

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

No. P1332/2002

### CATCHWORDS

Application under Section 80 of the *Planning and Environment Act 1987* (the Act) to review **conditions** in a permit. Permit Application No. P258/01. Township Zone. Development Plan Overlay. Subdivision (20 residential lots) and removal of an easement. Irregular Site (Area 3.164 hectares). Public open space contribution. Whether drainage reserve is effective public open space. Whether drainage reserve should be vested in Council.

<b>APPLICANT FOR REVIEW:</b>	Mutton Nominees
<b>RESPONSIBLE AUTHORITY:</b>	Casey City Council.
<b>RESPONDENTS:</b>	
<b>THE LAND</b>	1-5 Robinson Road, Narre Warren.
<b>WHERE HELD:</b>	Melbourne
<b>BEFORE:</b>	Anthony Liston, Member
<b>DATE OF HEARING:</b>	2 September 2002
<b>DATE OF DECISION:</b>	3 October 2002
<b>MEDIUM NEUTRAL CITATION:</b>	[2002] VCAT 1220

### DECISION:

The order of the Tribunal is that the decision of the Responsible Authority is varied. Permit No. P258/01 issued by the Responsible Authority on the 27 March 2002 is modified by:-

- Deleteing conditions 9, 16, 37, and 44.
- In Condition 1 replace sub-condition (c) with the following sub-condition:

*(c) the proposed 20 metre wide drainage reserve to vest in Casey City Council, and to be included in a drainage easement in favour of Melbourne Water.*
- In condition 1 add the following new sub-condition:

*(d) a restriction in respect of the proposed lots abutting the drainage reserve requiring that black cyclone mesh fencing or other fencing acceptable to the Responsible*

*Authority, be used on the boundary of the lots with the drainage reserve, and for five metres along adjacent side boundaries.*

The Responsible Authority is directed to issue a modified permit in accordance with this order under the provisions of Section 85(1)(e) of the *Planning and Environment Act 1987*.

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A. P. Liston  
**Member**

**APPEARANCES:**

Ms Casandra McMaster Town Planner appeared on behalf of the Responsible Authority.

Mr Peter Merrigan Surveyor appeared on behalf of the Applicant for Review.

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL****PLANNING AND ENVIRONMENT LIST****No. P1332/2002****REASONS**

1. This is an application to review conditions in a permit issued in relation to a 20 lot subdivision of land in Robinson Road Narre Warren. The conditions which are the subject of this application for review are:

## Condition 9:

*'The owner must enter into an agreement with Melbourne Water and the Responsible Authority under Section 173 of the Planning and Environment Act 1987 (The Act) to provide for the maintenance of waterways and water features.'*

## Condition 16:

*'A Melbourne Water pipeline traverses the site. An easement vested in Melbourne Water is to cover this pipeline.'*

## Condition 30:

*'Entry into an existing roundabout, or provision of a roundabout if none exists, must be provided to the satisfaction of the Responsible Authority at the intersection with Robinson Road.'*

## Condition 37:

*'A cash equivalent to a minimum of ten percent (10%) of the site value of all the land in the subdivision must be made to the Responsible Authority in-lieu of the provision of land for public open space.'*

## Condition 42:

*'All reserves must be landscaped and planted to the satisfaction of the Responsible Authority.'*

## Condition 44:

*'Prior to the issue of a Statement of Compliance, the landowner must enter an agreement under Section 173 of the Planning and Environment Act with the Responsible Authority that:*

- (a) *That a restriction be placed on the title of each lot adjacent to the drainage reserve that black cyclone mesh fence, or other fencing*

*acceptable to the Responsible Authority, be used on the boundary with the drainage reserve and for five metres along side fences.'*

2. At the commencement of the hearing the Tribunal was advised that the parties had reached agreement in relation to Conditions 9, 16, 30 and 42. After some discussion, an agreed position was reached in relation to Condition 44. The outcome of these agreements was that the only condition in dispute was Condition 37. The parties at the hearing of the Application for Review made both written and verbal submissions and a number of plans and other documents were provided to the Tribunal. Subsequent to the hearing further correspondence was received from the parties in relation to the vesting issue dealt with in paragraphs 9 to 11 below.
3. The proposed subdivision includes a drainage reserve extending through the subdivision from north to south, and occupies about 17% of the land in the subdivision. Melbourne Water intend to construct an open landscape waterway through the drainage easement in accordance with modern practice whereby drains are as far as is practicable designed as an attractive natural feature providing a high level of amenity to nearby residents, and a habitat for a variety of flora and fauna. A pathway is to be constructed through the drainage reserve for use by public pedestrians, cyclists, and equestrians and also to provide access to the drain for maintenance purposes. The dispute is whether or not all or part of this drainage reserve should be regarded as a contribution to the Council for public open space. Ms McMaster advised me that the Responsible Authority was prepared to concede that a small part of the drainage reserve equivalent to 2.2% of the overall site area could be regarded as a public open space contribution, and the cash contribution could be reduced accordingly.
4. The Tribunal gave oral reasons for its conclusion that the drainage reserve in this particular case represented good quality public open space, and that the area of the reserve was more than sufficient to satisfy the requirements of Clause 52.01 of the Planning Scheme ordinance. A summary of the Tribunal's reasons is set out below.
5. There is planning and policy support for regarding the drainage reserve as useful public open space. The Narre Warren North Township Strategy Plan calls for a pedestrian/cycling/equestrian trail through the subject land, basically on the alignment

of what is now the drainage reserve. The Applicant is required to construct a roadway through the reserve to serve this purpose.

6. The value of linear public open spaces is increasingly recognized, they provide an attractive environment in which important recreational pursuits such as walking, cycling and horse riding can be pursued. The value of this particular area of drainage reserve is reinforced by the fact that it performs a connecting role between open space to the north, and the large retarding basin to the south.
7. Melbourne Water proposes to construct an open drain which will be landscaped to create the appearance of a visually attractive natural waterway which will result in an open space area with high amenity.
8. On the basis of these considerations it was my conclusion that the drainage reserve could reasonably be regarded as public open space, and as the drainage reserve occupies 17% of the overall site area, it satisfies the area requirement of the scheme.
9. A related issue is the question of whether or not the drainage reserve needs to vest in the Council as a consequence of the structure of Clause 52.01. The Clause commences:

*"A person who proposes to subdivide land must make a contribution to the Council for public open space....."*
10. It was the Responsible Authority's preference that the drainage reserve vest in Melbourne Water. Melbourne Water does not oppose the drainage reserve vesting in the Council, provided it had a drainage easement over the land. Mr Merrigan was concerned that it could be argued that Clause 52.01 was not satisfied unless the reserve was vested in the Council, so that the open space was '*a contribution to the Council*'.
11. I reserved on this question, and have since come to the conclusion that for the clause to be satisfied, the land to be set aside as public open space should be vested in some form in the Council. While I understand the Responsible Authority's reluctance to have the land vested in them, because of the cost of maintenance, I consider it unlikely that Melbourne Water could avoid its responsibilities to maintain a drain constructed

by it over the land affected by an easement in Melbourne Waters favour for this purpose. If this was a case where 10% of the site area was set aside as public open space elsewhere on the land, the Council would ultimately be responsible for its maintenance.

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A. P. Liston  
**Member**