

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2429/2005
PERMIT APPLICATION NO. WH/15272

CATCHWORDS

Whitehorse Planning Scheme; Application pursuant to Section 77 Planning and Environment Act 1987; Residential 1 Zone; Significant Landscape Overlay Schedule 5; Special Building Overlay; 52-lot subdivision; Native vegetation removal; ECV classification; Habitat score; Net gain (Avoid, minimise and offset); Building envelopes; Access arrangements

APPLICANT	Seventh Day Adventist Church
RESPONSIBLE AUTHORITY	Whitehorse City Council
REFERRAL AUTHORITIES	Melbourne Water Corporation Department of Sustainability & Environment (only after the gazettal of Amendment VC38 on 16/3/06)
RESPONDENTS	Blackburn Village Residents Group, Blackburn Lake Environmental Education Park Inc., Blackburn & District Tree Preservation Society Inc., Anne Clements, T F Robinson, Sylvia Abbott, Guy & Trudy Ward, Marilyn Condon
SUBJECT LAND	131-173 Central Road, Nunawading
WHERE HELD	Melbourne
BEFORE	Tonia Komesaroff, Presiding Member J A Bennett, Member
HEARING TYPE	Hearing
DATES OF HEARING	27 & 28 February and 1, 2, 3 & 6 March 2006 23 June 2006 (Directions Hearing only)
DATE OF ORDER	19 September 2006
CITATION	

ORDER

The decision of the Responsible Authority in relation to permit application No WH/15272 is affirmed. Pursuant to the provisions of Section 85(1) (a) of the *Planning and Environment Act 1987*, it is directed that a permit must not be granted.

Tonia Komesaroff
Presiding Member

J A Bennett
Member

APPEARANCES:

For Applicant: -

Mr Jeremy Gobbo QC with Mr Jason Kane.

Expert evidence was called from:

- Mr Phillip Borelli, Town Planner of SJB Planning Pty Ltd.
- Ms Julie Katz, Town Planner of The Planning Group (Vic) Pty Ltd.
- Mr Allan Wyatt, Landscape Architect of ERM Pty Ltd.
- Mr Russell Fairlie, Traffic Engineer of Ratio Consultants Pty Ltd.
- Mr Brett Lane, Botanist of Brett Lane & Associates Pty Ltd.
- Mr Rob Galbraith, Arboricultural Consultant of Rob Galbraith & Associates.

Mr Peter Hurley, Solicitor of McMahon Fearnley represented the permit applicant at the Directions Hearing on 23rd June 2006.

For Responsible Authority: -

Mr Ian Pitt, SC with Ms Tania Cincotta of Best Hooper Solicitors. Expert evidence was called from:

- Mr David Galwey, Arboricultural Consultant of Tree Dimensions.
- Dr Rodney Wulff, Landscape Architect of Tract Consultants Pty Ltd.
- Mr Stephen Mueck, Senior Botanist of Biosis Research Pty Ltd.
- Mr David Barnes, Town Planner of Hansen Partnership Pty Ltd.

No appearance for Melbourne Water Corporation.

Material was referred to the Department of Sustainability and Environment after the hearing in February/March 2006. The Department was represented at the Directions Hearing on the 23rd June 2006 by Mr Emile Kyriacou and Mr Russell Costello.

For Respondents: -

Mr David Morrison, Chairman Blackburn
Village Residents Group

Mr John Bergin, Chairman Blackburn Lake
Environmental Education Park Inc.

Mr David Berry, President Blackburn &
District Tree Preservation Society Inc. (Ms Sue
Lockwood represented the Society at the
Directions Hearing on 23rd June 2006).

REASONS

INTRODUCTION

- 1 Blackburn Lake and the treed and leafy residential environment around the lake reserve is a highly valued asset for the local community and one whose continued protection and enhancement has long been fought over by residents and groups interested in protecting it from what they see as inappropriate urban development. This case involves a proposal to subdivide a large area of land formerly used as a church camping ground. Although separated from the Blackburn Lake reserve by Central Road it contains vegetation of agreed very high value and despite its residential zoning, residents and interest groups would ideally like to see it retained as an extension to the Blackburn Lake Reserve. Taking a different approach, Council acknowledges that the land has a residential zoning and that as such, it is reasonable for it be developed for residential purposes – although not of the intensity or in the configuration now proposed.

Reason for the delay in giving our decision

- 2 Shortly following the hearing in March 2006, the state-wide native vegetation provisions applying in all Planning Schemes in Victoria were changed by amending Clauses 15.09, 52.17, 66.02 and 72. The changes sought to better explain *Victoria's Native Vegetation Management – Framework for Action* and the three-step approach of 'avoid', 'minimise' and 'offset' native vegetation removal. The amendment introduced two new planning tools – native vegetation precinct plans and property vegetation plans. It also changed the triggers for permit referrals to the Department of Sustainability and Environment (DSE). Because the amendment was gazetted after the hearing but before we handed down our decision, we directed referral of the proposal to the DSE. We also directed the DSE to provide a copy of its response directly to the Tribunal, the permit applicant and all other parties and we then gave parties an opportunity to further respond in writing by 26th July 2006. Written submissions were received by the due date and we have considered them in making our final determination.

What are we considering?

- 3 The Seventh Day Adventist Church opposes Council's decision to refuse its application to subdivide a 12.8 hectare parcel of land, heavily treed with remnant indigenous and native vegetation, into 52 lots comprising a 50-lot conventional subdivision, a Lot A for a future medium density proposal and a Lot B being the balance of its land.
- 4 The entire Blackburn site holds a former camping ground with conference facility, church, school and elderly person's hostel and scattered outbuildings. The relevant portion of the site for subdivision is the former camping ground with conference facility. The Church also wishes to

develop a road leading into the school along the swale which presently runs past its hostel site.

Planning provisions

- 5 The land is zoned Residential 1 and Clause 32.01- 4 triggers a permit for subdivision. A Significant Landscape Overlay (Schedule 5) applies and triggers a permit for the removal of a tree which has a circumference of greater than 0.5 metres at a height of 1.0 metres above ground level ('protected trees'). The Special Building Overlay applies to a small section along the creek in the south east corner and triggers a referral to Melbourne Water Corporation. Under Clause 52.17, a permit is required for native vegetation removal on land over 0.4ha in area.

Documents and site inspections

- 6 Written and verbal submissions were made by parties and by witnesses called by Council and the permit applicant. A variety of plans, diagrams, photographs and other documents were tendered to the Tribunal and remain on the Tribunal's file. Later written submissions have also been retained on Tribunal files.
- 7 During and following the hearing we have inspected the subject site, the general locality, streets within the Significant Landscape Overlay, Glenburnie Road, Grove Street, former Merchant Builders cluster developments at Vermont Park and Winter Park, and streets off Blackburn Road on the western side of the Blackburn Lake reserve. All these sites were strongly recommended to us for viewing by the various parties.

Substitution of plans

- 8 At the commencement of the hearing and pursuant to Clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act'), Mr Gobbo QC requested the Tribunal to amend the application for permit by substituting revised plans Nos 1969/CP Version 1E 5808 Road Layout Concept Plan, 1498-DR Version 10 Design Response, LWD 514/2 Landscape Concept Plan and LWD 514/1 Site Context Plan for those which had originally accompanied the application. As there was no objection and all parties had prepared their case based upon these plans, the substitution was made.

BASIS FOR DECISION

Native vegetation, planning policy and site responsive design

- 9 This is a flawed development that has paid insufficient regard to the site context and in particular the native vegetation on the site with a Very High EVC scoring. Because of differences of opinion between Mr Mueck and Mr Lane about the condition assessment we asked during the hearing that the two experts confer and advise us of an agreed position. It seems that the major point of difference is the understorey score. Depending on how the

assessment is undertaken there is difference which results in the site being rated Very High (>40) or High (<40). We note that the DSE as referral authority subsequently assessed the site as having a Very High rating. Unfortunately this threshold between the two ratings is abrupt and a score just over or just under makes a big difference in terms of how the Native Vegetation Framework would apply. Clearly the whole case for the permit applicant was based on the assumption of a High rating rather than Very High rating. However, even putting aside the development implications of High vs. Very High habitat rating, we also must consider the wider policy imperatives contained in the Whitehorse Planning Scheme.

- 10 As in all cases, Clause 11 of the Planning Scheme requires us to:

endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
- 11 This balancing is required, even for straightforward subdivisions of Residential 1 zoned land not affected by any overlays or unique site constraints. However in this case, environmental considerations need to be given much greater weight because of the specific provisions invoked by the SLO5 (gazetted in a final form after the hearing), by the emphasis within the LPPF in relation to the Blackburn Lake area and environmental issues generally and by the application of native vegetation clearance controls in clause 52.17 (and the consequential need to consider the Native Vegetation Framework for Action). We do not intend to recite in detail all of the local planning provisions and these were well covered by the various experts, by Mr Gobbo QC and Mr Pitt SC in their submissions and to a lesser extent, in the submissions and commentary by the various community groups. However we do wish to make some general observations about environmental policy.
- 12 As noted, the Whitehorse Planning Scheme has a considerable emphasis on protecting the natural environment in those areas of the municipality identified as having environmental significance. Over many years the two local government entities responsible at the time for this part of Melbourne sought to protect the environmental attributes so valued by residents and others. Since municipal restructure, the City of Whitehorse has continued that approach. The MSS (Clause 21) and the local policies (Clause 22) contain detailed references to Blackburn Lake, Gardiners Creek, Blackburn Creek, and their environs. The Strategic Framework Plan (21.04) identifies the site as being within an area of 'Special Character Controls' requiring protection as areas of special character. Clause 21.07 makes reference to areas in the City having special natural, environmental or historic significance and Clause 22.04 is entirely devoted to policy for tree conservation including the need *to assist in the management of the City's tree canopy by ensuring that new development minimises the loss of significant trees and to ensure that new development does not detract from the natural environment and ecological systems*. Techniques are that *site*

responsive designs for buildings, hard surfacing and other such works be encouraged to minimise potential damage to trees and their root systems, particularly where separation distances are at a minimum and the size and species of a tree requires additional steps to be taken to ensure its long-term health. In Clause 22.04-4 the four metre minimum separation distance for buildings and works near existing trees in the SLO is noted as being a minimum which may need to be increased having regard to the specific situation.

- 13 Clause 12, while not referring specifically to this geographic area, includes policy in relation to a 'Greener City' at 12.07. State policy is unambiguous that planning should *protect native habitat and areas of important biodiversity through appropriate land use planning*.
- 14 In addition to these broader State and local policies, any new subdivision must be designed having regard to site context and should meet the objectives and standards of Clause 56. It must also recognise, consider and meet any policies, objectives or strategies or specific controls included in the Significant Landscape Overlay (Schedule 5), which has been specifically applied to recognise the unique and highly valued natural characteristics of three nominated institutional sites including the review site. The thrust of the specific overlay is to retain the vegetation dominated vistas, streetscapes and sites by ensuring a dominance of vegetation cover and by ensuring that buildings and works do not dominate the landscape. In our minds this control largely relates to desired built form outcomes but clearly, subdivision layout, size of lots and the location of building envelopes have a direct relationship with how well buildings will sit within, rather than dominate, the landscape. We heard divergent opinions about the ability of retained trees to withstand the impact of housing and related residential activities. Although the inclusion of building envelopes is clearly a useful tool in directing buildings away from retained trees, we were not provided with building envelopes for all lots. Unfortunately it is our experience that trees of all species earmarked for retention either by permit condition or through the use of building envelopes, often do not survive in the medium to longer term. In relation to policy concerning built form not dominating the landscape, we acknowledge that given the height of the trees, two storey built form will easily nestle between the trunks and foliage.
- 15 In the context of planning controls in clause 52.17 calling for a three tiered approach to avoid, minimise and offset, we are not satisfied that this subdivision has as a first step sought to avoid vegetation loss, or that when such vegetation is to be removed that there has been an adequate attempt to minimise such loss. This issue requires us to analyse not merely trees on an individual worth rating, but also their cumulative impact as a stand of trees supporting each other. We have already noted the differences in habitat scoring between Messrs Mueck and Lane. While the implications of a Very High or High rating are very significant in terms of the net gain outcomes

and responses contained in the Framework, we want to emphasise that the Native Vegetation Framework is not set in stone, is not a mandatory control and is just one of many divergent issues that has to be weighed and balanced as part of our assessment in accordance with the previously quoted Section 11 of the Planning Scheme. We therefore accept that in the absence of the land being purchased for conservation purposes, there will be an inevitable loss of vegetation as a result of the land being subdivided and developed in accordance with the Residential 1 Zone. To do otherwise would be to render the land sterile, in contradiction to its residential zoning. However as will now be clear we do not accept that vegetation removal has been minimised to an acceptable degree.

- 16 We now turn to offsets. Put plainly we do accept the submissions made by the permit applicant on this aspect of the Native Vegetation Framework. We note the comments made by the Department of Sustainability and Environment in its letter dated 2 May 2006 and in particular the comments about offset arrangements and the difficulty in achieving appropriate offsets on private land. We do not accept that suitable offsets can be achieved by a combination of planting additional street trees, planting trees on lots devoid of vegetation and creek side planting.
- 17 Not surprisingly, parties took us to previous Tribunal cases where the loss of native vegetation and the three tiered approach needed to be assessed having regard to proposals for the subdivision of vacant land. Cases cited included *Environment Victoria Inc v West Wimmera SC*, *Trumane Pty Ltd v City of Maroondah* and *Villawood v Greater Bendigo CC*.¹ We do not intend to give a summary of each of these and other referenced cases but are familiar with the written reasons and decisions of the Tribunal in these and other similar cases. As we have noted on many occasions, it is often unwise to put too great a weight on previous decisions since there are always peculiarities and sometimes quite subtle differences between cases before the Tribunal. Mr Gobbo QC relied on the findings in a number of the cases to support his contention that net gain should not be so solely focussed on avoiding the removal of native vegetation (a point we agree with him about), that minimisation is an acceptable outcome and that net gain must be balanced against a wide range of competing policies.
- 18 In our view the three steps in the Net Gain process are not independent of each other and must be considered in totality. Any decision about avoiding or minimising vegetation removal must be guided by whether offsets are practically available. That does not mean, as different divisions of the Tribunal have found, that the exact areas and locations of offsets have to be determined at the time of a granting approval for a development; rather that there is high probability that offsets will be available. The probability of offsets being available will be absolutely fundamental to any decision about

¹ *Environment Victoria Inc v West Wimmera SC* [2004] VCAT 2511
Trumane Pty Ltd v City of Maroondah [2006] VCAT 664
Villawood Properties v Greater Bendigo CC (Red Dot) [2005] VCAT 2703

whether to remove the vegetation in the first place. Based on the material put before us in this case, we are convinced that there is almost no likelihood of suitable offset areas being identified elsewhere in the EVC. That should not automatically preclude removal, but it is crucial in determining how much of the site should be developed and hence how much of the vegetation will be lost.

19 We are not satisfied that the layout is sufficiently ‘organic’ in the sense that it does not respond appropriately to the very particular features of this site. Contrary views were taken by Ms Katz and Mr Wyatt for the permit applicant and Dr Wulff for the Council. On the one hand Ms Katz gave evidence that that she was:

satisfied that the proposal adequately meets the objectives of Clause 56 and provides a subdivision that ensures a liveable neighbourhood, identifies and responds to the environmental values of the site and respects the existing neighbourhood character.

20 In her written evidence-in-chief she said:

The design of the subdivision emphasises the landscape qualities of the site and integrates well with the existing residential development in the immediate vicinity and will provide an environment that is similarly dominated by indigenous vegetation and at a similar density to that of surrounding residential development. A benefit of the subdivision over the corresponding development in the vicinity is the ability of the subdivision to provide a (relative) range of lot sizes to suit a variety of dwelling and household types.

21 Mr Wyatt gave evidence that the proposed subdivision layout has responded to the site context and that the majority of existing vegetation that is worthwhile has been retained and construction envelopes will assure that development will be restricted on critical allotments to preserve existing vegetation.

22 In contrast Dr Wulff suggested that a more site responsive design would: recognise nearby setbacks along Central Road; reinforce the parkland character of Blackburn Lake; protect the main stands of trees by including them in large lots, open space or wide road reserves; locate higher density development in the cleared land adjacent to the rail line or to the east; locate roads to follow contours; provide on-site stormwater treatment; back conventional lot layouts onto similarly laid out lots on adjoining land; and use local provenance plant material in any new public areas.

23 When giving her oral evidence-in-chief, Ms Katz conceded a different layout would achieve the more ‘organic’ response we adverted to, although her solutions varied from those of Dr Wulff. Her suggestions included a different design for court bowls, a less geometric layout for roads (particularly in the north eastern corner), narrowing roads to pinch points, converting roads to local access places and stormwater drainage down the

centre of road pavements. We have put this down to a reasonable variation in views between expert witnesses.

- 24 Despite the evidence called for the permit applicant and Mr Gobbo's submission to the contrary, we have formed the strong impression that this subdivision has been driven by conventional subdivision and engineering priorities rather than by the need to tailor the layout of lots, roads, services and building envelopes to the quite unique natural attributes of this site. Our site inspection confirmed evidence and submissions that there are areas of trees/habitat on this site which should be excluded from development altogether or alternatively placed in public reserves and wider road reserves. This may mean fewer lots with building envelopes on such lots being well clear of any native vegetation. While the Department of Sustainability and Environment in its letter of 2 May 2006 suggested that only 20% of the site should be developed at an unspecified higher density with the balance protected by a binding agreement, we have not formed a view about specifying a specific outcome in terms of the exact area that should be set aside for development.
- 25 Aside from our concerns about the subdivision layout (location and design of roads, size and location of lots, placement of building envelopes and location of services) we are also concerned about the notion of creating a large Lot A for future consideration as a medium density site. It is possible that the impact of future development on significant habitat would be seriously compromised if it were hived off from the balance of the 50-lot subdivision for the time being. In our opinion, all components of subdivision and built form development should be considered holistically, there being a natural transition between these two parts of the land.² This would include investigating the potential for any access between the school road and the medium density site

Traffic and access to the site

- 26 The form of the road leading to the school (sitting as it does in a drainage line), the layout and circulation of the roads into the proposed residential subdivision, pedestrian permeability through to the Church's open spaces and habitat corridors from Blackburn Lake were also debated. We are not entirely convinced about the merits of providing a new access point to Central Road, although we can understand why Mr Fairlie would see benefit in separating residential and school traffic. There was some discussion about the location and 'bridging' structure of the new road over the grass swale and we agree that some form of light weight bridge, designed in keeping with the bushland character would be preferable to a bulky and visually unsympathetic bridge or embankment. However in view of rejection of the current proposal, an opportunity exists to revisit access arrangements in any new design. We do however wish to point out our

² Lot A and the 50-lot subdivision portion.

strong impression that the sight lines from the proposed new road entry point appeared minimal, even though Mr Fairlie assured us they complied with the standard.

CONCLUSION

27 Although the land is zoned Residential 1 and the proposed development will have few off site amenity impacts, there is a need to balance often competing objectives and policies in determining whether an application is appropriate and ought to be supported. In this case we are not satisfied that the subdivision of the land and removal of native vegetation on this particular site, in this particular location, adequately responds to the whole suite of zone, overlay and policy provisions contained in the Planning Scheme. Aside from the issue of whether policy lends support for a subdivision of the layout proposed, we also find that we are unable to satisfactorily ‘design out’ identified shortcomings in the overall site layout. As will be clear from our earlier comments, it is the way in which the layout has responded to the very significant native vegetation and the broader site context which needs to be comprehensively reconsidered.

DECISION

28 Accordingly we will disallow the application for review and direct that no permit issue.

Tonia Komesaroff
Presiding Member

J A Bennett
Member