

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1383/2007
PERMIT APPLICATION NO. M/2007/37

CATCHWORDS

Application under Section 80 of the *Planning and Environment Act 1987* (the Act) to review **conditions** in a permit. Residential 1 Zone. Clause 56 Residential Subdivision. Clause 52.01 Subdivision (2 lots) Validity of conditions requiring compliance with earlier permit for development. Private open space contribution.

APPLICANT	J & J Scott
RESPONSIBLE AUTHORITY	Maroondah City Council
SUBJECT LAND	20 Barkly Street, Ringwood
WHERE HELD	Melbourne
BEFORE	Laurie Hewet, Member
HEARING TYPE	Hearing
DATE OF HEARING	3 August, 2007
DATE OF ORDER	10 August, 2007
CITATION	Scott v Maroondah CC [2007] VCAT 1474

ORDER

The decision of the Responsible Authority is varied. The Tribunal directs that Permit M/2007/37 must contain the conditions set out in the Permit issued by the Responsible Authority on 18 May, 2007 with the following modifications:

- 1 Condition 1(a) must be deleted and condition 1(b) renumbered.
- 2 Conditions 3, 4, 5, 6, 7, 8, 9 & 10 must be deleted, and the remaining conditions renumbered accordingly
- 3 The following new condition must be included:
Prior to the issue of a statement of compliance, the owner must enter into an agreement with the responsible authority and made pursuant to section 173 of the Planning and Environment Act 1987 to prohibit the further subdivision of either lots 1 and 2, except with the written consent of the responsible authority.

Before the issue of a statement of compliance, application must be made to the Registrar of Titles to register the section 173 agreement on the title to the land under section 181 of the Act.

The owner/operator under this permit must pay the reasonable costs of the preparation, and execution and registration of the section 173 agreement.

The Responsible Authority is directed to issue a modified permit in accordance with this order.

Laurie Hewet
Member

APPEARANCES:

For Applicant

Mr P Merrigan, town planner

For Responsible Authority

Ms N Luketic, solicitor of Maddocks

REASONS

- 1 This is an application to review conditions placed on a permit issued by the responsible authority for the subdivision of land, at 20 Barkly Street, Ringwood. The conditions in dispute are outlined as follows:
 - a Condition 1 which requires amended plans showing the footprint of buildings removed and the area of lot 1 shown.
 - b Condition 3 which requires all buildings and works within each lot brought into compliance with plans endorsed under a previous permit authorising the construction of a second dwelling.
 - c Condition 4 which requires a payment of 5% of the site value of the land.
 - d Conditions 5, 6, 7, 8, 9 & 10 which require drainage works to be undertaken, landscaping to be provided in accordance with a landscaping plan, car parking areas to be constructed and vehicular access to be constructed.

The site

- 2 The site is a residential lot comprising two, modest, single storey dwellings, sited one behind the other. The front dwelling probably dates from the 1950's and the rear dwelling was constructed following the issue of a permit in 1996. Vehicular access to both dwellings is provided by a driveway located on the site's eastern side boundary.
- 3 The site has a frontage of 18.29 m, a depth of 54.86 m and an area of 1003 m².
- 4 The site is located on the north side of the road in a residential area comprising a mix of detached dwellings and medium density housing.

The proposal

- 5 It is proposed to subdivide the land into two lots. The area of lot 1 is not shown on the subdivision plans but lot 2 has an area of 278 m². The driveway is designated as common property.

The planning scheme

- 6 The review site is zoned Residential 1 under the Maroondah Planning Scheme.
- 7 A permit is required to subdivide land. An application to subdivide land, into lots each containing an existing dwelling or car parking space, is not subject to assessment against the requirements of Clause 56.
- 8 The site is subject to a Significant Landscape Overlay, but this overlay does not trigger a permit for subdivision.

- 9 An application to subdivide land into lots each containing an existing dwelling or car parking space is exempt from the notice requirements of Section 52(1)(a), (b) and (d), the decision requirements of Section 64(1), (2) and (3) and the review rights of Section 82(1) of the Act.
- 10 Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate, the State and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies
- 11 Clause 52.01 relates to public open space contribution and subdivision and is quoted in full as follows:

A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to this clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If no amount is specified, a contribution for public open space may still be required under Section 18 of the Subdivision Act 1988.

A public open space contribution may be made only once for any of the land to be subdivided. This does not apply to the subdivision of a building if a public open space requirement was not made under section 569H of the Local Government Act 1958 or Section 21A of the Building Control Act 1981 when the building was constructed.

A subdivision is exempt from a public open space requirement, in accordance with Section 18(8) of the Subdivision Act 1988, if:

- It is one of the following classes of subdivision:
 - Class 1: The subdivision of a building used for residential purposes provided each lot contains part of the building. The building must have been constructed or used for residential purposes immediately before 30 October 1989 or a planning permit must have been issued for the building to be constructed or used for residential purposes immediately before that date.
 - Class 2: The subdivision of a commercial or industrial building provided each lot contains part of the building.
- It is for the purpose of excising land to be transferred to a public authority, council or a Minister for a utility installation.
- It subdivides land into two lots and the council considers it unlikely that each lot will be further subdivided.

- 12 The schedule to Clause 52.01 states that the amount of contribution for public open space for all subdivisions is 5%.
- 13 The decision guidelines at Clause 65 must be considered and those at Clause 65.02 which also must be considered relate specifically to subdivisions.

The hearing

- 14 The parties at the hearing of the application for review relied on both written and oral submissions and a number of photographs, plans and other documents were tendered to the Tribunal.

Basis of decision

- 15 Ms Luketic provided me with a very detailed analysis of the legislative basis for the imposition of valid permit conditions, and of the relevant decisions which have considered the tests to be applied in determining the validity of conditions imposed on permits¹. Ms Luketic conveniently summarised the common law tests for validity in respect of a proposed condition as follows:
- The condition must fairly and reasonably relate to the permitted development.
 - The condition must be in aid of a planning purpose.
 - The condition must not be imposed for an ulterior purpose.
 - The condition must not be vague and uncertain.
- 16 The Council has obviously formed the view that the proposal satisfies the tests which need to be applied in determining whether or not the land is suitable for subdivision; it presumably would not have issued a permit for the subdivision otherwise. It is not open to me to enquire into the Council's decision to grant the permit for the subdivision because there is no application before me to review this decision. My considerations are limited to determining the appropriateness of the conditions attached to the permit.
- 17 With respect to conditions 3, 5, 6, 7, 8, 9 & 10, it was asserted by Ms Luketic that the development does not comply with conditions on the permit authorising the construction of the second dwelling. It was submitted that because the development which now exists on the land is different to that which was permitted, it is now appropriate for the Council to have regard to matters such as landscaping, drainage and car parking in considering the subdivision application. It was submitted that the imposition of conditions relating to these matters is necessary in order to ensure that current planning scheme requirements and policies are met.
- 18 The disputed conditions relate to the permitted development of the land for two dwellings but they do not fairly and reasonably relate to the permission for the subdivision of the land. In the event that the Council considers that there does exist areas of non compliance with the 1996 permit, the appropriate course of action for it is to pursue enforcement proceedings with a view to bringing the development into compliance. The imposition

¹ *Rosemeier v Greater Geelong City Council* (No.1) (1997) 20 AATR 86, *Christian Brothers Vic Pty Ltd v Banyule City Council* 9 VPR 128.

of the disputed conditions represents an attempt by the Council to use the conditions to achieve an ulterior purpose, that being to enforce compliance with the original permit.

- 19 I will direct that 3, 5, 6, 7, 8, 9 & 10 be removed from the permit.
- 20 I can see no reason why the footprint of the buildings on the site should be removed from the plans, and I was provided with no persuasive reason as to why this should occur. I will direct that condition 1(a) be removed but I regard the designation of the area of lot 1 as an appropriate requirement.
- 21 The determination of whether or not an open space contribution is required rests on an assessment of whether the subdivision is exempt from making a contribution under Clause 52.01. Mr Merrigan relied on the exemption provision which states that the subdivision is exempt from a public open space requirement if it subdivides land into two lots and the council considers it unlikely that each lot will be further subdivided.
- 22 Mr Merrigan advised that his clients have no intention of seeking a further subdivision of the land and that they are content to accept a condition requiring them to enter into an agreement preventing the land from being further subdivided.
- 23 Ms Luketic submitted that none of the exemptions under Clause 52.01 are applicable and in relation to the exemption provision relied on by Mr Merrigan, lot 1 is at least capable of being further subdivided, having regard to the size and configuration of that lot, and the development and subdivision pattern of the locality. It was further submitted that the intent of the current owners of the land is irrelevant to a consideration of the likelihood of the land being further subdivided.
- 24 It is possible to conceive a future redevelopment of lot 1 involving possibly the demolition of the existing dwelling on that lot and the construction of, say, two dwellings. I agree with Ms Luketic that, in those circumstances, the further subdivision of lot 1 can be contemplated.
- 25 The possibility of the land being further subdivided is one thing, but the likelihood of it occurring is an entirely different matter and that is the test which needs to be applied to determine whether the exemption under Clause 52.01 is applicable. This test needs to be applied in each individual case and it requires the Council to form a view that it considers it unlikely that each lot will be further subdivided, in order for the exemption to take effect.
- 26 In the circumstances of this case, having regard to the size and configuration of the lots, the imposition of a permit condition requiring the applicant to enter into an agreement made under s. 173 of the *Planning and Environment Act 1987* preventing the land from being further subdivided, is, in my view, sufficient to enable a view to be formed that the exemption under Clause 52.01 is met.

Conclusion

- 27 It follows from the above reasons that it is the Tribunal's conclusion that the decision of the responsible authority should be varied.
- 28 The permit will include the conditions contained in the notice of decision to grant a Permit issued by the responsible authority with modifications which have regard to the submissions of the parties and the matters which arise from these reasons.
- 29 I will direct that conditions 1(a), 3, 4, 5, 6, 7, 8, 9 & 10 be removed from the permit. I will also direct that a new condition be included requiring the applicant to enter into an agreement made under s. 173 of the *Planning and Environment Act 1987* preventing the land from being further subdivided.

Laurie Hewet
Member