

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2966/2006
PERMIT APPLICATION NO. YR-2006/1155

CATCHWORDS

Application under Section 77 of the *Planning and Environment Act 1987* (the Act) to review a **decision to refuse** a permit. Green Wedge Zone. Subdivision. State and Local Planning Policy Framework. Zone Purposes.

| | |
|------------------------------|---|
| APPLICANT | R & C Johnson |
| RESPONSIBLE AUTHORITY | Yarra Ranges Shire Council |
| SUBJECT LAND | 20 Connors Lane, Seville |
| WHERE HELD | Melbourne |
| BEFORE | Laurie Hewet, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 17 April, 2007 |
| DATE OF ORDER | 7 May, 2007 |
| CITATION | Johnson v Yarra Ranges SC [2007] VCAT 775 |

ORDER

The decision of the Responsible Authority is set aside. In permit application YR-2006/1155 a permit is granted and directed to be issued for the land at 20 Connors Lane, Seville. The permit allows the subdivision of the land in accordance with the endorsed plans and subject to the following conditions:

- 1 The plans to be endorsed and which will then form part of the permit are the plans submitted with the application.
- 2 The layout and site dimensions of the proposed subdivision as shown on the endorsed plan(s) must not be altered or modified unless agreed to by the Responsible Authority.
- 3 This permit will expire if one of the following circumstances applies:
 - (a) The Plan of Subdivision is not started within two (2) years of the date of this permit, as evidenced by the plan of subdivision being certified by the Council within that timeframe; or

- (b) The registration of the subdivision is not completed within five (5) years of the date of certification.

The Responsible Authority may extend the two year period if a request is made in writing before the permit expires, or within three (3) months afterwards.

- 4 The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity, gas and telecommunication services to each lot shown on the endorsed plan in accordance with the authority's requirements and relevant legislation at the time.
- 5 All existing and proposed easements and sites for existing or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
- 6 The plan of subdivision submitted for certification under the Subdivision Act 1988 must be referred to the relevant authority in accordance with Section 8 of that Act.

Laurie Hewet
Member

APPEARANCES:

For Applicant

Mr P Merrigan of Miller Merrigan

For Responsible Authority

Ms S Hartley, town planner

REASONS

- 1 This is an application to review the decision of the responsible authority to refuse permission for the subdivision of land at 20 Connors Lane, Seville. The responsible authority issued a Notice of Refusal to Grant a Permit for the following reasons:
 1. That the approval of the proposal will result in an overall loss of land used for productive agricultural purposes and will encourage the use of both proposed lots for rural residential purposes.
 2. That the proposal is inconsistent with the intent and strategic directions of the State and Local Planning Policy Framework of the Yarra Ranges Planning Scheme and Melbourne 2030 — Green Wedge Policy.
 3. The proposal is contrary to the purpose and decision guidelines to Clause 35.04 (Green Wedge Zone) of the Yarra Ranges Planning Scheme.

The Proposal

- 2 It is proposed to subdivide land contained in two Crown Allotments (CA 109a and 109b) and having a total area of 19.785 ha, into two lots with lot 1 proposed to have an area of 9.7 ha and lot 2 an area of 10.08 ha. Proposed lot 2 would consist of two parcels, being the existing CA 109b which is separated from the balance of the land by a government road, and approximately one half of the existing CA 109a.

The site and its environs

- 3 Ms Hartley provided the following useful description of the review site and its environs which I adopt:

The review site is located on the south-eastern corner of Connors Lane and Beenak Road, Seville and is situated approximately 2.3 km south east of the township of Seville.

The site currently contains a dwelling and various outbuildings that are located in the north eastern corner of the cleared portion of the site. Access on to the site is via a crushed rock driveway from Connors Road.

The review site is made up of two lots totalling 19.785 hectares including:

Northern Lot — Part CA 109A. This lot is an irregular shape with an area of 17.928 hectares and contains the dwelling, outbuildings and cleared areas in the western third of the lot, and intact areas of native vegetation forming the eastern two thirds of the lot. The dwelling is located on the crown of the hill and has extensive views to the south-west. As can be seen from the proposed subdivision plan, the dwelling is located on the ridge and the land slopes down

in all directions, but more steeply to the east, in the western and southern setbacks of the dwelling are cleared pasture and orchards. The remainder of the property is native bushland.

Southern Lot — Part CA 1096. This lot has an area of 1.857 hectares. This site has been cleared and is used for pasture and orchards in the western third, and retains native vegetation in the eastern two thirds.

The two lots are separated by a section of land set aside as a government road, which contains a track. The road was created to allow stock to have access to a spring at the end of the road.

The lots were reserved to allow the Victorian Government at any time to acquire any part of the land for construction of a railway and for mining of various metals and minerals.

Land surrounding the subject site in all directions is used for rural residential purposes, including orchards and pasture. The exception is those lots immediately abutting to the east and north-east, which are predominately covered in native vegetation. Lots range in size from approximately 2 hectares at 50 and 70 Connors Lane, to 15.6 hectares at 615 Beenak Road and 28.77 hectares at 60 Connors Lane.

Generally, the larger the lot, the more native vegetation has been retained.

The planning scheme

- 4 The land is zoned Green Wedge (Schedule 2) under the Yarra Ranges Planning Scheme. The purpose of the zone is:

To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To recognise, protect and conserve green wedge land for its agricultural, environmental, historic, landscape, recreational and tourism opportunities, and mineral and stone resources.

To encourage use and development that is consistent with sustainable land management practices.

To encourage sustainable farming activities and provide opportunity for a variety of productive agricultural uses.

To conserve and enhance the cultural significance and character of open rural and scenic non-urban landscapes.

To protect and enhance the biodiversity of the area.

- 5 A permit is required to subdivide land. Pursuant to clause 35.04-3, each lot must be at least the area specified for the land in a schedule to this zone. If no area is specified, each lot must be at least 40 hectares. The schedule to the zone states:

Except as provided for in the schedule to Clause 53, a minimum lot size of 12 hectares with an average lot yield not exceeding 1 lot to each 16 hectares of site area and a maximum lot size of 28 hectares

- 6 A permit may be granted to create smaller lots if any of the following apply:
 - The subdivision is the re-subdivision of existing lots, the number of lots is not increased, and the number of dwellings that the land could be used for does not increase. An agreement under Section 173 of the Act must be entered into with the owner of each lot created which ensures that the land may not be further subdivided so as to increase the number of lots. The agreement must be registered on title. The requirement to enter into an agreement only applies to a lot which could be further subdivided in accordance with this scheme.
 - The subdivision is by a public authority or utility service provider to create a lot for a utility installation.
- 7 A permit may be granted for this proposal under this provision of the scheme because the subdivision is the re-subdivision of existing lots, the number of lots is not increased and the number of dwellings that the land could be used for does not increase.
- 8 Decision guidelines are at Clause 35.04-6 and require consideration of matter categorised under the headings General issues, Rural issues, Environmental issues and Design and siting issues.
- 9 With respect to the applicable State and Local Planning Policy Framework¹, the review site is located outside the Urban Growth Boundary (UGB) and as such the site is located within a non-urban section of the municipality which the policy framework seeks to ensure continues to serve a range of functions which include agriculture, horticulture, landscape, environmental, ecological, rural living, intensive animal husbandry and recreation. Within these areas, the policy framework also encourages the protection of remnant bushland, protection of scenic landscape character and protection of rural areas from the intrusion of residential activities.
- 10 Clause 53 of the Planning scheme is unique to the Yarra Ranges Planning Scheme and seeks to facilitate consistency between the planning scheme and the Regional Strategy. Clause 7.0 of the schedule to Clause 53 contains subdivision requirements but these do not impose additional constraints to the grant of a permit.
- 11 General decision guidelines are at Clause 65 and guidelines specific to the approval of an application to subdivide land are at Clause 65.02.

¹ The applicable policy framework is most relevantly contained in Clauses 12.02, 12.03-2, 15.09, 16.03, 21.06, 21.07 and 22.03 of the Yarra Ranges Planning scheme.

The hearing

- 12 The parties at the hearing of the application for review relied on both written and oral submissions and a number of photographs, plans and other documents were tendered to the Tribunal.

Basis of decision

- 13 It was the council's submission that the grant of a permit would lead to the reconfiguration of the existing two lots and as a consequence this would contribute to the land as a whole being less suitable for agricultural production than that provided by the existing lot layout and configuration. It was submitted that such an outcome is not consistent with the zone purposes or the applicable policy framework.
- 14 Ms Hartley submitted that the existing southern most lot (CA 109b) which has an area of 1.875 hectares is not sustainable in terms of accommodating agricultural uses unless it was used in conjunction with a larger land holding. In Ms Hartley's submission however the existing northern most lot at 17.928 hectares is of a sufficient size to accommodate some form of viable agricultural production and there is evidence that the land has in fact been used relatively recently for grazing and as an orchard. The proposal to reduce the area of this lot and to fragment it into two lots of 9.7 hectares and 10.08 hectares would reduce the site's capacity to again be used for agricultural purposes. The council's concerns in this respect were reinforced by the likelihood that the grant of a permit would lead to a subsequent application for a dwelling to be constructed on proposed lot 2.
- 15 It was further submitted that while a permit could be applied for (and granted) on the existing, small, southern most lot, it is very unlikely that such a permit would be granted by the council. The prospects of an application for a dwelling being successful would be enhanced by the approval of the current application because this would increase the area of the southern most lot from 1.875 hectares to 10.08 hectares.
- 16 Ms Hartley further submitted that the applicant had not submitted sufficient justification in support of the application and that the subdivision was being pursued solely for personal reasons associated with estate inheritance issues. In response to this aspect of the council's submission I merely note that the personal circumstances of the applicants are not relevant to the consideration of the merits of the application, nor do they preclude a consideration of the application. The personal circumstances which have motivated the making of the application is entirely a matter for the applicants and my role in this matter is to determine whether or not the proposal achieves acceptable outcomes having regard to the applicable policy framework and the purpose and decision guidelines of the zone and of clause 65.
- 17 Mr Merrigan submitted that clause 35.04-3 which provides for the grant of a permit to create lots smaller than the specified minimum lot size is

intended specifically to enable the resubdivision of existing lots in circumstances where such resubdivision does not contribute to the creation of additional lots and provided that there is no increase in the existing entitlement for the number of dwellings capable of being accommodated on the land. In Mr Merrigan's submission the current application is entirely consistent with the outcomes contemplated by this clause of the scheme.

- 18 I agree with Mr Merrigan's submission in this respect but it is important that I emphasise that compliance with the tests under clause 35.04-3 to which I have referred above do not have the effect of automatically leading to the grant of a permit. These tests simply establish the circumstances under which an application for a permit can be made. In determining whether or not a permit ought to be granted the fact that the application complies with the tests under clause 35.04-3 is relevant but the application must still be considered against the applicable policy framework, zone purposes and decision guidelines.
- 19 In arriving at my conclusion that the proposal does achieve an acceptable outcome, I have influenced by a number of factors. Firstly the zone purpose and applicable policy framework emphasise not only the protection of green wedge land for agricultural purposes but also the protection of its environmental and landscape qualities. A consideration of the zone purposes reveals a tension within the purposes which needs to be resolved on a site by site and case by case basis. The protection of land for agricultural purposes is not necessarily consistent with the protection of a site's landscape and environmental qualities and in the context of this site the fact that approximately two thirds of the site is covered in remnant native vegetation is a relevant consideration. This land does not exhibit characteristics which make it suitable for viable agricultural production. Approximately 6 hectares of the site has been cleared and is available for agricultural production without further extensive native vegetation clearance. While I am unable to conclude that a permit would never be granted for native vegetation removal on this site it is nevertheless clear that any such application would need to be assessed against, among other matters, the purpose and provisions of the green wedge zone which seek to protect the landscape and environmental quality of the land.
- 20 My conclusion therefore is that this land cannot be regarded as an important agricultural resource because so little of the total area of the land is currently available for agricultural production. The reduction in the area of the northern most lot from 17.928 hectares into two lots of 9.7 hectares and 10.08 hectares has no significant impact on the prospect of this land being used for viable agricultural purposes.
- 21 The second arm of the council's submissions in support of its refusal of this application relate to the prospect of a second dwelling being constructed on part of the southern most lot and the prospect that this would conflict with the rural landscape of the area.

- 22 I do not have before me an application for a dwelling but I think it is clear that such an outcome is almost inevitable. Clause 65.02 of the planning scheme requires me to have regard to the possible future development of the land when considering an application to subdivide land, and it is appropriate that I do so. I do not share the council's concerns in this respect. The construction of a dwelling on a lot of 10.08 hectares in a locality in which dwellings on similar or smaller lots are not uncommon and in which the minimum lot size is 12 hectares, is unlikely to lead to a visual impact which is so discordant with the existing landscape character of the area that a refusal of this application is warranted. A permit will be required for both the use of the land for a dwelling and for the construction of a dwelling and the council will retain control over the siting and design of the dwelling in order to ensure that its impact on the rural landscape character of this locality is contained within acceptable limits. There is nothing about the size or configuration of proposed lot 2 which would lead me to conclude that a suitably designed and sited dwelling could not be located on that lot without imposing an unacceptable impact on the landscape character of the area.

Conclusion

- 23 It follows from the above reasons that it is the Tribunal's conclusion that the decision of the responsible authority should be set aside and a permit be granted.
- 24 In deciding the conditions to be included on the permit I have had regard to the draft conditions provided to the Tribunal by the responsible authority and the submissions and evidence of the parties in addition to the matters which arise from these reasons.

Laurie Hewet
Member