Beveridge Williams & Co Pty Ltd
Development & Environmental Consultants

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VCAT – Planning and Environment List Update

Recent Cases & Decisions

Neil Haydon, Senior Town Planner & Solicitor – Planning and Environment

Beveridge Williams & Co Pty Ltd - Ballarat

Introduction

1. This key note address is intended to provide you with a brief update on recent planning and environment cases and decisions at VCAT, highlighting some key issues and practical implications.
2. Most of the cases I will refer to are examples of how the Tribunal is interpreting and applying various policy provisions in planning schemes, in particular environmental policies.

Staged Subdivisions

3. The Tribunal's decision in *Moorabool Shire Council v Millar & Merrigan Pty Ltd* (29 March 2010) is a significant decision for subdivision planners, surveyors and developers alike. It provides authority where there was previously none, about the application of s. 68 of the *Planning and Environment Act* 1987 (Act) to staged subdivision permits without an expiry condition.
4. The decision involved an application for a declaration brought by Moorabool Shire Council in respect of a 2002 permit for a staged subdivision. The permit contained no expiry condition. At the time of the hearing, plans for seven stages of the subdivision had been certified and Statements of Compliance had issued for six (6) of those stages. Plans for stages 8 and 9 had been submitted for certification. At that point, Council became concerned that the permit had expired under section 68 (1) (aa) of the Act because all of the stages had not been certified within 2 years of the grant of the permit. Finding no case authority which clarified the issue, Council sought a declaration from the Tribunal that the permit had expired.

5. At the hearing, the permit holder argued that so long as the first stage of a staged subdivision is certified within 2 years of the issue of the permit, subsequent stages can then be certified during the 5 year period between certification of the first stage and the time required for its completion. It suggested that this process could be repeated for each subsequent stage.

6. The Tribunal disagreed and declared that the permit had expired. The Tribunal read both of s 68(1) (aa) and 68(3A) (b) of the Act as requiring all stages of a subdivision to be certified within two (2) years of the issue of the permit unless the permit specifies otherwise.

7. The Tribunal concluded:

> "*14. It is clear from section 69(2), which relates to extension of time, that the responsible authority may extend the time within which any stage of a development is to be completed or within which a plan under the Subdivision Act 1988 is to be certified.*
>
> *15. Accordingly, I find that all stages of the subdivision should have been certified within 2 years of the issue of the permit on 22 May 2002. Only some stages were certified within that time. Where a stage of the subdivision was certified within 2 years of the issue of the permit, the permit does not expire until 5 years from the certification of the last of the plans of the subdivision so certified"*

8. The message from the above case is now crystal clear. If the time afforded in the Act is unrealistic, a condition of the permit should clearly specify an alternative time line, particularly subdivisions that contain several stages (e.g. 10 stages resulting in 1000 allotments). Where a permit does not contain a condition dealing with the issue, developers should be mindful of the early expiry of the permit and seek an extension of time.

Notes:

Please find below some suggested permit expiry conditions for staged subdivisions put forward by the Tribunal in the case of *Moorabool Shire Council v Millar & Merrigan Pty Ltd*:

Time Limit

This permit will expire if:

- *(a) the plan of subdivision for the first stage is not certified within 2 years of the date of this permit; or*
- *(b) the plan of subdivision for any subsequent stage is not certified within 2 years of the date of certification of the previous stage of the subdivision; or.*
- *(c) the registration of any stage of the subdivision is not completed within 5 years of the date of certification of the plans of subdivision.*

The responsible authority may extend the time if a request is made in writing before the permit expires or within three(3) months afterwards.

In the case of *Southern Sustainable Developments v Casey CC* [2006] VCAT 1183, the following example of a condition for time limits for staged subdivision was included:

This permit will expire if:

- *(a) the subdivision is not started within two years of the date of this permit; or*
- *(b) the subdivision is not completed within five years from the date of starting; or*
- *(c) Where the subdivision is to be developed in stages, the time specified for the commencement of the first stage is two years from the date of this permit. The time specified for the commencement of any subsequent stage is ten years from the date of this permit and the time specified for the completion of each stage is five years from the date of its commencement.*

The Responsible Authority may extend the periods referred to if a request is made in writing before he permit expires of within three (3) months afterwards.

Public Open Space

9. This recent case concerns a decision about planning principles in *Stupak v Hobsons Bay CC,* which examines Section 18 of the *Subdivision Act* 1988 and the difference between the need for more public open space and the percentage of the contribution required. With respect to the percentage of contribution, the Tribunal noted the lack of guidance provided in the *Subdivision Act* 1988 for the exercise of discretion. On the issue of quantifying the percentage of open space contribution that should be required under Section 18(1), the Tribunal said:

> *"17. The applicant argued that small subdivisions, which result in only a modest increase in population, should pay less than large subdivisions. In fact they do – 5% of land in a subdivision worth $500,000 is substantially less that 5% of a site valued at $5 million. What the applicant has failed to convince me of is why the amount paid by a small subdivision should be proportionally less than a large subdivision. Why should the percentage be 5% in the case of a subdivision of 100 lots, or even 10 lots, compared with a percentage of only 2% in the case of a subdivision of three lots?"*

10. The Tribunal concluded in *Stupak* that there was no basis why the public open space contribution should be reduced from 5% to 2%.

11. A similar approach has been taken in other Tribunal decisions. For example, in *Parry v Bass Coast SC,* the Tribunal said:

> *"52. In my view, the open space requirements should not be a "free for all" where arbitrary amounts are bandied around as negotiating tools. If the principle is accepted that open space provision is a benefit to the community, and that the open space area will need to be developed and maintained, then it seems to be an entirely proper use of the planning system to levy a set amount for those who are improving their land (and generating more people) and then to specifically apply that amount to an equitable open space provision. The speculative exercise of picking a figure somewhere between zero and five has, and will, lead to endless doubt and inconsistency. A system that expressly locked in the 5% would remove that speculation"*

Climate Change Impacts

12. Planning to accommodate the future implications of climate change continues to create tensions between development proposals and appropriate responses to planning policy.

13. The objective for coastal inundation and erosion under State Planning Policy (Clause 13.01-1) is to plan for and manage the potential coastal impacts of climate change. The strategies include:

- In planning for possible sea level rise, an increase of 0.2 metres over current 1 in 100 year flood levels by 2040 may be used for new development in close proximity to existing development (urban infill);

- Plan for possible sea level rise of 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change;

- Consider the risks associated with climate change in planning and management decision making processes;

- For new greenfield development outside of town boundaries, plan for not less than 0.8 metre sea level rise by 2100;

- Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk;

- Ensure that development or protective works seeking to respond to coastal hazard risks avoids detrimental impacts on coastal processes;

- Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulphate soils, bushfire and geotechnical risk.

14. Several recent decisions have held that the use of fill to deal with worse-case flooding potential is a problematic and artificial approach that should generally be avoided. As the Tribunal said in *Lake Park Holdings Pty Ltd v East Gippsland SC:*

> *"30 We find the applicant's proposal of adaptations to effectively meet the Identified future risk via land filling is an inappropriate response. In our opinion, the proposal to fill part of the land is modifying the natural environment to fit the development. We are of the view this is contrary to the policies in the planning scheme and the Victorian Coastal Strategy (VCS)"*

15. In that case, the Tribunal found that whilst the land could be subdivided, the proposed layout and design of the subdivision was not appropriate in the context of its setting, which was adjacent to the Gippsland Lakes. It refused to grant a permit but suggested that a revised proposal, which took account of the Tribunal's detailed comments and better responded to the characteristics, constraints and setting of the land, might be approved.

Bushfires

16. In November 2011, Amendment CV83 introduced the Bushfire Management Overlay to replace the previous Wildfire Management Overlay and a new Particular Provision (Clause 52.47) about *Bushfire Protection: Planning Requirements* into the Victoria Planning Provisions. The Amendment is a response to implementing the recommendations of the 2009 Victorian Bushfires Royal Commission and is intended to strengthen consideration of bushfire risk and community resilience to bushfire.

17. The purpose of the Bushfire Management Overlay is not only to identify areas where the bushfire hazard requires specified bushfire protection measures, but:

> To ensure development does not proceed unless the risk to life and property from bushfire can be reduced to an acceptable level.

18. Likewise the purpose of the new particular provision in Clause 52.47 is:

> To ensure that development is only permitted if the risk to life, property and community infrastructure can be reduced to an acceptable level.

19. Member Martin's decision in *Land Management Surveys v Strathbogie SC* is a useful survey of recent Tribunal decisions dealing with bushfire issues. Some of the key points arising from these decisions include that:

- There are real limits on the ability of landowners to safely subdivide and/or develop lots in more remote and inherently fire-prone areas. These issues can particularly arise in heavily vegetated areas, where there is a long private driveway to reach a proposed dwelling location, where the access road to the subject land or driveway is sandy and/or rough, in areas with steep, narrow and/or unsealed roads and/or with areas with very limited road network options for escaping a bushfire.

- The Tribunal itself may find the bushfire risk to be unacceptable even where the CFA does not oppose the proposal or where the subject land is not affected by a Wildfire Management Overlay or Bushfire Management Overlay.

- There may be different considerations at play in terms of how to deal with the bushfire risk for property, compared to the bushfire risks for the loss of human life.

- The adequacy of proposed buffer areas or "defendable space" is critical. A potential complication is whether the defendable space which an applicant wished to rely upon falls within the boundary of the subject land, or whether this space includes other separately owned land where the applicant cannot guarantee how well the vegetation on that other land will be managed.

- Priority may need to be given to choosing the best part of the site for minimizing bushfire risks, regardless of the available views etc. An owner who insists on doing otherwise can leave the planning decision maker with little choice but to refuse the proposal as involving excessive bushfire risk.

- There may be tension between the bushfire risk management benefits of clearing substantial vegetation around the site of a proposed or likely future dwelling vis-à-vis other overlay controls seeking to protect the local conservation, biodiversity or landscape values and/or the need for net gain offset planting.

20. All of the decisions referred to in the *Land Management Surveys* case are worth reading for the insights they shed on the Tribunal's approach to the very challenging and complex issues associated with bushfire risks. As the Tribunal notes in *Robertson v Mornington Peninsula SC,* the planning scheme requires at Clause 65 that the decision-maker must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of the scheme. It is evident from the outcomes of decisions that increasingly the Tribunal is prepared to take a tough line and find the development proposals may not be acceptable when the bushfire risks are too great.

21. The *Land Management Surveys* case itself involved a section 80 application for review of conditions in a permit. The land consisted of four (4) lots and the council granted a permit to subdivide it into six (6) lots subject to conditions, including two (2) conditions requiring the applicant to extensively upgrade a lengthy section of two (2) abutting roads for a distance of several kilometers. The council's concern was that there needs to be sufficient trafficable width along the relevant sections of both roads for two (2) cars and/or a car and a fire tanker to be able to pass each other in the event of a major bushfire event where there is thick smoke and more limited visibility. The council said that the requirement to upgrade the two roads was central to its grant of the permit. The conditions could not be severed and in the event that the appeal against them was successful, the permit should be cancelled.

22. Member Martin found that the conditions were invalid. He found that the permit would not have been granted without the conditions. Accordingly, pursuant to section 85(1) (g) of the *Planning and Environment Act 1987*, he cancelled the permit.

23. This decision has been appealed to the Supreme Court. It remains to be seen what the final outcome will be on the facts of the case. However, that does not detract from the review of other Tribunal decisions in Member Martin's decision.

Water Catchments and the Precautionary Principle

24. The precautionary principle is a fundamental principle of decision-making embodied in all planning schemes and lying at the heart of many Tribunal decisions, particularly relating to environmental issues.

25. Some of you may be familiar with the *Rozen* cases. The *Rozen* saga has involved two (2) Tribunal decisions in 2007 and 2009 and two (2) Supreme Court decisions in 2008 and 2010. The decisions are important for the Supreme Court's examination of the precautionary principle and the Tribunal's application of it, and for the implications the decisions have for the protection of water catchments. In particular, the decisions have regard to and apply the Ministerial guidelines titled *Guidelines for Planning Permit Applications in Open, Potable Water Supply Catchments (May 2009) (*known as "the Guidelines").

26. In the second *Rozen* decision, the Tribunal considered the meaning of the precautionary principle and the assessment of cumulative risk in the context of the Guidelines and the *Australian Drinking Water Guidelines.* It is concluded that in the interests of net community benefit and sustainable development, a permit for only one dwelling on the combined area of the subject land of 72 hectares should be granted. The Tribunal said that each of the individual guidelines, including the guideline regarding a dwelling density of 1:40ha, should be applied cumulatively; and that the Guidelines should take priority over competing policy objectives or decision guidelines in the planning scheme in the event of a conflict. The Tribunal endorsed guiding principle 1 of the *Australian Drinking Water Guidelines* that protection of water sources is a paramount importance and must never be compromised.

27. An appeal against this decision to the Supreme Court was rejected.

28. Since the decisions of the Supreme Court and the Tribunal in the second *Rozen* case, various divisions of the Tribunal have relied upon what was said in those cases and have rejected applications for dwellings and subdivisions where the dwelling density limitation of 1:40ha has not been met or a minimum lot size of 40 hectares is not achieved in circumstances where a consideration of the Guidelines is relevant

29. The implications of these decisions and the constraints on development potential, which are inherent in the Guidelines, are beginning to be felt in rural areas across Victoria, which are located within open water supply catchments.

Conclusion

30. I hope the above selection of topics has provided you all with a small update on some recent VCAT decisions.

31. Thank you for your attention this morning – it's now morning tea time.

Acknowledgements: Paper by Deputy Gibson – VCAT Planning & Environment List (14 March 2012); and Maddocks