

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P591/2009
PERMIT APPLICATION NO. P2008-099

CATCHWORDS

Section 82 of the Planning & Environment Act 1987; Warrnambool Planning Scheme; Residential 1 Zone; Design and Development Overlay DDO5; One Dwelling; Three Lot Subdivision; Estuarine Area; Coastal Hazard Vulnerability; Clause 15.08.

APPLICANT	Robert Wade
RESPONSIBLE AUTHORITY	Warrnambool City Council
RESPONDENT	Dean Pickering Designs
SUBJECT LAND	No. 8 Edina Street, Warrnambool
WHERE HELD	Warrnambool
BEFORE	Margaret Baird, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	28 September 2009
DATE OF ORDER	16 October 2009
CITATION	Wade v Warrnambool CC & Anor [2009] VCAT 2177

ORDER

- 1 In permit application no. P2008-099, the decision of the Responsible Authority is set aside. A permit is not granted and no permit is to be issued.

Margaret Baird
Senior Member

APPEARANCES

For Applicant	Mr R Wade in person.
For Responsible Authority	Ms E Sonego, town planner.
For Respondent	Mr B & Mrs D Clancey.

INFORMATION

Nature of Proceeding	Section 82 of the <i>Planning & Environment Act</i> 1987.
Description of Proposal	<p>Subdivision of the land into three lots and construction of a double storey dwelling on Lot 1.</p> <p>Lot 1 would be 724.9 square metres, Lot 2 would be 570.9 square metres and Lot 3 would be 507.11 square metres. Lot 1 would be to the front of the site while Lots 2 and 3 each adopt a battle-axe format. Each has a 3.02 metre wide driveway from Edina Street and each has a frontage to the Old Pertobe Creek of around 12 metres.</p> <p>The dwelling would be setback between 6 and 7.8 metres from Edina Street at ground level with a minimum setback of 8 metres at the upper level. Side setbacks are 1.84 metres along the southern boundary at ground level and part of the first floor level. Part of the ground level eastern elevation would abut the eastern Lot 1 boundary.</p>
Zone and Overlays	Residential 1 Zone, Design & Development Overlays (DDO4 – Single Dwellings) and (DDO5 – South Warrnambool Plains).
Permit Requirements	Clause 32.01. Clause 43.02 (DDO 4 and 5).
Relevant Scheme Policies & Provisions	Clauses 11, 14, 15.01, 15.02, 15.08, 15.12, 16.01, 16.02, 18.02, 19.03, 21, 22.01, 54, 56 and 65.
Land Description	<p>The site is located on the west side of Edina Street. It has an area of 1,845 square metres and street frontage of 24 metres. The land is vacant and fronts the Old Pertobe Creek to its rear.</p> <p>Land to the north is vacant and is the subject of an application for units. Land to the south is developed with a single storey dwelling. This is the last lot terminating Edina Street. The South Warrnambool Wetlands are then to the south. The east side of Edina Street comprises predominantly single storey dwellings on generous lots.</p> <p>The area is low lying. It has an open feel assisted by a wide road reserve. The residential area on the south-west side of Stanley Street is close to the Merri River.</p>
Tribunal Inspection	I advised the parties at the commencement of the hearing that I inspected the locality on 28 September 2009. I revisited the area after the hearing.

REASONS

What is this proceeding about?

- 1 Dean Pickering Designs propose a double storey dwelling, and a three lot subdivision, involving a site in Edina Street, South Warrnambool. Mr & Mrs Clancey own the land. They hope to downsize by relocating to the double storey dwelling on Lot 1. Two additional lots are proposed to the rear of the site, fronting the Old Pertobe Creek. The Creek joins the South Warrnambool Wetlands one lot to the south-west of the site.
- 2 The Warrnambool City Council determined to grant a planning permit for the proposal subject to conditions. Mr Wade opposes the proposal and has applied for a review of the Council's decision. Mr Wade has concerns about the form of the double storey dwelling fronting Edina Street but most strongly opposes the creation of the two, rear, battle-axe lots. He contends the subdivision fails to recognise the sensitivities of the abutting Wetlands, will have a detrimental impact on the Old Pertobe Creek, is out of character with the area, does not comply with the applicable DDO5 and other local policies and provisions in the Scheme, and fails to take account of sea level rise and flooding impacts.
- 3 The Council and Respondent disagree. They submit all of the relevant requirements have been met, the proposal accords with policy outcomes set by the Scheme, and the design can address sea level rise by conditions sought through the Glenelg Hopkins Catchment Management Authority (that could be further modified if required).
- 4 I must decide whether to grant a permit. Having considered all submissions, and inspected the site and locality, I have decided to set aside the Council's decision and direct no permit be issued. The reasons for my decision follow, noting that I do not recite all of the submissions presented as all written material is retained on the Tribunal's file.

Are a dwelling and subdivision of the land acceptable in principle?

- 5 In principle, the prospect of subdividing the review site into three lots and building a dwelling on Lot 1 would be appropriate if only taking into account the purposes of the Residential 1 Zone and policy aims with respect to urban consolidation in Warrnambool.
- 6 Here, the physical circumstances of the land are pivotal and will determine the extent and form of any potential subdivision and dwelling development.
- 7 DDO5 acknowledges this. It refers to the area's development pressures but also seeks to ensure appropriate new development given the existing character and the relationship to the South Warrnambool Wetlands. A panel considered Amendment C3 in 2000. The Amendment is based on studies undertaken in the late 1990s. It was gazetted in 2003.

- 8 The Overlay addresses flooding considerations and the relationship of new development to the Wetlands, character, landscaping, building envelopes and subdivision. A number of buildings and works provisions at Clause 2.0 of DDO5 refer to land below 2.0m AHD as is the case here.
- 9 Even though the Overlay pre-dates the current understanding of impacts of sea level rise and climate change, at the time of the Overlay's formulation the low lying nature of the land and its relationship to the very sensitive Wetlands was apparent. The Overlay seeks to manage design insofar as how new development might address, and be setback from, the Wetlands.
- 10 In its response to the permit application¹, the local CMA stated there is no designated or declared 1:100 year flood level. It estimated the applicable level to be 1.7 metres AHD.² It sought a 600mm freeboard for a dwelling as a permit condition so as to achieve 2.3m AHD. It noted the land is at 1.0 – 1.7m AHD with the townhouses proposed at 1.4m AHD.
- 11 Ms Sonogo tabled further, later, correspondence from the CMA³ in relation to a proposal for the abutting land at No. 6 Edina Street. It refers to sea level rise projections. It states remodelling had concluded that the applicable flood level, without any sea level rise, was 1.27 metres AHD (ie. less than the earlier estimate) and a 0.8 metre allowance would see a 1% level of 1.81 metres. Thus, for the review site, Ms Sonogo submitted the floor level of the proposed dwelling should be increased to accommodate this information. She submitted this could be dealt with by a permit condition allowing for the required additional floor level to achieve a floor level of 2.4m AHD for the proposed dwelling on Lot 1. The CMA's correspondence also draws attention to the risk of acid sulphate soils.
- 12 This information raises questions in mind my about the potential to subdivide the land and to develop a dwelling on each proposed lot. The review site is lower lying than No. 6 Edina Street so that the elevation of dwellings would be greater if the CMA's position is extrapolated to apply to the review site. At 1.81 metres, the whole of the review site would be inundated and I expect that would include the roadway of Edina Street.
- 13 Proposed Lots 2 and 3 are constrained when taking into account setbacks from the Creek edge that would be expected through the application of the local policy (and as might be sought by the CMA⁴ and/or DSE). That will be compounded by site coverage and landscape treatments. These matters do not appear to have been considered at this stage, as might have been appropriate through the inclusion of building envelopes for Lots 2 and 3. I appreciate a dwelling on each lot would require a planning permit but this matter is relevant to the ability for each lot to contain a dwelling.

¹ Letter to the Council from the Glenelg Hopkins CMA dated 29/07/2008. The letter states the advice of the CMA was sought under section 52 of the Planning and Environment Act 1987 [rather than a section 55 referral].

² I understand that comment is based on an earlier version of the proposal with a townhouse on each proposed lot.

³ Letter to the Council from the Glenelg Hopkins CMA dated 24/06/2009 and a file note.

⁴ This matter is referred to in the CMA's correspondence with respect to No. 6 Edina Street.

- 14 That, in turn, is relevant having regard to the decision guidelines in Clause 65.02. That Clause requires me to consider the future development of the lots. On the information available, the ability to develop Lots 2 and 3 within the parameters desired by DDO5 (such as setbacks and site coverage) and still achieve a single dwelling form as sought by the Council in this case is questionable. Moreover, any dwelling would be likely to be significantly elevated. I do not have sufficient information before me to determine the precise boundaries for building envelopes.
- 15 Clause 15.08 and the General Practice Note *Managing coastal hazards and the coastal impacts of climate change*⁵ provide the basis for considering planning permit applications in specific risk situations as discussed in several recent Tribunal cases.⁶ That has caused the Tribunal to direct coastal hazard vulnerability assessments. The scale and type of assessment will vary from case to case but, as said in *Owen*, it is preferable for plans to be prepared after a coastal hazard vulnerability assessment so that the design response can be informed by the findings.⁷ This approach recognises climate change impacts will occur over time but decisions about development have long term implications because of the permanency of structures. There is no indication that such an approach has informed the design before me even though the Council and Respondent indicated that they are comfortable with the material they have relied upon in this respect.
- 16 For the above reasons, I accept submissions by Mr Wade that there has been insufficient consideration to the impacts of sea level rise and flooding impacts. I am also not persuaded for these reasons (and further reasons below) that subdivision would produce workable lots for the construction of a dwelling on each lot. I am less concerned with respect to stormwater runoff to the saline Wetlands, a matter also raised by Mr Wade, as I expect engineering solutions are possible when coupled with landscape buffers.

Is the double storey dwelling acceptable?

- 17 Mr Wade opposes a double storey dwelling on Lot 1. His submission is based on the existing single storey form of development in Edina Street and the recessive upper level of the only two storey dwelling in that Street.
- 18 The proposed dwelling would be setback between 6.2 and 8 metres from Edina Street excluding the front portico. This is less than would be required by Clause 54 but more than a minimum of 6 metres referred to in DDO5. The garage is also recessed as sought by DDO5. The height of the dwelling is marginally above the figure referred to in DDO5 where the dwelling is more than 40 metres from the Wetlands but that is not a significant departure in my view. Neither is this a problem in DDO4.

⁵ Department of Planning and Community Development, December 2008.

⁶ *Owen v Casey CC (includes Summary) (Red Dot) [2009] VCAT 1946*, *Myers v South Gippsland SC (includes Summary) (Red Dot) [2009] VCAT 1022*, *Ronchi & Anor v Wellington SC (includes Summary) (Red Dot) [2009] VCAT 1206*.

⁷ *Owen v Casey CC (includes Summary) (Red Dot) [2009] VCAT 1946* at paragraph 12.

- 19 The site coverage for Lot 1 is stated on the plans as being 47%, significantly higher than 35%, the discretionary figure in DDO5. However, based on the correct lot area, the site coverage calculates to around 35%.
- 20 The form of the proposed dwelling is a departure from the existing character, but it has a scale that is not unexpected given the provisions of DDO4 and DDO5. The upper level has been partly recessed to attempt to mitigate visual bulk. The only outstanding design question is the extent to which the floor level might need to be further raised but I have assumed that could probably be absorbed within the current building envelope.

Is the layout of the subdivision acceptable?

- 21 The proposed subdivision must be tested against the provisions of Clause 56 and DDO5. Clause 56 has requirements to respect the existing character or contribute to a preferred character. Here, DDO5 assists to inform a preferred character in terms of density.
- 22 The proposed lot density accords with the DDO's density figure of 450 square metres. However, in addition to the matters I have addressed above, the main issue arising with respect to the layout is the shape and size of the two smaller lots that are proposed in the most sensitive part of the site.
- 23 Individual driveways from Edina Street that are proposed for each lot result in 9.64 metres of the 24.56 metre frontage being used for this purpose. That equates to a proportion just under 40%. It would not comply with Standard B14 if applied on the basis of a three unit development but, even without that Standard applying, the extent of frontage devoted to driveways is inappropriate. It departs from DDO5 that states:

An application for subdivision is considered to met [sic] the design objectives where new lots have a minimum size of 450 square metres with a minimum frontage of 20 metres. [Tribunal emphasis added]
- 24 No matter whether the frontage is regarded as the driveway from Edina Street or the way in which the two lots, with dwellings, would front the Wetlands, the proposal would be well under the width specified.
- 25 Although DDO5 provision is not mandatory, it indicates the type of outcome being pursued. The proposed format is not found in the locality. There are several battle-axe lots off Macdonald Street but these service only one rear lot. They each achieve a much wider frontage to the Wetlands than Lots 2 and 3 here that are much narrower at around 12 metres each.
- 26 The proposed lot layout would also affect the ability to achieve other parts of DDO5 such as:
 - Outbuildings and garages are setback at a distance of 25 metres from the high water mark of the South Warrnambool Wetlands or Merri River unless it is demonstrated that a lesser setback results in a preferred environmental outcome.

27 The garage for Lot 2 would be able to comply but a garage for Lot 3 would be more constrained albeit not impossible.

28 Further, I have indicated above that an absence of building envelopes for the rear lots is problematic. This is further complicated by the uncertain information and impacts relating to the appropriate flood levels taking into account sea level rise and storm surges.

Conclusion

29 For the above reasons, I am not persuaded that, on the information available to me, the proposal would produce an acceptable outcome having regard to the provisions of the Warrnambool Planning Scheme. The lot layout is not acceptable and uncertainties remain with respect to the impacts of sea level rise particularly with respect to the two lower-lying lots.

30 I will allow the Application and order that the decision of the Responsible Authority be set aside.

31 Finally, I observe that there is no indication in any of the material available to me that the proposal has been the subject of a cultural heritage management plan or a decision has been made that no such plan is required. If I had been minded to grant a permit it is a matter upon which I would have sought further information because, should such a plan be determined as necessary for this land, a planning permit could not issue unless a cultural heritage management plan has already been approved.

Margaret Baird
Senior Member