VCAT

Taip v East Gippsland SC [2010] VCAT 1222 – Climate change and coastal development

by Wayne Gumley

In November 2008, the East Gippsland Shire Council resolved to grant a permit for a residential development of eight dwellings in a Business 1 Zone (B1Z) in Lakes Entrance. Ms Taip made an application to the Tribunal to review that decision. Her application was successful and VCAT set aside the decision to issue a permit. The Red Dot Summary of this case states:

> Lakes Entrance is a coastal town that has a very high vulnerability to flooding and to the impacts of climate change, including sea level rise. This application for review brings into focus how the Victorian planning system seeks to deal with the pressing issues of climate change, rising sea levels and the vulnerability of coastal communities to these impacts.
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> This decision considers the site's vulnerability to climate change impacts against the strategies and policies contained within the East Gippsland Planning Scheme, including the Urban Design Framework for Lakes Entrance and the related Planning Scheme Amendment C68, as well as a number of other relevant strategies, guidelines and materials. A cautious approach is considered to be warranted while planning frameworks and other responses are set in place to address and minimise these risks.
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> It is concluded that the proposal for this more intensive development of Lakes Entrance is one that is pre-emptive to the development of appropriate strategies to address climate change risks. This leads to the conclusion that to grant a permit fails to satisfy the purposes of planning in Victoria for intergenerational equity, sustainable, fair and socially responsible development and would not lead to an orderly planning outcome.

Tarwin Valley Coastal Guardians Inc v Minister for Planning & Anor [2010] VCAT 1226 –secondary consent by responsible authority re height of wind turbines by Wayne Gumley

The applicants sought declarations that the terms of a planning permit for construction of wind turbines at Bald Hills, Tarwin Lower, did not authorise the Minister for Planning, as responsible authority, to allow an increase in the height of wind turbines from 110 metres, as specified in the condition, to 135 metres. In rejecting this application the Tribunal determined:

- there was a secondary consent provision contained in condition 4(b) of the permit which provided the Minister with power to give consent to the increase. The term 'secondary consent' is a common term to describe words contained in a condition that provides something 'must not be changed without the prior written consent of the responsible authority', and one that is recognised in section 62(2) Planning and Environment Act 1987 (Vic). In this case, condition 4(b) included the words 'the following specifications, which must not be changed without the prior written consent of the Minister for Planning'. The reference in the permit to the Minister for Planning was to the responsible authority not to the Minister in another role.
- the giving of secondary consent was not a precondition to the amendment of the permit. Secondary consent and amendments to permits are two distinct processes.
- this does not render the condition misleading, vague or ambiguous. It is evident in the wording of the condition that changes are contemplated.
- the criteria formulated by the Tribunal in Westpoint and in particular the criteria that the change to be consented to 'is of no consequence having regard to the purpose of the planning control under which the permit was granted' is not a 'jurisdictional fact' for which its existence is required to be determined by the Tribunal. It is not a precondition but merely a guideline to assist the Tribunal in considering applications