

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. P3503/2009 Permit Application no. 2008/190
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in the matter of	Deborah Myers v South Gippsland Shire Council
BEFORE	Tracey Bilston-McGillen, Member

Nature of case	Subdivision of lot to provide for one extra lot, Township Zone, Environmental Significant Overlay Schedule 3,
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
Policy – interpretation or application of policy	Question if Coastal hazard vulnerability assessment is required prior to decision being made on subdivision application - Application of <i>Managing Coastal Hazards and the Coastal Impacts of Climate Change</i> General Practice Note December 2008.

Summary

This case involved an application to subdivide an existing lot into two lots. The land is located in a Township Zone, which is an appropriate zone for residential development. An Environmental Significant Overlay Schedule 3 applies to the site. Gale Street separates the site from the coast.

I have considered if a decision can be made on this matter without a proper assessment of the impact of climate change and in particular, the effect of storm surges on the proposed subdivision and future construction of a dwelling. I have accepted the precautionary principle of the *Managing Coastal Hazards and the Coastal Impacts of Climate Change* General Practice Note December 2008 and consider that a coastal hazard vulnerability assessment is required to be undertaken prior to a decision being made on the subdivision.

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CATCHWORDS

Section 82 of the *Planning and Environment Act 1987*, South Gippsland Planning Scheme, Clause 15.08, Township Zone, Environmental Significant Overlay Schedule 3, Coastal hazard vulnerability assessment, *Victorian Coastal Strategy 2008*, Ministerial Direction No 13 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* General Practice Note December 2008.

APPLICANT	Deborah Myers
responsible authority	South Gippsland Shire Council
RESPONDENT	Telfano Holdings Pty Ltd
SUBJECT LAND	2 Brown Street, Waratah Bay
WHERE HELD	Melbourne
BEFORE	Tracey Bilston-McGillen, Member
HEARING TYPE	Hearing
DATE OF HEARING	13 May 2009
DATE OF ORDER	22 June 2009
CITATION	Myers v South Gippsland SC (includes Summary) (Red Dot) [2009] VCAT 1022

directions

- 1 Leave is given to the permit applicant to prepare a coastal hazard vulnerability assessment for the subject site. 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.
- 2 The matter is adjourned for administrative mention on 6 July 2009. By that date the permit applicant must advise the Tribunal in writing:
 - whether it intends to prepare the assessment and, if so, the length of time required to prepare the coastal hazard vulnerability assessment.
 - whether a further directions hearing or mention is requested.
 No attendance is necessary.
- 3 Any party may request that the administrative mention be converted to a Practice Day Hearing. The party making the request must file and serve a Practice Day Request in accordance with Practice Note PNPE6 – Practice Day.
- 4 If the applicant does not intend to proceed with the preparation of the

assessment, the subject application before the Tribunal will be refused.

Tracey Bilston- McGillen Member		
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APPEARANCES

For Applicant for Review	Mr John Glossop, town planning consultant, Glossop town planning
For Responsible Authority	Mr Roger Simpson, Town planner
For Permit Applicant	Mr William McDonald, Town planner

INFORMATION

Description of Proposal	Subdivision of the land into two lots: Lot 1 – 537 square metres. Lot 2 – 1067 square metres.
Nature of Application	Section 82 <i>Planning and Environment Act</i> 1987.
Zone and Overlays	Township 1 Zone. Environmental Significance Overlay Schedule 3.
Permit triggers	cl 32.05-4 A permit is required to subdivide land. cl 42.01-2 A permit is required to construct or carry out works.
Planning policy	State Planning Policy Framework clauses: 15.08-1 Coastal Areas, 15.08-2, 16 Housing, 19.01 Subdivision. Local Planning Policy Framework clauses: 21.04-3, 21.04-10 Settlement.
Other documents	<i>Victorian Coastal Strategy</i> 2008. Ministerial Direction no.13 <i>Managing Coastal Hazards and the Coastal Impacts of Climate Change</i> . General Practice Note December 2008.
Land description	The site is located on the south-east corner of the intersection of Brown and Gale Streets in Waratah Bay. The site is generally rectangular in shape with the exception of a splay at the intersection of Brown and Gale Streets. The site has a depth of 50.92 metres, a maximum width of 36 metres and a total area of 1624 square metres. The site currently accommodates a two storey dwelling.
Site Inspection	18 June 2009
Cases referred to	<i>Gippsland Coastal Board v South Gippsland SC & Ors</i> (No2) (includes Summary) (Red Dot) [2008] VCAT 1545.

Reasons

- 1 This is an objector's application to review the subdivision of the subject land into two lots. The land is located in a Township Zone which is an appropriate zone for residential development. There are three key issues raised by Ms Myers' application:
 - i the potential impact of sea level rises due to climate change and/or localised flooding have not been properly considered;
 - ii the impact of future development on Lot 1 has not been properly considered; and
 - iii the subdivision is contrary to the character of Waratah Bay.
- 2 The applicant submitted that a decision cannot be made on this matter without a proper assessment of the impact of climate change and in particular the effect of storm surges on the proposed subdivision and future construction of a dwelling. The issue is whether a decision can be made on the proposal without the preparation of a coastal hazard vulnerability assessment. It then follows, is it appropriate to require one?
- 3 I have concluded that a coastal hazard vulnerability assessment should be provided prior to making a decision on this matter.

Background Information

- 4 The site is located within a Township Zone which encourages residential development that respects the neighbourhood character.
- 5 The site is included in Schedule 3 to the Environmental Significance Overlay, Coastal Areas which seeks to protect and enhance the natural beauty of the coastal area and ensure that development adjacent to coastal areas is compatible with the environment and does not result in adverse impacts on coastal processes.
- 6 The site is currently contained on one title. The permit applicant submitted that the site was originally two titles (in a different configuration with the smallest lot being to the rear of the site). He further cited examples of dwellings that have been or are under construction without having been required to prepare a coastal hazard vulnerability assessment.
- 7 The West Gippsland Catchment Management Authority advised that:

The Authority does not have any official record of flooding, for the location describe above, on which to base its assessment. The subject property is outside any known flood overlays and is not considered liable to riverine type flooding. However the Authority notes that the above property is directly opposite the beach and thus the potential impact of climate change should be considered by the applicant prior to the commencement of any future development.

The contour and feature plan provided to the Authority indicates that the flood advice is in relation to a two lot subdivision with proposed Lot 1 having a proposed building envelope of 208mw. Contour information indicates that the natural surface ranges between 3.00m AHD and 3.75m AHD on Proposed Lot 1 and between 3.75m AHD and 6.00m AHD on proposed Lot 2 (where the existing dwelling is located).

In light of the above survey information, it is unlikely that the Authority would object to the proposed sub-division.

- 8 The response of the West Gippsland Catchment Management Authority has not proved helpful in resolving the need for a further hazard assessment. On the one hand the authority highlights the potential hazard but makes no definitive statement as to whether the authority objects or not.
- 9 The application was referred to the Department of Sustainability and Environment [DSE] in accordance with Section 52 of the *Planning and Environment Act* 1987. DSE offered no objection, although it is noted its response is confined to matters of native vegetation.

Preparation of a Coastal Hazard Vulnerability Assessment

- 10 The submission on behalf of the applicant for review focussed on the concern that it is not possible at this stage to determine if the land is suitable for the subdivision as a proper assessment of the impact of climate change has not been carried out. On the other hand, the permit applicant submitted that this site was historically two lots and that other dwellings have been constructed without the need for any assessment of climate change, and it follows that one is not required in this case.
- 11 It was put to me by the applicant for review, that since the decision *Gippsland Coastal Board v South Gippsland SC* (No2), the rules have changed and the status and/or importance of climate change issues has also been elevated. Three documents have also been released since this decision including the *Victorian Coastal Strategy* 2008, Ministerial Direction no.13 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* and the General Practice Note December 2008. Each of these documents calls for a precautionary approach when considering applications for rezoning, development and subdivision on sites that are within or adjacent to low lying areas susceptible to coastal hazards. This precautionary approach is one that was also adopted in the *Gippsland Coastal Board* case, where the following observations were made:

[48] In the present case, we have applied the precautionary principle. We consider that increases in the severity of storm events coupled with rising sea levels create a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, which is unacceptable. This risk strengthens our

conclusion that this land and land in the Grip Road area generally is unsuitable for residential development.

- 12 I was not provided with any assessment relating to the impact of climate change on the proposed lot or addressing the relevant documents identified above. The Responsible Authority did not assess the issue at all.
- 13 There are a range of policies that direct me to consider the issue of coastal values, the impact of development on the coast and the potential impacts of climate change. Clause 15.08 [Coastal Areas] aims to protect natural coastal values, achieve balanced development, recognise the value the community places on the coast and plan for and manage the potential impacts of climate change. It is policy within the *Victorian Coastal Strategy* 2008 to plan for a sea level rise of not less than 0.8 metres by 2100 and also allow for the combined effects of tide, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. It also seeks to ensure that new development is located and designed so that it can be appropriately protected from climate change risks and impacts, and coastal hazards such as inundation by storm tides or combined storm tides and stormwater flows (i.e. both river and coastal inundation).
- 14 The Ministerial Direction No 13 applies to any planning scheme amendment that provides for the re-zoning of non-urban land for urban use and development of all land abutting the coastline or coastal reserve and land if less than 5 metres AHD elevation within one kilometre of the coastline. Whilst this Direction applies to re-zonings of land for urban use it assists as background information. A coastal hazard is defined in the Ministerial Direction No.13 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* as follows:

Coastal hazard means an occurrence of an event within coastal Victoria which includes the individual or combined effects or inundation by the sea, the effects of storm tides, river flooding, coastal erosion, landslip/landslide and sand drift which adversely affects or may adversely affect human life, property or aspects of the environment.
- 15 The General Practice Note December 2008 identifies when the impacts of climate change should be considered. In considering whether a coastal hazard vulnerability assessment is required I had regard to this Practice Note which reads:

How can planning seek to avoid development in vulnerable areas?

Planning for impacts of climate change on coastal hazards need to be considered for:

 - Amendments to planning schemes which seek to rezone land which would have the effect of allowing non-urban land to be

used for a new urban use and development. Refer to Ministerial Direction No.13 *Managing coastal hazards and the coastal impacts of climate change*.

- Considerations regarding development of individual parcels of land within existing zoning and overlay provisions within planning schemes.

In both the above cases, coastal hazard assessments may be required to understand the risks and identification of strategies to respond to and manage risk.

- 16 The Practice Note directly applies to the subject proposal. It is a subdivision application. The decision guidelines at clause 65 allow the consideration of the future development of the land. It therefore follows that it is appropriate and necessary to consider the impact on any future dwelling as well as the subdivision itself. The proposal will result in one extra dwelling being constructed.
- 17 In this case, I find it is appropriate to require a coastal hazard vulnerability assessment. The site is effectively within the primary dune area as it is only separated from the coastline by Gale Street, its elevation is less than 5 metres AHD and its geology of a type potentially susceptible to storm erosion i.e. sand beach. I have therefore formed the view that this site is located in an area susceptible to coastal hazards.
- 18 As to the concern of the permit applicant that there are houses currently being constructed without the need for such an assessment, this may well be the case. However, that is a separate issue. Perhaps the policy should apply in other situations also, but it definitely applies to this case. The policies and guidelines before me direct me to the conclusion that an assessment is required.
- 19 This proposed subdivision may seem insignificant in the overall scheme of things. However at some point a line in the sand needs to be drawn as there is a cumulative effect of single subdivisions (or development proposals) on our environment. I recognise that the effect of current policies may create more onerous requirements for a permit applicant. But in doing so, the long term consequences of development are being addressed.
- 20 Significant development occurs in coastal areas and is likely to continue to do so. The *Victorian Coastal Strategy 2008* identifies that our coastline is likely to be impacted by climate change. The coastal hazard vulnerability assessment may be seen as a constraint in areas susceptible to coastal hazards but it seeks to manage the risk and understand how climate change will impact on these coastal locations. The outcome of the coastal hazard vulnerability assessment may conclude that development can proceed. It may establish development parameters given the climate change issues such as levels of land or storm surges etc. But unless this assessment is

undertaken, an informed decision on these issues cannot be made.

- 21 I have therefore adopted the precautionary approach of the General Practice Note December 2008 in directing that a coastal hazard vulnerability assessment should be prepared prior to making a final decision on this matter.

Other issues

- 22 Having concluded that a decision can not be made until a coastal hazard vulnerability assessment is prepared, it remains to address the two other issues raised by the applicant, namely that:
- the subdivision is contrary to the character of Waratah Bay; and
 - the impact of future development on Lot 1 has not been properly considered.

Is the subdivision out of character with Waratah Bay?

- 23 The applicant submitted that the proposed lot is out of character with the neighbourhood character due to its position being located adjacent to a Reserve. It was further noted that the location of the proposed building envelope protrudes in front of the line of the reserve which is not a regular pattern in the existing streetscape.
- 24 A review of the cadastral plan of the site and surrounding area shows a regular pattern of conventional lots. There is a regular pattern of lots having a street frontage to Brown Street and Waratah Avenue, whilst lots in Coinda Court fan around the double headed cul-de-sac. The proposed lot is a corner lot that will have a frontage to both Gale and Brown Streets and shares a boundary to the Reserve. The proposed lot is regular in shape and reflects other lots within the immediate area. It is also not dissimilar to lot sizes within the surrounding area.
- 25 I find no reason to refuse the application on the ground that the subdivision is out of character with Waratah Bay. The proposed lot is not at odds with the character of the area.

The impact of the future development

- 26 The applicant submitted that No 1 Coinda Court has been designed to capture views of the ocean and that it is appropriate for me to consider the issue of view sharing in this case.
- 27 View sharing is an issue that many coastal planning schemes address. However, the South Gippsland Planning Scheme at present does not include any local policy or overlay protecting views. Amendment C45 to the South Gippsland Planning Scheme seeks to introduce a Design and Development Overlay Schedule 4 which reads:

- To prevent the interruption of views towards the coast by inappropriate or poorly designed development or that which is sited in prominent locations.
- 28 However, it was common ground that Amendment C45 is not yet a seriously entertained document as the amendment remains at the Panel hearing stage awaiting the findings of the Panel.
- 29 It would seem that whilst future development of the lot may be partially obstruct a view from 1 Cooina Court to the south west, the views due south and to the south east remain unobstructed. I find that the location of the proposed building envelope is acceptable and would allow for view sharing. I agree that the building envelope should form part of the plan of subdivision. I find that this issue does not warrant refusal of the proposal.

Conclusion

- 30 I would not reject a planning permit for reasons relating to the impact of the subdivision proposal on the neighbourhood character or on the impact on the amenity of the adjoining dwelling. But the impact of climate change is unresolved.
- 31 The Practice Note advances the precautionary approach in coastal decision making. The site is adjacent to low lying areas susceptible to coastal hazards. It is also clear that the impact of climate change has not been considered by any party in this matter including the responsible authority. Regard has not been had to clause 15.08 of the Planning Scheme, the recent *Victorian Coastal Strategy* or the General Practice Note.
- 32 I am not satisfied that I have adequate information before me to assess the impact of the future subdivision and consequent development of the land. Before deciding whether to approve the subdivision, the permit applicant must prepare a coastal hazard vulnerability assessment. The assessment must consider factors such as potential sea level rise, storm tide and surge, coastal processes, local topography and geology and how these factors affect the proposal. The assessment should be undertaken by a suitably qualified coastal engineer or coastal processes specialist.
- 33 If the permit applicant decides not to undertake this assessment, I will refuse to grant the permit.
- 34 If the permit applicant prepares this assessment, I will provide all parties an opportunity to present further submissions on the assessment.

Tracey Bilston- McGillen Member		
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