VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1656/2006
PERMIT NO. M/2005/921

CATCHWORDS

Subdivision – Open space requirement – Realignment of boundaries – Relationship between *Subdivision Act* 1988, *Planning and Environment Act* 1987 and Planning Schemes – History of Public Open Space Provisions – Validity and interpretation of clause 52.01 of planning scheme - *Subdivision Act* 1988; section 18 and 18(8)(a), *Planning and Environment Act* 1987; section 6(1) and 62(6).

APPLICANT FOR REVIEW	Graham C Fletcher
RESPONSIBLE AUTHORITY	Maroondah City Council
SUBJECT LAND	17 Woodland Avenue and 21 Penhyrn Avenue, CROYDON
WHERE HELD	Melbourne
BEFORE	Justice Stuart Morris, President
HEARING TYPE	Hearing
DATE OF HEARING	29 September 2006
DATE OF ORDER	8 December 2006
CITATION	Fletcher v Maroondah City Council [2006] VCAT 2205

ORDER

1 The decision of the responsible authority is varied. The tribunal directs that Permit No M/2005/921 pursuant to the Maroondah Planning Scheme must not contain condition 6 as set out in the permit issued by the responsible authority.

2 I declare that the subdivisions authorised by Permit No M/2005/921 pursuant to the Maroondah Planning Scheme are not subdivisions to which the requirement in the schedule to clause 52.01 of the Maroondah Planning Scheme applies.

Stuart Morris
President

APPEARANCES:

For Applicant for Review	Mr Peter Merrigan, town planner of Millar & Merrigan Pty Ltd
For Responsible Authority	Mr John Rantino, solicitor of Maddocks

REASONS

1 The City of Maroondah ("the council") has granted a permit to enable the subdivision of two existing lots into three lots. As a condition of the permit the council has required the owner of the land to pay to the council a sum equivalent to 5% of the site value of the land as a public open space contribution. The permit holder challenges the lawfulness of this condition. He also submits that it is an inappropriate condition, even if lawful. The answer to these questions requires the tribunal to analyse planning scheme provisions concerning public open space contributions, the provisions of the *Subdivision Act* 1988, and difficult questions as to the source and nature of the power to impose a requirement on a subdivision for a public open space contribution.

Background facts

2 The permit holder owns a residential lot at 17 Woodland Avenue, Croydon. This lot has an area of 1,521 square metres, and is improved by a single storey weatherboard house which is located towards the western end of the allotment. The permit holder also owns a residential lot at 21 Penhyrn Avenue, Croydon. This lot has an area of 1,495 square metres, and is improved with a split level weatherboard house, which is located towards the eastern end of this lot. The rear of each lot shares a common boundary. Further, both lots have a sideage to Ryland Avenue.

3 The permit holder seeks to achieve the objective of creating three lots out of the two existing lots. One of these lots, which would contain the single storey weatherboard house, would face Woodland Avenue and would have an area of 1,023 square metres. Another lot, which would contain the split level weatherboard house, would have an area of 1,057 square metres and would face Penhyrn Avenue. The third lot, which would not contain any dwelling, would have an area of 936 square metres and would face Ryland Avenue. In essence the third lot would be created out of part of the backyard of the existing Woodland Avenue lot and part of the backyard of the existing Penhyrn Avenue lot.

4 Both existing lots are affected by a restrictive covenant which restricts the use of each lot to a single dwelling. Before the permit holder can implement his objective it will also be necessary that he obtain some variation to this covenant which would have the effect of allowing the construction of a dwelling on the new Ryland Avenue lot.

5 The surveyor acting for the permit holder would appear to have been aware of planning scheme provisions concerning a public open space contribution when he prepared the plan for the proposed subdivision. A 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. Armed with this knowledge the proposed subdivision for which a permit was sought was expressed to take place in two stages.

- The first stage would involve the variation of an existing 1.83 metre wide drainage easement at the rear of the existing Penhyrn Avenue lot; and then the realignment of the existing rear boundary of the two lots, so as to reduce the size of the Penhyrn Avenue lot from 1,495 square metres to 1,057 square metres. The Woodland Avenue lot would, as a consequence, be increased from 1,521 square metres to 1,959 square metres.
- The second stage would then be to vary the restrictive covenant so as to permit two dwellings to be constructed on the enlarged Woodland Avenue lot. Also, as part of the second stage, the enlarged Woodland Avenue lot would be divided into two lots of 1,023 square metres and 936 square metres.

It is lawful for one permit application to seek permission for more than one development (or one development in two stages); and, in such an instance, the permit application should be disaggregated for the purpose of deciding the matter.[1] The fact that the permit in this case was not so expressed is not decisive; it is the proper characterisation of the application that counts.[2]

6 The application was thought by the surveyor for the permit applicant to only involve two lot subdivisions; and, by reason of the timing of the variation of the restrictive covenant, to only involve two lot subdivisions where (in each case) a reasonable council would consider it unlikely that each lot would be further subdivided.

Contentions

7 The council submitted that there was a flaw in the approach taken by the permit holder, namely that on the first subdivision a reasonable council would *not* consider it unlikely that the enlarged Woodland Avenue lot (then of 1,959 square metres) would be further subdivided. (There would appear to be no issue about this in relation to the second subdivision.) The permit holder answered this by characterising the first stage as a "re-subdivision"; and, more particularly, as a type of subdivision that was not intended to be subject to the public open space requirement.

Relevant statutory provisions

8 In support of the condition, the council relies upon clause 52.01 of the Maroondah Planning Scheme. This provides:

> 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

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1 *Sweetvale Pty Ltd v VCAT* [2003] VSCA 83.
2 *City of Springvale* v *Heda Nominees Pty Ltd* (1982) 57 LGRA 298; 1 PABR 287.

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)(a) 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.

Significantly, the schedule to clause 52.01 specifies in relation to all subdivisions (except in a location which is not relevant in the present context) that the amount of contribution for public open space is "5 per cent". Hence the planning scheme provision which is applicable does not enable the tribunal to re-exercise a discretion as to the quantum of any public open space contribution.

9 Clause 52.01 interacts with section 18 of the *Subdivision Act* 1988. Relevant parts of this section provide:

> (1) If a requirement for public open space is not specified in the planning scheme, a Council, acting as a responsible authority or a referral authority under the **Planning and Environment Act 1987** may require the applicant who proposes to create any additional separately disposable parcel of land by a plan of subdivision to –
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> (a) set aside on the plan, for public open space, in a location satisfactory to the Council, a percentage of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or

(b) pay or agree to pay to the Council a percentage of the site value of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or

(c) do a combination of (a) and (b) so that the total of the percentages required under (a) and (b) does not exceed 5 per cent of the site value of all the land in the subdivision.

(1A) The Council may only make a public open space requirement if it considered that, as a result of the subdivision, there will be a need for more open space, having regard to –

(a) the existing and proposed use or development of the land;

(b) any likelihood that existing open space will be more intensively used after than before the subdivision;

(c) any existing or likely population density in the area of the subdivision and the effect of the subdivision on this;

(d) whether there are existing places of public resort or recreation in the neighbourhood of the subdivision, and the adequacy of these;

(e) how much of the land in the subdivision is likely to be used for places of resort and recreation for lot owners;

(f) any policies of the Council concerning the provision of places of public resort and recreation.

(1B) If a Council requires an applicant to pay or agree to pay an amount under sub-section (1) –

(a) the amount must be paid before the Council issues its statement of compliance; and

(b) subject to paragraph (a), the time for payment of the amount is at the applicant's discretion; and

(c) despite paragraph (a), the whole or any part of the amount may be paid after the Council issues its statement of compliance if the applicant and the Council so agree under section 21(1)(b)(ii).

……

(4) The applicant may agree with the Council to set aside or pay a percentage other than the set percentage.

(5) A public open space requirement may be made only once in respect of any of the land to be subdivided whether the requirement was made before or after the commencement of this section, unless sub-section (6) applies.

……

(8) A public open space requirement is not required if –

(a) the subdivision is of a class of subdivision that is exempted from the public open space requirement by the planning scheme; or

(b) the subdivision is for the purpose of excising land to be transferred to a public authority, Council or a Minister for a utility installation; or

(c) the subdivision subdivides land into two lots and the Council considers it unlikely that each lot will be further subdivided.

Section 19 of the *Subdivision Act* sets out important machinery provisions concerning the valuation of land required for open space. And section 20 requires a council to set aside for public open space any land which is vested in the council for that purpose; and to use any payment which it receives under the Act for public open space to buy or improve parkland.

10 Section 62(6) of the *Planning and Environment Act* is also relevant. This provides that a responsible authority must not include in a permit a condition requiring the person to pay an amount for facilities except, *inter alia*, where a planning scheme requires such a condition to be included in the permit.

History of open space contribution provisions

11 The power to require the provision of public open space (or payment in lieu) on the subdivision of land can be traced back to section 569B(8A) of the *Local Government Act* 1958, which came into force on 1 June 1967. That provision was confined to circumstances where land was subdivided.

12 In 1970 section 569B was widened to cover circumstances where flats were built, but land was not subdivided.[3]

13 The intent of section 569B was to empower a council to require an open space contribution where additional (or improved) open space was needed by reason of a subdivision or an erection of flats. Notwithstanding this it became common enough for councils to impose such a requirement as a matter of course. From time to time such requirements were overturned by arbitrators under the *Local Government Act* or, subsequently, the Planning Appeals Board. One such case was *Paul v City of Melbourne*[4] where the board re-emphasised that the key consideration in determining whether an open space contribution could be required was whether or not there would be an increased need for places of public resort and recreation as a result of the subdivision. To assist in assessing this the board set out a number of factors which would generally be relevant.

14 In the 1980s considerable attention was given to the reform of subdivision law. For example, in September 1983 a task force submitted a report to the Minister for Local Government and the Minister for Planning and

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3 See *Hand v Warrnambool City Council* [2004] VCAT 19.

4 (1984) 2 PABR 8.

Environment on the consolidation of subdivision legislation. In June 1987 the Ministry for Planning and Environment published a document "Reforming Subdivision Legislation" which set out an outline of a draft subdivision bill. Like the 1983 report, this document recommended a continuation of the provisions then in the *Local Government Act* that enabled a council to require a public open space contribution of up to 5% of site area or land value. However, for the first time, a new concept was introduced. The 1987 report recommended an additional element, namely that provision may be included in a planning scheme for variation of the percentage of open space to be provided in a subdivision.

15 The *Subdivision Act* 1988 was drafted in conjunction with the *Planning and Environment Act* 1987. Ultimately it was not considered at the same time, but was enacted very shortly after the *Planning and Environment Act* had been enacted. As I said in *Hand v Warrnambool City Council*:

> These two Acts must be read together. Not only do the Acts form part of cognate legislation enacted by the Parliament at the same time, but also each Act depends for its operation upon the other.[5]

16 When the *Subdivision Act* was first enacted, it did not effect any amendment to the *Planning and Environment Act* to widen the matters that could be addressed in a planning scheme; in particular, by specifying that a planning scheme could make a public open space requirement. However the *Subdivision Act* did amend the *Planning and Environment Act* in relation to notice provisions for an amendment to a planning scheme that proposed a change to provisions relating to land set aside or reserved as public open space. Thus I would infer that the draftsperson considered the question of power and believed the existing provisions of the *Planning and Environment Act* to be wide enough for a requirement for open space to be specified in a planning scheme.

17 When the *Subdivision Act* was initially passed in 1988, section 18(1) commenced by providing:

> If a requirement for public open space is not specified in the planning scheme a Council, acting as a referral authority under the *Planning and Environment Act* 1987 may require the applicant who proposes to create any additional lot by a plan of subdivision to [set aside land or pay a monetary amount to the Council].

In 1989 section 18(1) was amended by inserting the following words after the words "acting as", namely "a responsible authority or". The significance of this change is not easy to discern. But I held in *Hand v Warrnambool City Council* that at least since 1995 (when section 62(6) of the *Planning and Environment Act* was introduced) the words "acting as a responsible authority" should be taken to mean "when acting as a

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5 [2004] VCAT 19 at [13].

responsible authority", thereby indicating the time at which a requirement may be made under section 18 of the *Subdivision Act*.[6]

18 In October 1989 the Ministry for Planning and Environment published a user guide to the new *Subdivision Act*. One of the key points made in the guide was that conditions in planning permits should refer to all matters relevant to the subdivision, including open space requirements. The inspiration behind this guideline was that, where subdivision required a planning permit, the planning permit should contain a comprehensive outline of all relevant requirements, even though the conditions might not spell out the requirement in detail. In relation to requirements for open space the user guide stated:

> A council may decide to require a greater (or lesser) amount than 5% for an open space requirement but any greater amount must be specified in the local section of the council's planning scheme. An application for an amendment to seek a larger open space requirement would need to be supported with strong policy reasons for the change.

19 One of the departmental officers closely involved in the preparation of the *Subdivision Act* was Mr Robert Easton. In June 1990 he presented a paper at a public seminar[7] in which he expressed the following view:

> Public open space provisions are contained in three locations:
>
> (a) Section 18 of the *Subdivision Act*.
>
> (b) Section 21A of the *Building Control Act*.
>
> (c) Clause 7-1.4 of the State section of all Victorian planning schemes.
>
> All three of these provisions must be read together.

At that time clause 7-1.4 of the planning scheme simply identified classes of subdivision which were exempt from a public open space requirement. But what was then clause 7-1.4 is now to be found, albeit in an expanded form, in clause 52.01 of all Victorian planning schemes.[8]

20 The purpose of this historical review has been to assist in interpreting and applying the current provisions in clause 52.01 of the planning scheme. In particular, this review emphasises the strong interrelationship between section 18 of the *Subdivision Act* and clause 52.01 and any schedule to clause 52.01. The closeness of the relationship is also supported by section 18(8)(a) of the Subdivision Act, which provides that a public open space requirement (under the *Subdivision Act*) is not required if the subdivision is of a class of subdivision that is exempted from the requirement by *the planning scheme*.

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6 [2004] VCAT 19 at [18].

7 "Fine Tuning the Subdivision System", a public seminar organised by the Association of Consulting Surveyors (Victoria) Inc and the Institute of Surveyors, Victoria on 22 June 1990 at Moonee Valley Racing Club, Moonee Ponds.

8 Section 21A of the *Building Control Act* is no longer relevant, as this Act did not survive the *Building Act* 1991 (and the relevant provision was not replicated in the 1991 Act).

Issues

21 In my opinion, the following issues emerge from an analysis of provisions concerning public open space contributions.

22 First, if a requirement for public open space is not specified in a planning scheme, a council may require the applicant for a subdivision which will create an additional separately disposable parcel of land to make a public open space contribution of up to 5% of site area or land value.

23 Second, a planning scheme may specify a requirement for public open space. If such a requirement is specified, it must be complied with; and if it is specified as a condition which must be included on any relevant permit, then, in granting such a permit, the responsible authority must include such a condition.[9]

24 Third, the nature of a requirement that may be specified in a planning scheme is not at large. For example, a planning scheme could not specify that all owners of land over 10 hectares – whether or not that land is being subdivided - must cede 10% of that land as public open space. Hence it may be necessary to identify the limits on the power to specify a requirement for public open space in a planning scheme.

25 Fourth – and this is related to the third issue – it is necessary to interpret the nature of the requirement in clause 52.01 of the planning scheme in order to ascertain the circumstances where it will apply.

26 The first two issues are not in dispute in this case. The third issue is relevant, but can be conveniently considered in the context of the fourth issue as a planning scheme provision ought be interpreted as being within power if at all possible.[10]

The planning scheme requirement to contribute to open space

27 In *Equity Trustees Executors and Agency Co Ltd v Melbourne and Metropolitan Board of Works* Gobbo J observed:

> Where a planning authority is empowered to create zones or to reserve land for a public purpose, it would arguably be an abuse of the power granted to the planning authority for it to create a zone which was a reservation by subterfuge. Such a course would be analogous to an exercise of power, not for the specified purpose but for an ulterior object.[11]

This statement of general principle applies more broadly to planning scheme provisions. The *Planning and Environment Act* is mature legislation and (together with cognate legislation, such as the *Subdivision Act*) is intended to authorise the making of planning schemes within limits.

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9 See section 62(1)(a) of the *Planning and Environment Act*.

10 See *D'Emden v Pedder* (1904) 1 CLR 91, at 120; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, at 216; *Keen v Telstra Corporation Ltd* [2006] FCA 834.

11 [1994] 1 VR 534 at 544. See, also, *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170.

Some limits are to be ascertained from the general nature and scope of legislative provisions; other limits are to be ascertained by particular provisions, including the legislative history and context of those provisions.

28 Part 3B of the *Planning and Environment Act* authorises the making of a development contribution plan. This may require a person to make a public open space contribution upon the subdivision of land. Although this is relevant, it does not determine whether the planning scheme may make such a requirement outside of a development contribution plan: as section 46I of the Act makes it clear that the power to make a development contribution plan does not limit the general power to make a planning scheme.

29 Section 6(1) of the *Planning and Environment Act* is cast in broad language: it provides that a planning scheme may make any provision which relates to the use, development, protection or conservation of any land in an affected area. But this broad language is confined by the nature and scope of the legislation: for example, as the Act is a planning statute, not a taxing statute, it would not be regarded as extending to the making of a planning scheme that imposed a general land tax or a tax on the windows of dwellings[12] or the compulsory exaction of property. Further, there are particular provisions in the Act – such as the reservation provisions (that may give rise to a compensation claim under Part 5) and the compulsory acquisition power (in section 172) - that would be inconsistent with an unbridled power to make a planning scheme sterilising land or compulsorily taking land.

30 A provision that requires a person who proposes to subdivide land to make a contribution to a council for public open space must be interpreted in the light of the nature of the power to make a planning scheme. Clearly it is not a requirement to be taken literally: in order to trigger the requirement it must be necessary to do more than *propose* a subdivision. It would be unconscionable if a person was required to make a contribution in respect of a proposed subdivision for which a permit was ultimately refused. How, then, should clause 52.01 be interpreted?

31 In my opinion, there is no lawful basis for a planning scheme requirement for an open space contribution in respect of a subdivision which does not increase the number of lots. For a requirement to contribute open space to be a lawful requirement, a subdivision needs to be of a character that is likely to generate a need for more open space; otherwise, the requirement would be a mere tax. In this respect, the analysis in the seminal decision of *Eddie Barron Constructions Pty Ltd v Shire of Pakenham*[13] is relevant, even though the present context is that of a planning scheme provision, rather than what is a valid permit condition. Hence, I do not regard clause 52.01

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12 Such a tax was introduced by King William III in 1696 and remained in England until 1851.

13 (1990) 6 AATR 10.

as applying to a subdivision that does not create an additional separately disposable lot.

32 It is possible that the original authors of the *Subdivision Act* thought that this issue was put beyond doubt by the exemption provisions in the planning scheme. On 30 October 1989 the regional section of metropolitan planning schemes provided that any control over the subdivision of land did not include a subdivision which realigns the boundary between lots provided that any lot which is reduced in area meets any minimum lot area and dimensions for the zone. However the introduction of VicCode 1 in 1991 opened an argument as to whether there remained lot area minima in residential zones. Further, in September 1991 Victorian planning schemes were amended to confine the exemption provision (in cases where there was no minimum lot area) to a realignment of boundaries where no more than 30 square metres was being transferred.

33 It is instructive that clause 52.01 does not use the term "responsible authority", but uses the term "council": which is the same term which is used in section 18 of the *Subdivision Act* and which is defined in that Act (but not in the *Planning and Environment Act*, nor in the planning scheme). Further the other references in clause 52.01 to the *Subdivision Act* (and its predecessors) indicate a very strong connection between a requirement under the planning scheme and those Acts. I have already referred to section 18(8)(a) in this regard.

34 It would be an odd outcome if many of the provisions set out in the *Subdivision Act* in relation to a public open space contribution did not apply to a contribution pursuant to a planning scheme requirement. For example, it would be odd if a payment pursuant to a planning scheme requirement could be made after the issue of a statement of compliance without being secured in some way.[14] It would be odd if the provisions concerning staged subdivisions did not apply to a requirement under a planning scheme.[15] It would be odd if the provision that an open space requirement could only be made once did not include requirements under a planning scheme.[16] It would be odd if the valuation provisions found in section 19 of the *Subdivision Act* did not apply to a requirement under a planning scheme. And it would be particularly odd if Parliament intended that contributions under a planning scheme requirement would be devoid of the trust provisions set out in section 20 of the *Subdivision Act*.

35 Further, the history and context of the provisions are consistent with an intention that the machinery provisions in the *Subdivision Act* apply equally to contributions required by a planning scheme. This is clearest when it comes to the process of calculating the precise amount of a requirement,

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14 Compare section 18(1B).

15 Compare section 18(2). There is a similar provision in clause 52.01. But if the two provisions are to be considered separately, this could result in two requirements in respect of the same land, one under the *Subdivision Act* and one under the planning scheme.

16 Compare section 18(5).

and to the way in which land or money, provided or paid pursuant to a requirement, must be used. But, in turn, it also suggests that the circumstances in which a requirement for public open space may be specified in a planning scheme – and has been specified in this planning scheme - are the same circumstances in which a council may require a public open space contribution under section 18(1) of the *Subdivision Act*. That is, that a planning scheme requirement ought be interpreted as only applying to a subdivision which creates an additional separately disposable parcel of land. Of course, the first of the two subdivisions in this case does not do this.

36 Thus, in my opinion, the effect of the opening words in clause 52.01 of the planning scheme is to fix the percentage (in this case at 5%, but which may be greater than 5%) of any contribution for open space, but to otherwise leave in place the provisions of the *Subdivision Act* as to the circumstances in which a contribution is required, the method of calculating the requirement and the trust in which funds or land the subject of a contribution must be used.

37 The conclusion I have reached may seem to be at odds with the decision of Senior Member Byard in *Tucker v Mornington Peninsular Shire Council.*[17] However Mr Byard was not required to address the question of the power to make a planning scheme which requires the payment of a tax in circumstances where a subdivision does not generate any additional need for open space. It is this issue that drives my conclusion: as I have interpreted clause 52.01 in a manner that confined its operation so as to be within power.

38 I wish to emphasise the equity of the outcome in this case. If one lot was being divided into two lots – with no prospect of re-subdivision – no contribution would be required. In other words, there is no open space requirement if the outcome that results is one additional lot. In this case two lots are to be re-subdivided, then one of them is to be subdivided into two, with the outcome being one additional lot. There is no basis in equity to require a contribution in the second case, but not the first.

39 In addition to allowing the application for review, I think I should also make a declaration that the subdivision does not attract the requirement contained in clause 52.01; because there is the possibility that the current dispute may persist, not in the context of a permit condition, but in the broader context of a planning scheme requirement.

Stuart Morris
President

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17 [2006] VCAT 1780