VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2306/2007
PERMIT APPLICATION NO. M/2007/591

CATCHWORDS

Planning and Environment; Two lot subdivision; Public open space 5% schedule contribution; clause 52.01 exemption; construction of exemption; whether each lot is unlikely to be further subdivided; whether s.173 agreement prohibiting further subdivision could satisfy exemption; whether contribution should only be applied to one of the two lots.

APPLICANT	G and L Thompson
RESPONSIBLE AUTHORITY	Maroondah City Council
REFERRAL AUTHORITIES	Yarra Valley Water and Others
SUBJECT LAND	132 Dorset Road, Croydon
WHERE HELD	Melbourne
BEFORE	Tonia Komesaroff, Member
HEARING TYPE	Hearing
DATE OF HEARING	18 December 2007
DATE OF ORDER	20 December 2007
CITATION	Thompson v Maroondah CC [2007] VCAT 2455

ORDER

The decision of the responsible authority is affirmed. The Tribunal directs that the permit must be subject to the conditions contained in the notice of decision to grant a permit no. M/2007/591 issued by the responsible authority on 28 August 2007.

Tonia Komesaroff

Member

APPEARANCES:

For Applicant	Mr Simon Merrigan, town planning consultant, Millar Merrigan Land Development Consultants.
For Responsible Authority	Ms Natalie Luketic, solicitor, Maddocks Lawyers.

REASONS

BACKGROUND TO THIS PROPOSAL

1 The subdivider has applied for a two lot subdivision of land which fronts two roads, Dorset Road and Dixon Avenue. Proposed lot 1, measuring 2114m^2, will contain an existing house which has been considerably extended and renovated to the tune, I am told, of $200,000 while proposed lot 2, which measures 745m^2, is a vacant block anticipating a dwelling. Proposed lot 2 is presently the backyard of lot 1.

2 In granting permission for the proposed two lot subdivision, council has imposed the following condition on the permit.

> 4. The applicant or owner must pay to the Council a sum equivalent to 5% of the site value of all land in the subdivision. This payment shall be made prior to the issue of a Statement of Compliance and may be adjusted in accordance with Section 19 of the Subdivision Act.

The subdivider appeals this condition to the Tribunal, submitting that an exemption under clause 52.01 of the Maroondah Planning Scheme applies.

3 The exemption to the otherwise fixed five percent public open space contribution applies where the proposal:

> Subdivides land into two lots and the Council considers it unlikely that each lot will be further subdivided.

4 The review site is a 2890m^2 irregularly shaped block of land. A similarly irregularly shaped block of land to its immediate south has been subdivided in such a manner as to provide for two lots over a similar sized lot to the proposed lot 1 fronting Dorset Road, with a third lot fronting Dixon Avenue to the rear. Each of the southern three lots contains a dwelling.

PRELIMINARY MATTERS

5 This case has a peculiar twist to it, in that it has come to me from the Practice Day hearing on 2 November 2007 in a constrained manner. At the practice hearing, Deputy President Dwyer was advised by council that it had appealed to the Supreme Court, the Tribunal decision of ***Scott v Maroondah City Council***[1]. In ***Scott***, the Tribunal had imposed a section 173 condition prohibiting further subdivision of either of the two lots except with the written consent of the responsible authority. Council has appealed the validity of such a condition to the Supreme Court and the hearing is listed for 2008. Council wished to adjourn this proceeding pending the outcome of that Supreme Court appeal because the facts in both cases are very similar.

[1] [2007] VCAT 1474

6 At the practice day hearing, Mr Merrigan indicated to the Tribunal that:

> … his client was no longer pursuing a Section 173 Agreement to prohibit any further subdivision (being part of a condition at the heart of the Supreme Court appeal) but still wished to have the matter listed so that the condition imposing the public open space contribution could be challenged generally.

7 The constraint is therefore that my hands are tied in relation to the imposition of a section 173 condition, if I were of the opinion that without such a condition on a two lot subdivision permit it is not unlikely that each lot will be further subdivided (at some unspecified time in the future).

THE SITE, ITS LOCALITY AND ZONING

8 The subject land is zoned Residential 1 with a Significant Landscape Overlay Schedule 3. Neither the zoning nor the overlays are in issue in this case. The issue is limited to the construction of clause 52.01 and its exemption provision.

9 Council advised the subdivider that the contribution would amount to $25,750.

10 There were no objectors to the proposed subdivision, the subdivider making it very clear to surrounding neighbours that his intention was only for one additional dwelling on lot 2 and no further subdivision after that.

ISSUES FOR CONSIDERATION

11 Council raised two issues. The first issue I have to determine is whether *council's opinion* that it is unlikely that each lot will be further subdivided is reviewable on the merits or only on a judicial review. The second issue is the meaning of the word *'unlikely'* in the exemption to clause 52.01.

12 The subdivider raised a third issue which was my preparedness to impose (as an alternative to a section 173 condition which I am estopped from imposing in the particular facts of this case) the public open space contribution to one of the two lots proposed rather than to both. I will deal with each issue in turn.

ANALYSIS OF THE ISSUES

Judicial review or merits review

13 There is a departure between divisions of this Tribunal about the Tribunal's review power concerning 'council's opinion'. In ***Tucker v Mornington Shire Council***[2], Senior Member Byard opined that a review of the merits of council's opinion of *'unlikely'* was not open to the Tribunal and the only

[2] [2006] VCAT 1780

review that was open was akin to judicial review on the grounds of *'**Wednesbury**[3] unreasonableness'*.[4]

14 A contrary view was expressed by Member Quirk in ***R D Carter and Associates v Mornington Peninsula Shire Council*** [5]. In ***Carter*** Member Quirk, a non-legal member of the Tribunal, disagreed with Senior Member Byard and opined that the review power encompassed the merits of council's opinion so that if the Tribunal came to an opposite opinion on the merits, it was open to it to apply the exemption and not impose a public open space contribution on a two lot subdivision.

15 Member Quirk arrived at his opinion based on the *VCAT Act* 1998, section 51(1) which states:

> In exercising its review jurisdiction in respect of a decision, the Tribunal –
>
> (a) Has all the functions of a decision maker; and
>
> (b) Has any other function conferred on the Tribunal by or under the enabling enactment; and
>
> (c) Has any functions conferred on the Tribunal by or under this Act, the regulations and the rules.

16 Having considered both opposing positions, it is my opinion that, consistent with the *VCAT Act* 1998, section 51(1), the Tribunal exercises its power *de novo* to consider whether it is unlikely that each lot will be further subdivided.

'Unlikely'

17 Is it unlikely that each lot will be further subdivided? Council considers it not unlikely and has therefore imposed the public open space contribution.

18 The subdivider says it is unlikely that proposed lot 1 will be further subdivided because it contains a $500,000 dwelling on top of which $200,000 had been expended on extensions, renovations and landscaping. That raises the presumption that no-one will demolish such a large and expensive dwelling in the future to create a two lot subdivision out of this house lot. Council's rebuttal was that proposed lot 1 measures 2,114m^2 in area and can easily be subdivided into two 1,007m^2 lots as has been done to the site's immediate south at nos. 134 to 136 Dorset Road. Council maintains that an objective test has to be applied, not the subjective test of the current owner or one future owner.

19 The test is whether it is unlikely that a proposed new lot will be further subdivided. There is no time constraint on when such further subdivision will occur. I could not say that it is unlikely that proposed lot 1 will be

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[3] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223
[4] At paragraphs 37 to 38
[5] [2007] VCAT 821

resubdivided in the future. I have seen plenty of recently renovated dwellings demolished (albeit in a middle ring suburban environment) to make way for two double storey townhouses. I distinguish the facts in this case from those found by Member Quirk in ***Carter*** where he held:

> In my experience it has been a long held view in this Tribunal that a two lot residential subdivision of such dimensions in a place like Rye, set back as it is from the beach front, would be unlikely to have each lot further subdivided. It is more likely that a valuable single dwelling would be built on the second lot.
>
> Leaving aside any legal arguments which I was not requested to determine, in the planning context it is my view that having regard to the policies and provisions of the Mornington Peninsula planning scheme it is unlikely that a responsible authority adjudging an application such as this fairly and reasonably in regard to its own provisions would form the view that further subdivision of these two lots is likely. Certainly, acting as the responsible authority under s.5l(1A) of the VCAT Act I consider it so. Therefore, the condition will be deleted.

20 It is my opinion that the location of proposed lot 1 along Dorset Road differs from the location of a Rye beachfront lot.

21 As for lot 2 which presently measures 745m^2, in a more inner metropolitan context, it is not uncommon for such a sized lot to be re-subdivided into two lots. Although it is arguable that two 372m^2 lots are out of character with the surrounding neighbourhood along Dixon Avenue, I can envisage a development where the building envelope mirrors development in the surrounding neighbourhood and yet can be subdivided to provide two dwellings. Therefore I do not consider it unlikely that proposed lot 2 will be further subdivided at some point in the future. Planning policies change and low scale medium density development is catching on everywhere in the metropolitan region, in accordance with *Melbourne 2030* policy. The clause 52.01 exemption imposes no time limit on a re-subdivision. Our suburbs are evolving. They experience very many examples of single dwelling lots which are converting to dual occupancy, such as this one is. As policy changes, so will subdivision potential.

22 I have therefore come to the conclusion that, without the benefit of a section 173 agreement, it is not unlikely that each lot will be further subdivided at some point in the future. Were it not for the constraint imposed upon me by the practice day agreement between the parties, I would have imposed a section 173 agreement on this two lot subdivision, prohibiting further subdivision. Although council has taken such a condition on appeal to the Supreme Court on the basis that it is an invalid condition to impose on a subdivision permit, it would have been a condition which I would have been satisfied to impose. The clause 52.01 trigger would then have been available to the subdivider because it makes it unlikely that each lot will be further subdivided. If that eventuality ever occurred, by way of an

application for a fresh planning permit with such a restriction removed from the certificate of title, the public open space contribution could be imposed at that point in time.

23 However I do not have that luxury in this case even though it is my opinion that such a condition satisfies the tests of a valid planning permit condition which are:

- 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.[6]

Can the public open space contribution be imposed on one of the proposed two lots only?

24 I sympathise with council's dilemma. Avoiding the imposition of a public open space contribution at this initial stage of a subdivision means that a continuing series of two lot subdivisions could be undertaken and, by stealth, avoid this contribution altogether.

25 On the other hand, there must be some purpose and meaning to the exemption in the first place. It cannot be that the exemption will only trigger in the case of an absurd situation. I use as an absurd example a three metre wide lot created for carriageway purposes on which a dwelling could not be constructed under any circumstances no matter what the planning policy becomes in the future. It is my opinion that the purpose of the exemption is to negate the need for a public open space contribution where a subdivision as small as any normal two lot subdivision occurs.

26 But because I am sympathetic to council's fear that a series of two lot subdivisions could occur by stealth, I would have been prepared to impose a section 173 agreement on this subdivision. Now that I am constrained from doing so, Mr Merrigan has urged me to apply the contribution to only one of the two lots, namely the vacant lot, proposed lot 2.

27 Mr Merrigan referred me to Senior Member Byard's opinion in ***Tucker***, which held that the exemption would be defeated if only one of the lots being created was likely to be further subdivided. Mr Merrigan agreed with Senior Member Byard's opinion, but referred me to ***Van Der Zweep v Maroondah City Council*** [7] where Member O'Leary only imposed the contribution on one of the proposed two lots. Member O'Leary's reasons for doing so involved the fact that there was a restrictive covenant over one of the lots, preventing the construction of more than one dwelling on that lot. Member O'Leary considered that, as far as the restrictive covenant lot

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

[7] [2007] VCAT 1806

was concerned, it was *'unlikely that it would be further subdivided'* so he only imposed the public open space contribution on the other non-constrained lot. Member O'Leary had the advantage of a starting point from a rather unusually worded permit condition which read:

> The applicant or owner must pay to the Council a sum equivalent to 5% of the site value of all land in the subdivision **or a particular lot or lots**. This payment shall be made prior to the issue of Statement of Compliance and may be adjusted in accordance with Section 19 of the Subdivision Act. (Tribunal emphasis)

28 The condition that Member O'Leary imposed read:

> The applicant or owner must pay to the Council a sum equivalent to 5% of the site value of **Lot 2** in the subdivision. This payment shall be made prior to the issue of a Statement of Compliance and may be adjusted in accordance with Section 19 of the Subdivision Act.
>
> (Tribunal emphasis)

29 I distinguish the facts in ***Van Der Zweep*** from the facts in this case. As I have already said, I agree with council that it is not unlikely that each lot will be further subdivided at some time in the future.

CONCLUSION

30 Caught as I am in the dilemma between believing that there is a purpose to the clause 52.01 two-lot subdivision exemption and the council's concern that, by a progressive series of two lot subdivisions, subdividers will avoid their public open space contribution obligations, I would have been prepared to impose a section 173 agreement condition to resolve the dilemma. But my hands are tied on this matter, because of the practice day constraint imposed on me, so I have no alternative but to uphold council's condition 4.

Tonia Komesaroff
Member

TK:AM