

BUILDING AND PROPERTY LIST

NOTICE OF APPLICATION AND NOTICE OF DIRECTIONS HEARING

South Gippsland Shire Council
9 Smith Street
LEONGATHA VIC 3953



VCAT FILE NUMBER: BP1255/2018
YOUR REFERENCE:

APPLICANT: Ansevata Nominees Pty Ltd (ACN: 004 686 121)
RESPONDENT: South Gippsland Shire Council

DATE: 10 September 2018
TIME: 9:30 am
PLACE: 55 King Street, MELBOURNE VIC 3000
ESTIMATED DURATION OF THE HEARING: 30 minutes

An application has been made against you to VCAT. A copy of the application is enclosed. VCAT has scheduled a directions hearing of the dispute on the date and time above.

On the day of the directions hearing

On the hearing day, arrive 30 minutes before your hearing time to make sure you allow enough time to pass through security.

Further information

At the directions hearing VCAT may explore methods to resolve the issues in dispute and make directions for the future conduct of the proceeding. VCAT may also make a determination on any legal issues raised. Parties are not expected to bring witnesses as the hearing of any evidence will be listed for a later date.

If appropriate, VCAT may refer the matter to a mediation or a compulsory conference.

You are required to attend the directions hearing personally, or through a representative. Please note that where a party fails to appear, VCAT may proceed to make orders and directions in that party's absence.

Please note that any request to adjourn the directions hearing must be made to VCAT immediately and should:

- only be made in exceptional circumstances;
- be made with the consent of the other party/ies, if possible; and
- specify the reasons for the request. Please note that giving the reason, 'by agreement of the parties', will not usually be regarded as sufficient reason.

An application for costs incurred by another party resulting from a late application to adjourn the hearing, or a failure to attend, may be considered at a subsequent hearing.

This is the only notice of the directions hearing which VCAT will send to you. We have notified the other party(ies) by a similar letter.

Any counterclaim should be filed as soon as possible with the appropriate application fee. Please send a copy of any counterclaim to all parties identified in the application at the time you send the counterclaim to VCAT.

Other Issues

We have asked the applicant to contact you to confirm you have received this letter.

Please ensure that VCAT is immediately notified in writing of any changes in your address or your solicitor's details.

An "Application for Directions/Orders" form is available on the VCAT website or by request from Registry. This should be used for all applications for further directions or interlocutory orders but is not required for an initial directions hearing where the 'usual' directions are sought.

Please contact our Customer Service team on the number below if you have any other queries or visit our website vcat.vic.gov.au.



Christopher Temperley
Registrar - Civil Division
Thursday, 23 August 2018

Application to Building and Property List (Retail Tenancies and Real Property)

Building and Property List, Victorian Civil and Administrative Tribunal
1300 01 8228 (1300 01 VCAT)
<http://www.vcat.vic.gov.au>

Fields marked with an asterisk (*) must be completed.

Do you need to complete this form?

- Use this form if you want VCAT to hear your retail tenancy, joint property or water disputes.
- If you do not understand any of the questions on the form or require further help phone the VCAT Customer Service on 1300 01 8228. For information on how hearings are conducted and access to legislation, please refer to the VCAT website.

Applicant details

Applicant 1

Is the applicant an individual or an organisation/company? * Individual Organisation/Company

Name (if the applicant is an individual)

Title * Surname * Given name 1 Given name 2

Address

Street address *

Suburb / Town * State * Postcode *

Address for service (if different from above)

Street address

Suburb / Town State Postcode

Contact details

Please provide at least one phone number *

Business phone After hours phone Mobile Fax number

 () ()

Area code Number Area code Number Number Area code Number

Email *

Organisation/Company (if the applicant is an organisation or company)

Organisation/Company *

Contact person (contact legal representation)

Name

Title

Surname

Given name 1

Given name 2

Address

Street address *

Suburb / Town *

State *

Postcode *

Address for service (if different from above)

Street address

Suburb / Town

State

Postcode

Contact details

Please provide at least one phone number *

Business phone

Area code Number

After hours phone

Area code Number

Mobile

Number

Fax number

Area code Number

Email

Applicant 2

Is the applicant an individual or an organisation/company? *

Individual

Organisation/Company

Name (if the applicant is an individual)

Title *

Surname *

Given name 1

Given name 2

Address

Street address *

Suburb / Town *

State *

Postcode *

Address for service (if different from above)

Street address

Suburb / Town

State

Postcode

Contact details

Please provide at least one phone number *

Business phone ()	After hours phone ()	Mobile	Fax number ()
<small>Area code Number</small>	<small>Area code Number</small>	<small>Number</small>	<small>Area code Number</small>

Email *
[]

Organisation/Company (if the applicant is an organisation or company)

Organisation/Company *
[]

Contact person

Name

Title	Surname	Given name 1	Given name 2
[]	[]	[]	[]

Address

Street address *
[]

Suburb / Town * [] State * [] Postcode * []

Address for service (if different from above)

Street address
[]

Suburb / Town [] State [] Postcode []

Contact details

Please provide at least one phone number *

Business phone ()	After hours phone ()	Mobile	Fax number ()
<small>Area code Number</small>	<small>Area code Number</small>	<small>Number</small>	<small>Area code Number</small>

Email
[]

Is the applicant represented? * Yes No

If Yes, please enter details in the next section.

Applicant's representative details

Name of law firm or other representative * Wisewould Mahony Lawyers	Representative's reference []
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Contact person

Title	Surname	Given name 1	Given name 2
[]	[]	[]	[]

Address (Please note, if there is a named representative all correspondence will be sent to your representative's address)

Street address (PO Box address or DX is acceptable) *

8/419 Collins Street

Suburb / Town *

MELBOURNE

State *

VIC

Postcode *

3000

Contact details

Please provide at least one phone number *

Business phone

()
Area code Number

After hours phone

()
Area code Number

Mobile

Number

Fax number

()
Area code Number

Email

Respondent details

Respondent 1

Is the respondent an individual or an organisation/company? *

Individual

Organisation/Company

Name (if the respondent is an individual)

Title *

Surname *

Given name 1

Given name 2

Organisation/Company (if the respondent is an organisation or company)

Organisation/Company *

South Gippsland Shire Council

Contact person

Name

Title

Surname

Given name 1

Given name 2

Mr

Tamlin

Tim

Address

Street address *

9 Smith Street

Suburb / Town *

LEONGATHA

State *

VIC

Postcode *

3953

Address for service (if different from above)

Street address

9 Smith Street

Suburb / Town

LEONGATHA

State

VIC

Postcode

3953

Contact details

Business phone

(03) 5662 9200
Area code Number

After hours phone

()
Area code Number

Mobile

Number

Fax number

()
Area code Number

Email

Respondent 2

Is the respondent an individual or an organisation/company? *

Individual

Organisation/Company

Name (if the respondent is an individual)

Title *

Surname *

Given name 1

Given name 2

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
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Organisation/Company (if the respondent is an organisation or company)

Organisation/Company *

Contact person

Name

Title

Surname

Given name 1

Given name 2

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
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Address

Street address *

Suburb / Town *

State *

Postcode *

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Address for service (if different from above)

Street address

Suburb / Town

State

Postcode

<input type="text"/>	<input type="text"/>	<input type="text"/>
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Contact details

Business phone

After hours phone

Mobile

Fax number

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Area code Number

Area code Number

Number

Area code Number

Email

Application for order

I apply to the Victorian Civil and Administrative Tribunal for the following orders: *

(describe the order sought and include reference to the Act (including the section) or other legislative provision giving power to make order sought):

- A. Injunction - s19(3) or s19(5) of the Water Act 1989 plus s123 of VCAT act 1998.
- B. Damages - s15(1), s16(1), s16(2) and s19 of the Water Act 1989.
- C. Interest
- D. Costs
- E. Such further or other Orders as to the Tribunal seems fit.

Reason for application

My reasons for making the application are: *

South Gippsland Shire Council are in breach of:

- Section 15(1) of the Water Act 1989 - please refer to attached Points of Claim;
- Section 16(1) of the Water Act 1989 - please refer to attached Points of Claim; and
- Section 16(2) of the Water Act 1989 - please refer to attached Points of Claim.

Are you seeking an injunction (an urgent order to stop a party doing something or to compel a party to do something)? *

Yes No

If Yes, there is an additional fee if you are applying for an injunction.

Supporting documents

You must provide documents that support your application. For further information please refer to the Application Guide.

- **Supporting documents**
Any documents that support your application.

If providing attachment electronically, please supply as: docx;xls;doc;pdf

Acknowledgement

I understand and acknowledge that:

- To the best of my knowledge, all information provided in this application is true and correct and that no details relevant to the application have been left out.
- I approve the information that has been provided.
- It is an offence under section 136 of the *Victorian Civil and Administrative Tribunal Act 1998* to knowingly give false or misleading information to VCAT.

By ticking this checkbox I confirm that I have read and understood all the statements above *

Full name of person completing this application *

Date *

[REDACTED]

20.08.2018

Signature of person completing this application *

[REDACTED]

Privacy statement

The information collected in this application will be used to assess the application and determine eligibility to initiate a proceeding at the Victorian Civil and Administrative Tribunal (VCAT).

The Victorian Civil and Administrative Tribunal Act 1998 governs what information is available to the public.

The Information Privacy Act 2000 (the Act) and the Victorian Privacy Principles set out the requirements that persons must abide by. Section 10 of the Act refers to Courts and Tribunals and the exemptions that apply to them.

For further information regarding VCAT's privacy policy, please visit the VCAT website.

Lodgement

You can lodge this completed form and any attachments online or by:

Mailing it to:

The Principal Registrar
Victorian Civil and Administrative Tribunal
GPO Box 5408 Melbourne VIC 3001

Delivering it in person to:

The Principal Registrar
Victorian Civil and Administrative Tribunal
Ground Floor, 55 King Street
Melbourne VIC 3000
Office hours: 9am - 4.30pm Monday to Friday
(closed public holidays)

Website: <http://www.vcat.vic.gov.au>

VICTORIAN CIVIL AND
ADMINISTRATIVE TRIBUNAL
MELBOURNE REGISTRY
BUILDING AND PROPERTY LIST

No:

BETWEEN:

BETWEEN

ANSEVATA NOMINEES PTY LTD

Applicant

(ACN 004 686 131)

-and-

SOUTH GIPPSLAND SHIRE COUNCIL

Respondent

CLAIM

Date of Filing:

Filed on behalf of: The Applicant

PO BOX 239
Collins St West
Melbourne VIC 8007
Solicitors Code: 9534
Tel: (03) 9629 8333
Fax: (03) 9629 4035
Reference: [REDACTED]

Prepared by:

Wisewould Mahony Lawyers
Level 8, 419 Collins Street
Melbourne Vic 3000

NATURE OF CLAIM

- A. The Applicant makes this claim pursuant to sections 15(1), 16(1), 16(2) and 19 of the *Water Act 1989 (Act)* on the grounds that the Respondent **(Council)**:
- (a) in breach of subsection 15(1) of the Act, has and continues to pollute water, being the water in the dam located on the land in Certificate of Title Volume 10032 Folio 335 (**the basin land**, described in paragraph 4 of the Points of Claim, below), and by that act has caused and continues to cause economic loss to the Applicant;
 - (b) further and alternatively, in breach of subsection 16(1) of the Act, has caused and continues to cause a flow of water which was and is not reasonable from the land, constituted by drains owned by the Council, or alternatively the Promontory Views Estate, Walkerville, onto the land

constituted by the dam on the basin land, and by that act has caused and continues to cause economic loss to the Applicant.

- (c) further and alternatively, in breach of subsection 16(2) of the Act, has interfered and continues to interfere with flows of water which were and are reasonable from the land constituted by the dam located on the basin land onto the Applicant's Land and by that act has caused and continues to cause economic loss to the Applicant.

B. The claim is for:

- (a) damages; and
- (b) an order pursuant to subsection 19(3) or subsection 19(5) of the Act or otherwise that Council carry out, within a reasonable period of time, such works as are reasonably necessary to prevent Council from continuing:
 - (i) to pollute the water in the dam on the basin land;
 - (ii) to cause flows of water which are not reasonable from the land constituted by the drains owned by or vested in Council or alternatively the Promontory Views Estate, Walkerville onto and into the dam on the basin land; and
 - (iii) to interfere with flows of water which are reasonable from the dam on the basin land onto the Applicant's land.

POINTS OF CLAIM

Parties

- 1. At all material times the Applicant:
 - (a) is and was incorporated pursuant to law;
 - (b) is and was capable of suing in its own name;
 - (c) until on or about 8 May 1990, was the owner of the whole of the land known as "Marapana" comprising approximately 404 hectares at Loop Road, Walkerville in the State of Victoria ("**the Land**");

Particulars

The Land was then more particularly described in Certificate of Title Volume 9828 Folios 950 and 951.

- (d) on and after about 8 May 1990, is and was the owner of all of the Land save for an area of 2.685 hectares of the Land sold to Shire of Woorayl (**the Shire**) as set out in paragraph 4 hereof ("**Applicant's land**");

Particulars

The Applicant's land is now more particularly described in Certificate of Title Volume 10337 Folios 327 to 331

- (e) used and uses the Applicant's land for agricultural purposes including grazing cattle and sheep and operating a vineyard.

2. At all material times Council is and was:

- (a) a body corporate capable of being sued in its own name;
(b) responsible for the performance of the functions and powers conferred upon it by the *Local Government Act* 1989 (Vic) within its municipal district; and
(c) the successor in law of the Shire.

3. In or about 1988 the Shire approved a scheme for the construction of stormwater drainage and a retarding basin (**dam**) to receive storm water and treated septic effluent from the area known as Promontory Views Estate at Walkerville (the **Estate**) within the municipality of the Shire.

Particulars

The Estate presently covers approximately 25 ha, including 380 allotments, of which approximately three quarters have dwellings. There is no reticulated water supply or sewerage.

Land Sale Agreement

4. For the purpose of acquiring a site for the construction of the dam, by an agreement dated 8 May 1990 made between the Applicant and the Shire (**the land sale agreement**) the Shire acquired from the Applicant a part of the Land (**the basin land**).

Particulars

The basin land, prior to the acquisition, was part of the land more particularly described in Certificate of Title Volume 9828 Folio 950. The basin land constituted 2.685 hectares and is now more particularly described in Certificate of Title Volume 10032 Folio 335. The land sale agreement is in writing. A copy of the land sale agreement is in the possession of the solicitors for the Applicant and may be inspected by appointment.

5. There were express written terms of the land sale agreement, inter alia, that:
- (a) the Shire would pay to the Applicant the sum of \$16,000.00;
 - (b) the Shire would not use the basin land for any purpose other than the construction and maintenance of a dam and the collection, storage and disposal of water thereto and therefrom and any purpose necessarily incidental thereto (SC 3(a));
 - (c) the Shire would allow the Applicant to take from the dam water for the purpose of irrigation and /or watering of stock on the Applicant's Land or any part thereof without causing nuisance or negligence provided that not more than 50% of the water then contained in the dam shall be drained therefrom at intervals of not more than 30 days (SC 3(b));
 - (d) the Shire would allow the Applicant to construct or place on or within the water of the dam such pipes, pumps, equipment and facilities as were reasonably necessary to the purpose described in paragraph 5(c) above;
 - (e) the land sale agreement was conditional upon the execution and exchange by both parties of the Agreement a copy of which was annexed to the land sale agreement (**the water agreement**) (SC 2(a))

Water Agreement

6. After the land sale agreement, on or about 8 May 1990 the Applicant and the Shire entered into the water agreement.

Particulars

The water agreement is in writing and is dated 8 May 1990. A copy of the water agreement is in the possession of the solicitors for the Applicant and may be inspected by appointment.

7. It was a recital to the water agreement that the Shire would make available all water to be stored in the dam free of charge to the Applicant for irrigation and stock watering purposes in accordance with the water agreement (paragraph E)
8. There were express written terms of the water agreement, inter alia, that:
 - (a) the land sale agreement was conditional upon the execution and exchange of the water agreement;
 - (b) in part consideration for the transfer of the basin land from the Applicant to the Shire and conditionally upon such transfer, the Shire agreed and granted to the Applicant the right to the Applicant free of charge to take water from the dam in such quantities and at such times as the Applicant required for irrigation of and watering of stock on the Applicant's land without causing nuisance or negligence provided that not more than 50% of the water then contained in the dam shall be drained therefrom at intervals of not less than 30 days (cl.41) (**the water entitlement clause**);
 - (c) the Shire shall at least 6 times per year at no less an interval that one calendar month, and at such other times when the Applicant has reasonable grounds to believe that the water of the dam may be polluted, take samples of such waters and have them tested for biological and chemical pollution in accordance with methods recommended by the Environment Protection Authority and make the

results of such tests available to the Applicant (cl.8) (**the sampling clause**);

- (d) the Shire will take all necessary action to prevent untreated septic tank effluent being discharged into the dam (**the discharge of effluent clause**);
- (e) the Shire gave no warranty or representation that the waters from the dam will be suitable for any purpose other than the irrigation of pasture and crops and watering of stock (cl.6) (**the warranty clause**).

9. Further, there was and is an implied term in the water agreement that the Shire warranted that the waters in the dam would be suitable for the purpose of the irrigation of pasture and crops and the watering of stock (**the term as to water quality**).

Particulars

The term as to water quality term is implied by law from the warranty clause and the sampling clause and to give business efficacy to those clauses.

Construction of dam and drains

10. In or about the early 1990's the Shire:
- (a) constructed or caused to be constructed on the basin land a dam of approximately 120 meters by 200 meters and designed to have a holding capacity of about 15 megalitres;
 - (b) constructed or caused to be constructed a stormwater drainage system (**Council's drains**) to receive and transport storm water and treated septic effluent from the Estate;
 - (c) authorised, and continue to authorise, owners and occupiers of land within the Estate to discharge their storm water and septic effluent into the Council drains;
 - (d) constructed the Council drains so that the storm water and septic effluent carried by the drains flowed into the dam.

Subsection 15(1) claim

11. At all material times the Council drains have collected and carried storm water and septic effluent from the Estate and flowed, directly or indirectly, into the dam (**the flows**).
12. The flows have altered the chemical and biological properties of the water in the dam.

Particulars

Since about 2016 the water in the dam has E Coli and faecal coliform levels above the levels previously identified.

13. By reason of the matters set out in paragraph 12 above, the water in the dam has been made less fit for any beneficial purpose for which it is, or may reasonably be expected to be, used.

Particulars

The water in the dam is less fit for irrigation purposes and livestock watering. By reason of the water agreement, the water in the dam was or may reasonably be expected to be used for irrigation purposes and livestock watering.

14. By reason of the matters set out in paragraphs 12 and 13 above, for the purposes of s. 15(1) (c) of the Act, the Council has polluted and continues to pollute the water in the dam.
15. By polluting the water in the dam the Council has caused and continues to cause the Applicant to suffer economic loss.

Particulars

The Applicant will provide full particulars of its loss and damage prior to trial.

16. By reason of the matters set out in paragraphs 11-15 above, pursuant to s.15 (1) of the Act, the Council is liable to pay damages to the Applicant in respect of its injury or damage.

Subsection 16(1) claim

17. Further and alternatively, by reason of the matters set out in paragraphs 11 and 12 above, there was and are flows of water from the Council drains or alternatively the land constituted by the Estate onto the land constituted by the dam **(the contaminated water flows)**.
18. The contaminated water flows are not reasonable flows.

Particulars

The Applicant refers to and relies upon section 20 of the Act and in particular refers to the fact that for the purposes of section 20 "all the circumstances" include that the flows contain contaminants and are flows in contravention of the term as to water quality and the warranty clause. The Applicant refers to and relies upon s.20 (1) (e) and (g) of the Act.

19. By reason of the warranty clause and the discharge of effluent clause, Council was and is under duty to put in place a monitoring system to ensure, and to ensure, that the stormwater and effluent transported in the Council drains to the dam did not contain effluent which contained E Coli and faecal coliforms inconsistent with the use by the Applicant of the water in the dam for the purpose of irrigating pasture and crops and the watering of stock **(duty)**.
20. In breach of the duty Council did not put in place a monitoring system to ensure, nor did it ensure, that the stormwater and effluent transported in the Council drains to the dam did not contain effluent which contained E Coli and faecal coliforms inconsistent with the use by the Applicant of the water in the dam for the purpose of irrigating pasture and crops and the watering of stock **(Council's breach of duty)**.
21. Council caused the contaminated water flows by:
 - (a) Council's conduct set out in paragraph 11 above;
 - (b) Council's breach of duty

22. The water constituted by the contaminated water flows has caused and continues to cause damage to the Applicant and has caused the Applicant to suffer economic loss.

Particulars

The Applicant refers to and repeats the particulars subjoined to paragraph 15 above

Subsection 16(2) claim

23. Further and alternatively:

- (a) by the water entitlement clause, the Applicant was and is entitled to take water from the dam which was suitable for the irrigation of pasture and crops and watering of stock;
- (b) by the warranty clause and the term as to water quality, the Council was under a duty to ensure that the water available to be taken by the Applicant pursuant to paragraph (a) above was suitable for the irrigation of pasture and crops and watering of stock

24. The flows of water which the Applicant was entitled to take and took from the dam for the purpose of the irrigation of its pasture and crops and the watering of its stock constituted flows which are reasonable (**reasonable flows**).

Particulars

The flows were reasonable because they were suitable for the irrigation of pasture and crops and the watering of stock. The Applicant refers to and relies upon s.20 (1) (e) and (g) of the Act.

25. Council interfered with the reasonable flows by failing to ensure that the water available to be taken from the dam by the Applicant was suitable for the purpose of irrigating pasture and crops and the watering of stock.

26. As a result of that interference water has caused and continues to cause damage to the Applicant and has caused the Applicant to suffer economic loss.

Particulars

The Applicant refers to and repeats the particulars subjoined to paragraph 15 above

Ongoing and Future Damage

27. In the premises the Applicant apprehends that unless restrained by this Tribunal the Council will continue to:

- (a) pollute the water in the dam;
- (b) cause the contaminated flows, and
- (c) interfere with the reasonable flows

and cause the Applicant loss and damage.

28. It is just and convenient that the Tribunal make an order or orders restraining the Council, after the expiration of a reasonable period to carry out works, from continuing to pollute the water in the dam, causing the contaminated flows and interfering with the reasonable flows.


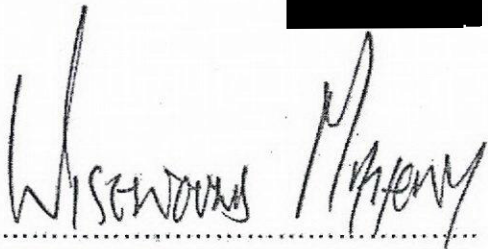
AND THE APPLICANT CLAIMS

- A. Damages.
- B. An order pursuant to section 19(3) or 19(5) of the Act, or alternatively an injunction pursuant to section 123 of the *Victorian Civil and Administrative Tribunal Act* 1998, requiring Council, by its servants, agents or howsoever otherwise, to carry out, within a reasonable period of time, such works as are reasonably necessary:
 - (i) to prevent Council from continuing to pollute the water in the dam located on the land in Certificate of Title Volume 10032 Folio 335;

- (ii) to prevent Council from continuing to cause flows of water which are not reasonable from the Council drains or alternatively the land constituted by the Promontory Views Estate, Walkerville onto land constituted by the dam located on the land in Certificate of Title Volume 10032 Folio 335
- (iii) to prevent Council from interfering with the reasonable flows from the dam onto the Applicant's land.

- C. Interest.
- D. Costs.
- E. Such further or other Order as to the Tribunal seems fit.

Dated:

Wisewould Mahony

Legal practitioners for the Applicant