6]

Kellehers Australia has vast experience with S173 agreements. One example of the specific purpose or outcome to be achieved by a 173 includes an agreement to indemnify Council against possible future actions arising from building over an easement, where a service authority has rights within the easement.

In *Lyons v Mornington Peninsula SC*[7], VCAT Members Cook and David warned that s173 agreements should not be employed as the primary mechanism for the control of land use[8]. They cautioned that S173 agreements 'should be used sparingly where additional security is needed to minimise the potential for land use conflicts or to maintain the orderly use of the land'[9]. However, in the circumstances of that case, a S173 agreement was agreed to by the parties, which VCAT noted as 'lock[ing] in' the requirement for a Farm Management Plan to ensure the agricultural/horticultural primary land use in a Green Wedge Zone would not be subservient.

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[6] Ibid, at [33]
[7] [2011] VCAT 1761
[8] *Lyons v Mornington Peninsula SC* [2011] VCAT 1761
[9] Ibid, at [26]