

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2901/2009

CATCHWORDS

Clause 35.06-2 – access to dwelling via all-weather road – jurisdictional fact – consent orders – effect of flooding – climate change.

APPLICANT	West Gippsland Catchment Management Authority
RESPONSIBLE AUTHORITY	East Gippsland Shire Council
RESPONDENT	Underwood Design Pty Ltd
SUBJECT LAND	Jubilee Head (Lot 10 on LP 144082) BOOLE POOLE VIC
WHERE HELD	55 King Street, Melbourne
BEFORE	Helen Gibson, Deputy President Ian Potts, Member
HEARING TYPE	Hearing
DATE OF HEARING	14 July 2010
DATE OF ORDER	4 August 2010
CITATION	West Gippsland Catchment Management Authority v East Gippsland SC [2010] VCAT 1334

ORDER

- 1 The decision of the responsible authority is set aside.
- 2 In permit application No. 577/2008/P no permit is issued.

Helen Gibson
Deputy President

Ian Potts
Member

APPEARANCES

For West Gippsland Catchment Management Authority	Mr Adam Dunn
For East Gippsland Shire Council	Ms Courtney Campbell of Beveridge Williams
For Underwood Design Pty Ltd	No appearance

INFORMATION

Description of Proposal	Dwelling and vegetation removal
Nature of Application	Section 82 <i>Planning and Environment Act</i> 1987
Zone and Overlays	Rural Conservation Zone Vegetation Protection Overlay (Schedule 6) Land Subject to Inundation Overlay (Part)
Permit triggers	Clause 35.06-1 (use for dwelling in RCZ) Clause 35.06-5 (buildings and works in RCZ) Clause 42.02-2 (vegetation removal in VPO) Clause 52.17 (removal of native vegetation)
Land description	Irregular shaped lot at the north west corner of the Boole Poole Peninsula with northern and western boundaries adjoining the foreshore of the Gippsland Lakes Area 13.8 hectares.

REASONS

(Given orally at the hearing and subsequently revised)

- 1 This proceeding is an application for review by an objector, the West Gippsland Catchment Management Authority, against the council's decision to grant a permit for use and development of a dwelling and removal of vegetation. Prior to the hearing, the Tribunal received a request from the parties for a consent order to grant the permit subject to additional conditions requested by the West Gippsland Catchment Management Authority. The Tribunal refused to make a consent order and advised all parties that the hearing would proceed as scheduled.
- 2 Representatives from the council and the West Gippsland Catchment Management Authority attended the hearing, but there was no appearance by the permit applicant. We were satisfied that the permit applicant was aware of the fact that the consent order was not acceptable to the Tribunal and that the hearing would proceed. Under section 99(2) of the *Victorian Civil & Administrative Tribunal Act 1998*, if a person, including a party, to whom notice has been given in accordance with the rules fails to attend, the hearing may be held in the absence of that person. In these circumstances, we chose to proceed with the hearing.
- 3 At the conclusion of the hearing we were in a position to make an oral decision. Notwithstanding the non-attendance of the permit applicant, we do not consider that anything it had to add would have altered the decision we reached, for reasons which we set out in our oral reasons. We have put our oral reasons in writing because we consider that both the council and the West Gippsland Catchment Management Authority should be aware of our detailed reasoning so they may consider it in future cases.¹
- 4 The subject land is located on an isolated peninsula in the Gippsland Lakes. It has an area of about 13.8 hectares. The application is for a dwelling. A permit is required under the Rural Conservation Zone and the Land Subject to Inundation Overlay, and also for vegetation removal under the Vegetation Protection Overlay and clause 52.17. Most of the land is covered by the Land Subject to Inundation Overlay. Only a small area of slightly higher ground is not subject to this overlay and it is on this land that the house is proposed to be located.

¹ Subsequent to the hearing and our oral decision, we have become aware of the letter from the Minister for Water dated 17 December 2009 sent to all catchment management authorities and Melbourne Water about planning for impacts of climate change on flooding in coastal areas. This letter sets out preliminary guidelines for development in coastal areas subject to flooding, which are to be applied by catchment management authorities and Melbourne Water in their decision making processes. These guidelines were not referred to by West Gippsland Catchment Management Authority. However, we consider that they reinforce the conclusions we reached about flooding and the effects of climate change in this case. Clearly, the guidelines will be relevant in future decision-making.

- 5 The critical issue is that there is no road access to the site. It is only accessible by water. A jetty is located approximately 290 metres from the house site. It has been suggested that there is access by land via a fire track, but this is not a formal road. We have no information about it or where it goes except that apparently it passes through private property and is subject to inundation in parts. We have therefore placed no weight on this suggestion.
- 6 A planning permit is required for the dwelling and to remove native vegetation. Under the Rural Conservation Zone, dwelling is a section 2 use which must meet the requirements of clause 35.06-2. This clause provides that a lot used for a dwelling must meet certain requirements, including that access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles. We consider this requirement for the provision of access is the most critical issue in this particular matter.
- 7 The council decided to grant a permit although the recommendation of the council officer was to refuse a permit because of access and flooding issues.
- 8 The application for review was lodged by the West Gippsland Catchment Management Authority (CMA). Its statement of grounds focussed on these issues of access and flooding but it then withdrew its opposition to the grant of a permit subject to additional conditions being included relating to the provision of access between the jetty and the dwelling, and requirements for a section 173 agreement and a flood response plan. The council and the permit applicant consented to the additional conditions.
- 9 Notwithstanding this, we are not prepared to make a consent order because the Tribunal has an obligation to be satisfied that any planning permit it grants, even by way of consent, is lawful. The Tribunal is not just a rubber stamp.² Always we have an obligation to be satisfied that it is appropriate to grant a permit. Although we may not inquire into all the details when a consent order is put before us where discretionary matters only are involved, if there is a legal requirement that needs to be met and we do not believe it has been met, we would not be prepared to grant a permit because such a permit would not be lawful.
- 10 In this particular case, we do not believe that a permit would be lawful because we are not satisfied that the requirements of Clause 35.06-2 about emergency vehicle access have been met. The existence of such access is a jurisdictional fact that must be established before any discretion can be exercised as to whether or not a planning permit should be granted. The requirements set out in clause 35.06-2 are mandatory requirements. There is no discretion about whether or not these requirements should be satisfied. It is only if they are satisfied that a discretion can then be exercised about

² See *M & J Dowling Pty Ltd v City of Malvern* (1983) 1 PABR 86 at 89 – 90; *Innes v Moyne SC* [2007] VCAT 1832; and *Muller v Mildura* [2010] VCAT 42

whether a permit should be issued based on other considerations in the planning scheme.

- 11 In the present case we find that the requirement to provide access via an all-weather road with dimensions adequate to accommodate emergency vehicles is not met.
- 12 We understand the permit applicant overcame the council's concerns on this issue by saying that under the common law waterways are considered to be roadways. We have looked at the statement of grounds that was filed by the applicant and they also refer to the common law, but there has been no evidence or information provided to back up this assertion.
- 13 We do not consider that a waterway can be considered to be an all-weather road for the purposes of meeting the requirements of clause 35.06-2. The meaning of what constitutes a road in this particular provision must be determined from its context. It is a provision in a planning scheme therefore the definitions in the *Planning and Environment Act 1987* are relevant. Under this Act, a road is defined inclusively. It includes "a highway, street, lane, footway, square, court, alley or right of way, whether a thoroughfare or not and whether accessible to the public generally or not". All of these words and categories refer to passageways over land not water.
- 14 Likewise, looking at the term in the context of the words of clause 35.06-2 itself, the reference is to an all-weather road "with dimensions". We do not consider that an open waterway such as the Gippsland Lakes can be said to have "dimensions" as such, certainly not dimensions that bear any relation to accommodating emergency vehicles. Nor could an open waterway be described as an all-weather road within the plain English meaning of this expression. In our view, we must consider the purpose of the provision. It refers to providing access for emergency vehicles. Emergency vehicles include not just four wheel drive CFA trucks, but other vehicles such as ambulances, police and emergency services vehicles. Most certainly the waterway is not "adequate to accommodate emergency vehicles" such as fire trucks, ambulances, police or emergency services vehicles or provide for their access to the dwelling or the land.
- 15 We therefore find that this requirement of clause 35.06-2 is not met and as a result a dwelling is prohibited.
- 16 Quite apart from the jurisdictional fact issue about all-weather access, there is the discretionary consideration of the effect of flooding on this land. Although it is not necessary for us to rely upon this issue, it is nevertheless a further very strong reason why we do not believe that a permit should be granted in this case. Under the State Planning Policy Framework, in particular clauses 15.02 and 15.08, the effects of flooding must be considered and the need to plan for and manage the potential impacts of climate change. We are not satisfied that these matters have been properly addressed.

- 17 There has been no coastal hazard vulnerability assessment prepared, which in a location such as this we believe should be required in order to properly assess the impacts of sea level rise due to climate change.
- 18 We acknowledge that whilst the CMA has said it applied a 0.8 metre sea level rise by 2100 to the existing flood levels for the purposes of its assessment, which means that a very small island of land would remain above flood level to accommodate a house, this fails to take account of the combined hazards of storm tides, river flooding, coastal erosion and sand drift as required by clause 15.08-2. We believe that the requirements of the practice note³ relating to this issue clearly indicate that in circumstances such as this a coastal hazard vulnerability assessment should be prepared.
- 19 The CMA has been prepared to agree to a planning permit provided a boardwalk is provided to the jetty for emergency egress in times of floods. However, potentially a boardwalk is likely to be nearly 300 metres long and at least 1.2 metres high in places. It would still be covered by water in some places at times of extreme flooding. We have no idea of the cost of such a boardwalk or its feasibility. It would require a permit for works in its own right and for vegetation removal associated with it. We do not consider it would be consistent with principles of orderly and proper planning to grant a permit for a dwelling without considering and having more information about the feasibility of such a significant item of infrastructure necessary to support the residential use of this land. (In this respect we note that there is no difference between a holiday home and permanent dwelling.)
- 20 We find that a dwelling in this location would be at risk in times of flood. We consider there would be a risk for both occupants and emergency service personnel. This risk is likely to arise both now and even more so in the future when the effects of sea level rise due to climate change manifest themselves.
- 21 For all these reasons, we determine that the decision of the responsible authority should be set aside and no permit is granted.

Helen Gibson
Deputy President

Ian Potts
Member

³ Managing coastal hazards and the coastal impacts of climate change: General Practice Note December 2008 (Department of Planning and Community Development)