

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1338/2007
PERMIT APPLICATION NO. M/2006/1003

CATCHWORDS

Subdivision of land, Residential 1 Zone, Erection of one additional dwelling on a lot, Significant Landscape Overlay, Open space contribution, Neighbourhood character, Outcomes sought to be achieved in the overlay

APPLICANTS	J & J Van Der Zweep
RESPONSIBLE AUTHORITY	Maroondah City Council
OBJECTORS	Shane Alderson and others
SUBJECT LAND	11 Allendale Road and 32 Lindisfarne Avenue, Croydon
WHERE HELD	Melbourne
BEFORE	Peter O'Leary, Member
HEARING TYPE	Merits Review
DATE OF HEARING	12 September 2007
DATE OF ORDER	3 October 2007
CITATION	Van Der Sweep v Maroondah CC [2007] VCAT 1806

ORDER

The responsible authority's decision is set aside.

The responsible authority must issue a permit for development of a single storey dwelling and a two stage – three lot subdivision in accordance with the endorsed plan.

The conditions on the permit are:

- 1 Before the use development starts, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be in accordance with the plans by Millar & Merrigan Land Development Consultants 12699P2 Version 1, but modified to show:

- (a) A schedule of materials, colours and finishes
- 2 The development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
- 3 Prior to the endorsement of development plans, a landscape plan prepared by a suitably qualified person which incorporates:
- (a) A survey of all existing vegetation and natural features;
 - (b) The area or areas set aside for landscaping;
 - (c) A schedule of all proposed trees, shrubs and ground cover, which will include the location and size at maturity of all plants, the botanical names of such plants and the location of all areas to be covered by grass, lawn or other surface material as specified;
- shall be submitted to and approved by the Responsible Authority. An endorsed copy of the landscape plan shall form part of this permit.
- 4 Construction plans showing all parking areas and access lanes and the drainage thereof shall be submitted to and approved by the Responsible Authority prior to the commencement of any buildings or works authorised or required by this permit, except with the further consent of the Responsible Authority.
- 5 That part of the common carriageway easement must be sealed and constructed to the satisfaction of the Responsible Authority.
- 6 Before the dwelling is occupied, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and then maintained to the satisfaction of the Responsible Authority.
- 7 The subdivision as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 8 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.
- 9 Prior to the issue of a Statement of Compliance for the subdivision permitted under this permit, the Owner of the land must complete to floor level, the unit development that is proposed to be subdivided or, enter into, and register on title, an agreement with the Responsible Authority under Section 173 of the Planning & Environment Act 1987, which among other things, provides that:
- Except with the consent of the Responsible Authority, the development of any lot created by the subdivision of the land must be in accordance with the development authorised by **Planning Permit No M/2006/1003** issued by Council and the various conditions included in that

planning permit and the development depicted in the plans from time to time endorsed pursuant to that permit. The agreement may allow for a predetermined termination after the development is completed.

- The cost of the preparation of the agreement and its registration on the title to lot 2 must be borne by the Owner of the land.
- 10 The plan of subdivision submitted for certification under the Subdivision Act must be forwarded to Melbourne Water, Yarra Valley Water, SP Ausnet P/L, Multinet Gas and Telstra under Section 8 of that Act.
 - 11 The owner of the land must enter into an agreement with Melbourne Water for the acceptance of surface and stormwater runoff, directly or indirectly into Melbourne Water's drainage system.
 - 12 No polluted or sediment laden runoff is to be discharged directly or indirectly into Melbourne Water's drains and watercourses.
 - 13 The owner of the land enters into an agreement with Yarra Valley Water for the provision of water supply and the provision of sewerage.
 - 14 The applicant shall enter into an agreement with SP Ausnet Pty Ltd for the supply of electricity to each allotment on the endorsed plan to the satisfaction of the Responsible Authority.
 - 15 Arrangements for the supply of electricity will be subject to obtaining the agreement of other Authorities and any landowners affected by routes of the electric power lines required to supply the lots and for any tree clearing.
 - 16 This permit shall expire if:
 - (a) The subdivision plan is not certified within twelve (12) months of the date of issue of this permit; and
 - (b) Statement of Compliance is not obtained within five (5) years of the certification of the plan;
 - (c) The development hereby permitted is not commenced within three (2) years of the date of issue of this permit; and completed within two (2) years of commencement of the development, (as evidenced by inspection of footings);

or any extension of such periods the Responsible Authority may allow, if a request is made in writing before the permit expires or within three (3) months afterwards.

Peter O'Leary
Member

APPEARANCES:

For Applicant

Mr Simon Merrigan, Surveyor of Millar &
Merrigan Pty Ltd

For Responsible Authority

Mr Scott Ebbett, Town Planner

For Objectors

Mr Shane Alderson. Mr Peter Onley appeared
on his own behalf

REASONS

- 1 This is an application for review¹ against the decision of Maroondah City Council to refuse an application for development of a single dwelling and a two lot subdivision, and vegetation removal on a property comprising 11 Allendale Road and 32 Lindisfarne Avenue in Croydon.
- 2 The responsible authority refused the application on the basis that:
 - 1 The proposal is not in keeping with the existing and preferred objectives and policies of Clause 22.03 of the Maroondah Planning Scheme. In particular relating to setback patterns and vegetation retention.
 - 2 The proposal does not satisfy the following objectives and standards of Clause 55.
 - Neighbourhood Character objectives – Standard B1
 - Landscaping objectives – Standard B13
 - 3 The proposal does not comply with the provisions of Clause 42.03 (Significant Landscape Overlay – Schedule 3) of the Maroondah Planning Scheme.
- 3 Objectors to this application supported the responsible authority's decision and principally raised concerns about:
 - Loss of vegetation
 - The development not being consistent with the character of the area
 - The development will set a precedent and ruin the character of the area
 - Visual impact of the proposed dwelling on neighbouring properties
- 4 Mr Merrigan, on behalf of the applicant, refuted the responsible authority's decision and argued:
 - The proposal meets all measurable Rescode standards and is appropriate when assessed against the general thrust of applicable State and Local policies
 - In the context of the site there is opportunity to provide for an additional dwelling on one of the few allotments that does not have a restriction
 - Particular care has been taken in the design of the proposed dwelling, the driveway access and the surrounding landscape to ensure a dwelling that will sit well in the context of surrounding housing and will contribute to an attractive neighbourhood

¹ Pursuant to Section 77 of the *Planning and Environment Act 1987*

character through the provision of well designed and appropriately located canopy trees

- 5 There are four principal issues to be determined in this application:
- Is the subdivision classified as a three lot subdivision; and thereby triggers a warrant for a 5% open space contribution under Clause 52.01 of the Maroondah Planning Scheme?
 - Is the proposed dwelling appropriate having regard to the neighbourhood character?
 - Is the removal of vegetation appropriate in the context of the neighbourhood and the development proposal?
 - Is there sufficient opportunity for replacement planting to respond to the character of the area and the significant landscape vegetation provisions?

Purpose Sought

- 6 This is a packaged application comprising an application to develop an additional single storey dwelling on a lot at the rear of an existing single storey weatherboard house at 11 Allendale Road in Croydon. However, the remainder of the package of this application includes a two staged 3 lot subdivision at 32 Lindisfarne Avenue and 11 Allendale Road. The subdivision plan titled 12699T1 Version 1 shows

STAGE 1: RESTRUCTURE EXISTING LOTS 60 & 43
CREATING LOTS 1 & (2, 3)

STAGE 2: SUBDIVIDE (2, 3) CREATING LOTS 2 & 3

- 7 The subdivision involves removing a 4.4 metre wide parcel of land that extends for the entire length of 32 Lindisfarne Avenue, but widening out to 7.4 metres at its rear from Lot 43. This parcel will then be annexed to the rear of 11 Allendale Road. Then a parcel of land measuring 19.5 metres by 19.81 metres will be subdivided from the original Lot 60 – 11 Allendale Road to create a separate parcel that will contain the proposed new dwelling.
- 8 This stage subdivision method is required due to the nature of restrictions on the title to 32 Lindisfarne Avenue that is restricted by a “one house” covenant and is, for practical purposes, the only piece of land available for the creation of vehicular access to a road. The subdivision is designed so that no part of the future dwelling on the new Lot 2 will be erected on the remnant parcel of land to Lindisfarne Avenue to comply with the covenant to 32 Lindisfarne Avenue.
- 9 The proposed dwelling is single storey with a 30 degree pitched roof. It comprises two bedrooms, bathroom, walk-in-robe and ensuite, double car garage, study and hall, and a living dining and kitchen with a northerly orientation. A deck is also to be erected in front of the living dining and

kitchen with an obvious northern orientation. A new driveway is created over the eastern portion of the remnant of 32 Lindisfarne Avenue. This will be for almost the entire length of that property and will be widened out at its southern extremity to allow for vehicles to manoeuvre in and out of the garage in a forward direction.

- 10 There are 10 trees listed for removal, most of these trees are deciduous exotic species listed as a Box Elder and Silver Birches and Tortured Willow trees.
- 11 As part of the subdivision there will be a carriageway easement created at the north-eastern corner of the property boundary facing Lindisfarne Avenue so that there is vehicular access to both 32 Lindisfarne Avenue and the driveway to the proposed new Lot 2.

Locality

- 12 The subject site is located on the western side of Allendale Road and on the southern side of Lindisfarne Avenue in Croydon. The two existing lots make up an L shaped site that is occupied by two single storey elevated dwellings. Surrounding properties comprise single storey detached dwellings on generously proportioned lots.
- 13 This neighbourhood principally comprises single with some two storey detached dwellings set amongst generous vegetated gardens. A reason that most of the neighbourhood retains its verdant detached house character is due to the “one house” covenant. Another reason is the presence of substantial exotic and native vegetation with substantial tree canopy. This vegetation canopy is reflected in the Significant Landscape Overlay controls covering this part of Croydon.
- 14 There has been a few isolated examples of medium density housing but these seem to have been introduced prior to the year 2000 and therefore were probably approved at a time where limits on development in a covenant area were not constrained to the extent that they are under current planning legislation.

Planning Controls and Policies

- 15 The subject site is located in a Residential 1 Zone and a permit is required to develop more than one dwelling on a lot under Clause 32.01-4. A permit is also required to subdivide land under Clause 32.01-2. This then triggers assessment under Clause 55 and 56 of the Planning Scheme. I was told the responsible authority also has a separate schedule for the Residential 1 Zone concerning minimum amount of private open space, additional setbacks, front fence heights and rear setbacks.
- 16 The purposes of the Residential 1 Zone seek amongst other things:
 - Implementation of State and Local Planning Policies,
 - A range of densities with a variety of dwellings,

- Development which respects the neighbourhood character
- 17 The site is also located within a Significant Landscape Overlay Schedule 3, Ridgeline Protection Area – Inside the Urban Growth Boundary. The relevant objectives of this overlay are:
- To conserve the existing pattern of vegetation, landscape quality and ecosystems within the area and encourage the re-generation of vegetation.
 - To maintain a dense vegetation canopy that contributes to the environmental significance of the area.
 - To control or minimise the effect of future development upon natural features particularly significant vegetation and ridgelines.
 - To ensure that the development, use and management of land is compatible with the existing character and landscape protection of the area.
 - To maintain the overall scenic beauty of the municipality.
- 18 A permit is required to remove, destroy or lop vegetation on trees over 5 metres in height or with significant trunk circumference.
- 19 There are various State and Local planning policies of relevance².

The Review Hearing

- 20 At the commencement of the hearing Mr Onley sought leave to make a submission to the Tribunal. There was no objection and accordingly, I admitted him as party pursuant to Section 60 of the VCAT Act. Both Mr Ebbett and Mr Merrigan provided detailed written submissions and Mr Onley provided oral presentation including the tabling of photographs and a plan showing lots in covenant areas. I was provided with plans, elevations, extracts of Council planning policies including the Neighbourhood Character Study – Area 12, details of the covenant affecting 32 Lindisfarne Avenue, and a previous Tribunal decision³. I advised the parties that I had viewed the site and neighbourhood on the day preceding the review hearing.

Basis of Decision

Proposed Dwelling

- 21 Essentially the proposed single storey dwelling is considered a reasonable form of development having regard to the neighbourhood context. The proposed dwelling is set well back from all boundaries, will not significantly overshadow surrounding properties and is of a size and design which is respectful of this detached house neighbourhood.

² including Clauses 16, 19.01, 19.03, 21, 22.01, 22.03 and 65

³ Fletcher v Maroondah City Council [2006] VCAT 2205

- 22 It has been designed to take account of the northern solar orientation, has adequate car parking, vehicular access and open space. The roof treatment is consistent with other pitched roof treatments in the neighbourhood and the only matter requiring any attention is for screening above the northern fence line abutting 13 Allendale Road. Such information has been shown on the plans and I note that the owner of that property has provided written documentation supporting the permit application.
- 23 I acknowledge that it is unusual to have a “dual occupancy” type of development in this neighbourhood owing to the “one house” covenant but that alone does not mean that an individual single storey dwelling cannot be allowed on a lot that is not encumbered by the covenant. The only real issue about this development is whether there is sufficient opportunity for landscaping and the planting of trees that will replace the lost vegetation and produce outcomes sought in this neighbourhood and the directives of the Vegetation Protection Overlay.
- 24 The plans submitted show opportunity for the planting of at least two large canopy trees together with the opportunity for smaller trees, shrubs, hedges and other screen planting in strategic locations on the proposed new Lot 2. I note the new large trees will be Eucalypts, in time will grow to complement the canopy vegetation found in the neighbourhood and also supports other fauna and flora in the area.
- 25 Whilst it is sad to see trees removed, those trees are not significant, and at least one tree may pose hazard in the near future and its removal at this time would seem appropriate. I note that the Council’s arborist did not oppose removal of vegetation rather he was unconvinced about the opportunities for replacement of vegetation.
- 26 Accordingly I consider there are satisfactory opportunities for replacement vegetation although I have changed at least one condition limiting the extent of paved surfaces near the southern section of the driveway so as to maximise opportunities for the tree to grow without being hindered by a sealed driveway.

Subdivision

- 27 At the commencement of the hearing Mr Ebbett argued that this was really a three lot subdivision and so the description of the purpose should be amended accordingly. Mr Merrigan opposed the change in description on the basis that the subdivision only created one additional lot and was to be done in a two stage process. For all intent and purposes whether this is called a three lot subdivision or a two lot subdivision, the net outcome is three lots; two of which already contain dwellings and a new house lot which will contain the new dwelling.

- 28 Mr Merrigan referred to the *Fletcher* decision⁴ wherein Justice Morris, as he was then, made findings that a two stage two/three lot subdivision does not draw an open space requirement in the schedule to Clause 52.01 of the Maroondah Planning Scheme.
- 29 There are a number of similarities between this matter and the *Fletcher* decision because each applied a “re-subdivision” approach sought to avoid a public open space requirement in Clause 52.01 of the Maroondah Planning Scheme. Justice Morris’ decision provided an overview of recent subdivision legislation and public open space contributions. The section on the *History of Open Space Contribution Provisions* is a helpful and well informed commentary about open space contributions although it does not necessarily assist in determining this matter. Full details of the plans or permit conditions for the *Fletcher* decision were not supplied so it was not possible to make a complete comparison and Mr Merrigan conceded whilst there are similarities there were also some differences in the two subdivisions.
- 30 So whilst I had no fundamental difficulty with Justice Morris’ decision I consider it prudent to apply the relevant planning scheme provisions concerning subdivision and the development as packaged and in the context of this particular proposal.
- 31 Whilst there may be circumstances where a minor boundary realignment is, for all practical purposes, considered as part of a two lot subdivision, that does not seem to be the case in this proposal. The extent of land subdivided is substantial to such an extent that an additional house lot will be created. I acknowledge, based on my findings, that a requirement for a 5% open space contribution is triggered.
- 32 Due to the choice of approach taken by the applicant and circumstances of the site which include limited options for access and the covenant I consider this to be a three lot subdivision created in two stages with the net result of one additional house lot.

Open Space contribution

- 33 Clause 52.01 of the Maroondah of the Planning Scheme states:

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 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.

- 34 Further, at Clause 52.01 it states:

⁴ *Fletcher v Maroondah City Council* [2006] VCAT 2205

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.

35 Near the conclusion of the hearing a draft set of conditions was supplied by the responsible authority. Mr Merrigan opposed the imposition of Condition 8 relating to the payment of 5%. This condition states:

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)

36 During the hearing I questioned the parties about the intent of the wording of this draft condition particularly as the responsible authority appeared to anticipate some discretion about the extent of the lots. I sought particular guidance from both Council officers about this wording, but they could not elaborate on why the Council had chosen it.

37 A reading of Section 18(8) of the Subdivision Act provides some indication that a Council may decide to waive a need for a contribution if it was satisfied the land could not be subdivided further. However, there is uncertainty in this aspect because there is no prohibition on subdivision or minimum lot size in the planning scheme. Whilst the covenant prevents more than one dwelling on the land affected, it does not mean the covenant cannot be varied and it does not limit subdivision.

38 The Council, and therefore the Tribunal, has no discretion about the percentage of open space that can be attributed to this subdivision, such as that contained within Section 18(1A) of the Subdivision Act. However I consider there is scope to apply to a 5% contribution to part of the subdivision on the basis of the wording in the draft condition.

- 39 Having regard to the nature of the dispute, I consider it is appropriate to apply the open space contribution only to that part of the subdivision that results in the creation of one additional developable lot, particularly when only one additional lot is created. I consider this would seem to be a reasonable and logical approach having regard to the extent of the two lots that have dwellings on them and the limited ability to further subdivide and/or develop in this neighbourhood. Accordingly, I have modified the condition to make it clear the 5% requirement applies to Lot 2 in the subdivision. I consider this is reasonable because:

Conclusion

- 40 On the basis of the proposed future dwelling on the site and the form of subdivision I consider that the subdivision is a reasonable proposal in this neighbourhood. As I explained during the hearing I do not consider this subdivision and single storey dwelling as a package will create an undesirable precedent. I am guided by the covenants affecting most properties in this neighbourhood, vegetation protection policies and the Vegetation Protection Overlay that seeks to protect both the neighbourhood character and the significant vegetation that contributes substantially to this neighbourhood character.
- 41 I can well understand the concerns of residents about unreasonable or excessive development, but I do not consider that this proposed modest single storey dwelling on a single lot is out of character with the neighbourhood. Similarly, I consider it is an outcome anticipated in the purposes of the Residential 1 Zone. Accordingly, I direct that a permit issue.

Peter O'Leary
Member