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

for review under s.149 of the Planning and Environment Act. There is no statutory requirement for such a precondition to the giving of consent.

- the changes consented to do not trigger a requirement for a further assessment or approval under the Environment Effects Act 1978 (Vic). The application of the EE Act is discretionary and there is no reference in the EE Act to secondary consent.
- the applicants were not denied procedural fairness. They were also accorded their right pursuant to s.18 Charter of Human Rights and Responsibilities Act 2006 (Vic) to participate in public affairs when they appeared and presented submissions to the Panel. An opportunity to participate in public affairs does not extend to notification of every change that will occur under a condition in a planning permit.

SOUTH AUSTRALIA

Full Court of the Supreme Court

Lakshmanan & Anor v City of Norwood, Payneham and St Peters [2010] SASCFC 15 by Rebecca Macaulay, Senior Associate, Norman Waterhouse

This was an appeal to the Full Court of the South Australian Supreme Court against a decision of the full bench of the Environment Resources and Development Court (ERD Court).

The appellants' local heritage-listed Victorian stone dwelling had suffered flood damage but remained structurally sound. The dwelling was in the 50-year average recurrence interval flood plain for First and Second Creeks. The appellants did not want to repair the dwelling due to the risk of future flooding. City Wide Principle of Development Control 172 of the Council's Development Plan provided that demolition or removal of a local heritage place should not occur unless the portion to be demolished did not contribute to the heritage value of the place; the structural condition was seriously unsound and could not be rehabilitated; and a heritage impact statement had been prepared by an independent qualified heritage expert.

The Council had refused the appellants' development application for demolition (only) of the dwelling. The ERD Court upheld that refusal without considering the risk of future flooding or the heritage value of the dwelling, notwithstanding that evidence of such matters had been given.

The Supreme Court held that the ERD Court had failed to consider the engineering evidence of the threat of future flooding and the relative heritage value of the dwelling. The Supreme Court remitted the matter back to the ERD Court.

The two most interesting parts of the decision come from Justice Kourakis (Justice White agreeing).

First, His Honour suggested that at times matters outside the relevant Development Plan may be relevant considerations in a planning assessment. He said that Development Plans 'cannot be expected to deal with all possible circumstances' and 'there may be good reason not to apply a particular provision'.

Whilst it is accepted that a Development Plan is not applied strictly as if it were a statute, it is with considerable caution that a relevant authority should consider matters outside the Development Plan. Where it appears that it may be appropriate to consider matters outside the relevant Development Plan, it is recommended that legal advice be sought prior to any decision being made by the relevant authority.

Second, the Council argued that the appeal should be dismissed as it did not include a replacement dwelling as sought by City Wide Objective 90 and City Wide Principle of Development Control 223. His Honour commented that the ERD Court 'must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms'. The ERD Court had before it a further appeal of the appellants, an appeal for both