

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P564/2005
PERMIT APPLICATION NO. P517/04

CATCHWORDS

Application for Review of conditions in a permit; Banyule Planning Scheme; Business 1 Zone; permit issued for two lot subdivision and construction of two single storey dwellings; reliance by responsible authority on prescriptive guideline formerly included in proposed amendment to Planning Scheme rejected by panel.

APPLICANT	Jack Pelligra
RESPONSIBLE AUTHORITY	Banyule City Council
SUBJECT LAND	182 Nell Street, Greensborough
WHERE HELD	Melbourne
BEFORE	Des Eccles, Member
HEARING TYPE	Merits hearing pursuant to s 80 of the <i>Planning and Environment Act 1987</i>
DATE OF HEARING	8 June 2005
DATE OF ORDER	15 June 2005
CITATION	[2005] VCAT 1207

ORDERS

1. The decision of the responsible authority is varied. The conditions in Planning Permit P517/04 are amended as follows:

Condition 1(c) is amended to:

Dwelling 2 modified such that the garage does not extend forward of the living room, generally in accordance with Drawing No. 12090P2 Version 3 dated 17/02/05 prepared by Merrigan Land Development Consultants.

Conditions 1(d), (e), and (f) are deleted.

2. By no later than 28 days from the date of this Order the responsible authority must pay Jack Pelligra the sum of \$2,792:90, being his costs in this proceeding.

Des Eccles
Member

APPEARANCES:

For Applicant

Mr S Merrigan, Consultant Town Planner

For Responsible Authority

Mr J Elbourne, Planning Officer, Banyule City Council

REASONS

1. These reasons follow a decision and reasons given orally at the conclusion of the hearing.
2. The subject land is located on the north side of Nell Street at the corner of Nell and Greta Streets. It has a frontage to Nell Street of 20.12 metres, a frontage to Greta Street of 37.69 metres and an area of 756 square metres. It is in the Residential 1 Zone and no overlays apply to it.
3. On 16 February 2005 the responsible authority issued Planning Permit P517/04 for "development of two single storey dwellings and associated two lot subdivision" subject to conditions. Condition 1 required the submission, approval and endorsement of amended plans to the satisfaction of the responsible authority. Conditions 1(c) - 1(f) were as follows:

(c) Dwelling 2 modified to show that the garage does not extend forward of the living room (this may include locating the garage and the laundry on the boundary).

(d) The garage servicing Dwelling 1 relocated a minimum of 1 metre to the north.

(e) Dwelling 2 modified such that all windows serving bedrooms 1 and 2 face a space which is clear to the sky with a minimum dimension of 1 metre not including land on an abutting lot.

(f) Building site coverage reduced to 40%.

4. On 23 February 2005 the applicant's agent, Merrigan Land Development Consultants, wrote to the responsible authority enclosing an amended plan showing these amendments, save for (f), as well as other amendments required by Condition 1 of the permit. The letter stated as follows:

We are prepared to run with these amendments provided condition 1(f) is varied to 42%.

The difference in site coverage between 40% and 42% is 13 square metres and this change cannot be accommodated without major variation to the design.

If the variation cannot be accommodated we understand that our client will lodge an appeal to VCAT against conditions 1(c), (d), (e), (f) and (g).

5. Mr Merrigan stated that he was informed by the Banyule City Council's Manager of Development Services that the responsible authority would not agree to a site coverage of 42%. The Application for Review was then lodged on 8 March 2005. The Application for Review was of Conditions 1(c), (d), (e) and (f). The grounds of review were that:

The design changes required by the above conditions will not achieve a better design outcome.

The requirement for site coverage of 40% cannot be justified given the ResCode standard allows for a maximum of 60%.

6. This proceeding would not have been initiated if the responsible authority had not insisted that the site coverage proposed of 42% be reduced to 40%. As was stated in the grounds of review, the relevant ResCode standard at Clause 55 provides for maximum site coverage of 60%.
7. The subject land is in the Garden Suburban Precinct, as identified in the *Banyule Neighbourhood Character Strategy* (March) 1999), a reference document supporting Clause 21.07 of the Banyule Planning Scheme. The brochure *Garden Suburban Precinct GSI*, prepared for the information of the general community and, presumably, for the information of prospective developers, sets out the existing characteristics of the precinct and includes a statement of preferred neighbourhood character. It also sets out general non-prescriptive guidelines for future development in the precinct. These guidelines do not deal with site coverage.
8. However, this brochure appears to have been superseded by another brochure with the same title, but incorporating changes adopted by Council on 8th April 2002 and 21st June 2004. This brochure also sets out the characteristics of the precinct and includes a statement of preferred neighbourhood character and guidelines for future development in the precinct. These guidelines do deal with site coverage, and with side/rear setbacks, stating that "*Building site coverage should not exceed 40% in order to provide sufficient site area for planting and retention of vegetation*" and "*Buildings should be set back at least 5 metres from one side or rear boundary to accommodate trees and other substantial vegetation*".
9. It is clear the responsible authority relied on the prescriptive maximum site coverage of 40% contained in the more recent brochure to justify Condition 1(f) of the permit. This and other prescriptive guidelines were originally proposed as part of Amendment C34 to the Banyule Planning Scheme. They were adopted by the Council despite the Panel report on Amendment C34. In *Petridis Cornetta Architects v Banyule CC* [2005] VCAT 100 I said at paras 10 and 11:

Amendment C34 proposed to change the Residential Character Policy set out in the Planning Scheme and to include more prescriptive objectives and guidelines as part of the Scheme. The amendment was exhibited in November 2002 and the Panel appointed by the Minister was highly critical of those proposed changes in its report and recommended that they be abandoned. In February 2004 the Minister gazetted only part of Amendment C34, essentially that part making explicit that the policies set out in Clause 22.07 apply to land in the Residential 1, Low Density Residential and Environmental Rural Zones. Following the Panel's report the Council adopted changes to the Neighbourhood Character Strategy, modified the balance of Amendment C34 and forwarded it to the Minister for approval.

The modified balance of Amendment C34 has been with the Minister for 7 months. Its status is at best uncertain and I have not given it any weight in my consideration of the proposal before me. That is consistent with the views of the Tribunal in previous cases in Banyule.

10. It is now approximately 12 months since the modified balance of Amendment C34 was forwarded to the Minister. Its status must be considered as even more uncertain. The prescriptive 40% site coverage guideline is in effect an "under the counter policy" that sits outside the Planning Scheme. That the Council is relying on it, despite my decision in *Petridis Cornetta*, and despite the explicit warning as to the award of costs in *McEntee v Banyule CC* [2004] VCAT 467, is outrageous.
11. Mr Merrigan applied for costs on behalf of his client pursuant to s 109 of the *VCAT Act*. I have awarded costs because it is fair to do so, having regard to s 109 (3)(b), (c) and (e). The Application for Review would never have been lodged had the responsible authority not insisted on a 40% site coverage.
12. I now turn to the other conditions contested by the applicant. Condition 1(c) is justified, given the width of the garage in relation to the width of the western elevation of Dwelling 2 as a whole. In my opinion the garage located forward of the dwelling would be unreasonably intrusive in the streetscape. But the width of the garage for Dwelling 1, compared to the width of the southern elevation of the dwelling as a whole, would make it a relatively minor element in the way the building presents to the street. In my opinion there is no justification for setting the garage back a metre to the north as required by Condition 1(d). As to Condition 1(e), I am satisfied that the bedrooms would receive an adequate amount of daylighting without that condition being applied. The distance between the eave of the building and the carport to the east adjacent to the east facing window of Bedroom 1 is approximately half a metre, and this bedroom also has a relatively large north facing window. Bedroom 2 does not have any structure adjacent to its west facing window other than a boundary fence, and it also has a relatively large south facing window. I have therefore amended Condition 1(c) and deleted Conditions 1(d), (e) and (f).

Des Eccles

Member