Sheahan J agreed with Council. His Honour found that the development was 'designated development' under Schedule 3 of the EP& A Regulation as the excavation and relocation of contaminated soil from one portion of the site to another constituted a disturbance of the whole of the site, triggering the designated development provision; and the treatment of contaminated soil was not ancillary to the erection of the seniors living development.

Significance

This judgment demonstrates a rather rigid interpretation of the definition of 'contaminated soil treatment works' under the EP&A Regulation. Sheahan J took the view that whilst the excavation of contaminated soil was less than the 3 hectare limit prescribed by the EP&A Regulation, its placement on other areas of the site was sufficient to 'disturb the whole of the site'.

This case also raised the issue of whether the treatment of contaminated material can fall within the cl 37A exemption in Schedule 3 of the EP&A Regulation which provides that development is not designated development if it is ancillary to another development, and is not proposed to be carried out independently of that other development.

In response to this issue, Sheahan J concluded that the treatment of contaminated soil in this case was not ancillary to any other development, stating only that:

> The test of the concepts of 'ancillary' and 'independent' development/use (including any allegation that one might 'subserve' another) is objective in character, is a question of fact and degree in all the circumstances, and is to be applied from a town planning perspective.

Arguably, this is an unsatisfactory explanation. The earthworks proposed to treat the contaminated material at the site were not required to be carried out for any independent, secondary or other purpose and Toner was under no obligation to remediate the site as is clear from the RAP and SEE. The earthworks were purely a preliminary step in making the site suitable for a residential development and, therefore, were arguably ancillary to that development and not independent of that development.

This case further clarifies the definition of 'treatment' relating to contaminated material for the purposes of triggering 'designated development' under the EP&A Regulation. Sheahan J rejected Toner's argument that storage, without more, is not 'treatment' of contamination and, therefore, not designated development, stating:

> The creation of the mounds is a 'storage' measure but the compaction of the materials, and their 'capping', and their 'shaping' to ensure 'free drainage', amount to 'treatment…' I believe that their establishment on top of existing contamination amounts to a 'treatment' of that material as well, as it adds to the safety of humans and the environment.'

His Honour concluded that storage of contaminated material can be considered to be 'treatment' in certain circumstances.

Victoria

Heath Hill Poultry Pty Ltd v Cardinia Shire Council (Red Dot) [2012] VCAT 1444

by Damon Jones and Alex Wills

This case concerned a planning permit application for one of the first purpose-built free range poultry farms in Victoria. Given the market shift towards free range production, the case highlighted the need for future applications to provide an appropriate evidentiary basis to demonstrate that farms are proposed in appropriate locations, meet relevant air quality and other standards and are set back appropriate distances to avoid adverse amenity impacts.

The Victorian Civil and Administrative Tribunal (Tribunal) noted that the free range poultry industry needs to support farmers with establishing this appropriate evidentiary basis. Providing this evidence will also assist in the implementation of strategy set out in cl 14.01–2 of the planning scheme to support effective agricultural production and assist farming enterprises to adjust flexibly to market changes.

The proceedings concerned an application for review by Heath Hill Poultry Pty Ltd (Heath Hill) under s 77 of the *Planning and Environment Act 1987* (Vic) against the decision of Cardinia Shire Council to refuse a permit application for the development of two large free range poultry farms and associated buildings and works in Yannathan, Victoria.

The proposal was for the development of two separate farms of six sheds each to house free range chickens with a total of 480,000 birds across the two farms. The sheds were to be located 45 metres apart, separated by grassed free range areas and fenced to contain the chickens.

The permit applicant did not produce any evidence to justify the proposed setbacks from a nearby sensitive use. This was criticised by the Tribunal, which held that simply relying upon a 500 metre buffer distance in accordance with EPA Publication AQ 2/86 *Recommended Buffer Distances for Industrial Residual Air Emissions* was insufficient.

The Tribunal said that the applicant should also have addressed the requirements of the *State Environment Protection Policy (Air Quality Management)* (SEPP(AQM)) (as is required by both statute and policy) and provided evidence about risk assessment or impact of the proposal on beneficial uses and the appropriateness of those impacts.

Heath Hill sought to avoid the requirements of SEPP AQM on the basis that there was insufficient data available to undertake an odour modelling and risk assessment consistent with SEPP AQM requirements, and that even if the SEPP AQM approach was taken, its odour criteria were too stringent for poultry meat production. The Tribunal rejected this argument and held that the SEPP AQM was directly relevant to the application, and that Heath Hill must address its principles and requirements.

The Tribunal found that more information should have been provided by the applicant (such as in a more detailed environmental management plan) on best practice general farm management; drainage; vermin control; dust control; protection of surface, ground and land waters; odour emissions; the issue of adequate buffer distances and the application of relevant planning policies. Without this evidence, the Tribunal was not persuaded that the setbacks and separation distances proposed were satisfactory.

It accepted that the *Victorian Code for Broiler Farms* 2009 is not directly applicable to free range chicken farms, but found it was still relevant to compare the buffer distances that would be applicable under the Code to those proposed by the applicant.

The Tribunal held that regardless of the suitability of the land for the proposed use, it was unable to grant a permit without more information being provided to support the proposal. The decision of the Council to refuse the permit was affirmed.