

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1440/2009
PERMIT APPLICATION NO. P553/08

IN THE MATTER OF

Owen v Casey CC

BEFORE

Margaret Baird, Senior Member

NATURE OF CASE	Two dwellings in a Residential 1 Zone and Land Subject to Inundation Overlay.
LOCATION OF PASSAGE OF INTEREST	Paragraphs 8-18.
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
PLANNING SCHEME – interpretation or consideration of VPP provision	Consideration and application of Clause 15.08 relating to the consideration of climate change in a development proposal for two units. Refers to previous Tribunal decisions relating to coastal hazard vulnerability assessments.
POLICY – interpretation or application of policy	
APPLICATION – significant, interesting or unusual use or development; application of policy, provision or principle; or circumstances	

SUMMARY

The case raises a preliminary question as to whether a coastal hazard vulnerability assessment is required for a permit application for two dwellings. Consistent with the Tribunal's decisions in *Myers v South Gippsland SC* (includes Summary) (Red Dot) [2009] VCAT 1022 and *Ronchi & Anor v Wellington SC* (includes Summary) (Red Dot) [2009] VCAT 1206, it is determined that an assessment is required. State policy makes it clear that the wider risks and consequences for the community require this matter to be addressed in permit applications and in decision-making. Even though the proposal is only for two dwellings, Melbourne Water has not objected to the permit application, and the obligations may seem onerous, it is not appropriate to avoid an assessment.

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CATCHWORDS

Section 77 of the Planning & Environment Act 1987; Casey Planning Scheme; Residential 1 Zone; Preliminary Question; Coastal Hazard Vulnerability Assessment; Clause 15.08.

APPLICANT	E & G Owen
RESPONSIBLE AUTHORITY	Casey City Council
SUBJECT LAND	No. 1 Lyne Street, Tooradin
WHERE HELD	Melbourne
BEFORE	Margaret Baird, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	18 September 2009
DATE OF ORDER	25 September 2009
CITATION	Owen v Casey CC (includes Summary) (Red Dot) [2009] VCAT 1946

ORDER

- 1 A coastal hazard vulnerability assessment for the subject land is required to be prepared by the Applicant. The assessment must consider factors including sea level rise, storm tide and surge, coastal processes, and local topography and geology. The assessment is to be undertaken by a suitably qualified coastal engineer or coastal processes specialist with input, if necessary, from a qualified hydrologist or geotechnical engineer.
- 2 The matter is adjourned to administrative mention on 19 October 2009. By that date the Applicant must advise the Tribunal and Responsible Authority in writing:
 - (a) whether it intends to prepare the assessment and, if so, the likely length of time required to prepare the coastal hazard vulnerability assessment.
 - (b) whether a further directions hearing or mention is requested.

Margaret Baird
Senior Member

APPEARANCES

- For Applicant Mr J McCaffrey, consultant town planner, with Mr and Mrs Owen.
- For Responsible Authority Mr R Stevenson of Hansen Partnership.

REASONS

What is this preliminary question about?

- 1 Mr & Mrs Owen propose two double storey dwellings on a site in Tooradin. The Casey City Council determined to refuse to grant a permit for the proposal, a decision that the Owens have applied to be reviewed by the Tribunal.
- 2 Prior to the hearing, the Council sought advice from the Tribunal as to whether a coastal hazard vulnerability assessment is required for the subject land. Written advice was given through the Registrar that such an assessment was required although no correspondence relating to that question was filed on behalf of the Applicant and a copy of the Registrar's letter was not sent to the Applicant.
- 3 Hansen Partnership, for the Council, subsequently advised the Tribunal and Applicant that it would seek to raise this question as a preliminary matter at the merits hearing. It did so. I indicated to the parties I would hear submissions on the question as to whether a coastal hazard vulnerability assessment is required for the subject land before determining whether such an assessment would be directed by the Tribunal. Having heard submissions, I reserved my decision on this preliminary question. I now set out the reasons for my decision to direct the preparation of an assessment.

What are the relevant circumstances of the subject land and proposal?

- 4 The review site is 646 square metres in area and located on the south side of Lyne Street. It is within a Residential 1 Zone under the Casey Planning Scheme and also affected by a Land Subject to Inundation Overlay.
- 5 Melbourne Water has stated that the applicable flood level is 2.7 metres AHD.¹ In its referral response to the Council², Melbourne Water stated it would not object to the permit application subject to conditions including finished floor levels being a minimum of 600mm above the applicable flood level. Garage floor levels were required to be 300mm above the same flood level. The plans show the dwellings' ground floor level at 3.3 metres.³

¹ Letter tendered by Mr Stevenson dated 14 September 2009.

² Letter to the Council dated 18 August 2008 and reiterated in a letter to the Registrar 20 July 2009.

³ There is no indication on the plans of stairs, retaining walls or the like, or floor levels for garages.

In summary, what are the parties' positions?

- 6 Mr Stevenson submitted a coastal hazard vulnerability assessment is required. He referred to the land's position and said an assessment is needed before assessing the merits of the permit application because design changes may be required. He noted correspondence from Melbourne Water and relied on two Tribunal decisions⁴ in support of Council's position.
- 7 Mr McCaffrey submitted the land involved in the two Tribunal decisions had a different context with different issues, for example, erosion is unlikely at the subject land in this case. He said those cases involved locations where the flood plain manager did not have the same knowledge and resources as Melbourne Water. Mr McCaffrey said that the Intergovernmental Panel on Climate Change identified an upper limit of sea level rise of 0.8 metre by 2100 and, taking into account the economic life of the units of 40-50 years, and with floor levels of 0.6m above the flood level, the development would not be fatally affected by sea level rise. He said sea level rise will affect many areas and a two unit development in this location should be kept in perspective and does not warrant a coastal hazard vulnerability assessment.

Is a coastal hazard vulnerability assessment required?

- 8 This permit application is one of many that will raise the same question; is a coastal hazard vulnerability assessment needed? The permit application was lodged before Amendment VC52 was introduced into all Schemes. It seems the design has not been informed by any information relating to impacts of climate change although it was modified through the application process to address the floor level specifications of Melbourne Water.
- 9 The Tribunal's decisions in *Myers* and *Ronchi* have drawn attention to the Scheme's obligation to consider and assess risks arising from inundation from ocean waters and/or river catchments with an expectation of impacts from processes such as sea level rise, varied tide ranges and storm surges. Even though the Intergovernmental Panel on Climate Change may identify an upper limit of sea level rise of 0.8 metre by 2100, Clause 15.08 of the Scheme refers to a sea level rise of "not less than 0.8 metre by 2100". The level in the Scheme is that to be adopted for our purposes at this time.
- 10 As I said in *Ronchi*, changes to State policy through Amendment VC52 place a much more significant onus on both permit applicants to consider risks in design and on decision makers to take climate change into account.
- 11 The General Practice Note *Managing coastal hazards and coastal impacts of climate change*⁵ provides guidance with respect to an assessment of applications for permits as well as rezonings.

⁴ *Myers v South Gippsland SC* (includes Summary) (RedDot) [2009] VCAT 1022 and *Ronchi & Anor v Wellington SC* (includes Summary) (RedDot) [2009] VCAT 1206.

⁵ Department of Planning and Community Development, December 2008.

- 12 A coastal hazard vulnerability assessment for small scale unit developments or a two lot subdivision can seem unduly onerous for a proponent. Assessments will add to time and cost. Changes to proposals may be needed although it is clearly preferable for plans to be prepared after an assessment so that the design response can be informed by the findings.
- 13 These considerations do not, however, mean that a coastal hazard vulnerability assessment should be avoided even where a permit application has pre-dated VC52 and the application has yet to be determined. Rather, State policy makes it clear that the wider risks and consequences for the community demand this matter to be addressed in permit applications and in decision-making. There are uncertainties with respect to coastal and river hazards but the risks are such that the Scheme has sought to direct decision-makers via Clause 15.08. Actual impacts in will vary dependent on a range of factors including local geology, topography and hydrology.
- 14 In the same way as aboriginal cultural heritage assessments are now more common place, coastal hazard vulnerability assessments will too become more routine in the planning process. They are likely to be one measure in a suite of planning responses to climate change. Assessment models can be expected to be refined over time and, as indicated by the *Victorian Coastal Strategy* and the General Practice Note, State policy may be reviewed as more scientific data becomes available. Development controls and/or policies can also be expected to emerge to hopefully provide clarity and guidance in the local context, achieving consistency in approach. In the meantime, and even though the form of an assessment may still be embryonic, it is necessary to proceed on the best available information.
- 15 With respect to three other points made by Mr McCaffrey, I comment as follows.
- 16 First, do not accept that the purported economic life of the proposed units of 40-50 years gives a basis to depart from the direction being pursued by State policy.
- 17 Second, I do not accept Melbourne Water's lack of objection leads to an automatic conclusion that risks are properly managed in the current design. Rather, as stated in the General Practice Note with respect to existing urban areas, an assessment of impacts is advisable for sites immediately adjacent to the coast or in/near an existing floodplain. Location specific information is required to inform a localised coastal vulnerability assessment and the development of appropriate land suitability, set back or design responses.
- 18 Third, the very recent gazettal of Amendment C118 that exempts single dwellings from a planning permit in a Land Subject to Inundation Overlay is not determinative in this case although it could potentially raise some considerations about differences in approach for single houses versus multiple units (a matter I commented on in *Ronchi*⁶).

⁶ *Ronchi & Anor v Wellington SC (includes Summary) (RedDot) [2009] VCAT 1206 at paragraph 18.*

- 19 For the above reasons, I find that a coastal hazard vulnerability assessment for the subject land is required to be prepared by the Applicant.

Margaret Baird
Senior Member