

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2378/2010
PERMIT APPLICATION NO. 07/0546

CATCHWORDS

APPLICANT Kala Developments Pty Ltd
RESPONSIBLE AUTHORITY Surf Coast Shire Council
RESPONDENTS Noel Fuller & others, Peter Judkins, Jim & Irene Stephen, Alister Shenfield, Helen Webb, Christine & Trevor Osbourne, Vic Roads - South Western Region
SUBJECT LAND 137-143 Great Ocean Road
ANGLESEA VIC 3230
WHERE HELD 55 King Street, Melbourne
BEFORE Helen Gibson, Deputy President
HEARING TYPE Practice Day Hearing
DATE OF HEARING 3 December 2010
DATE OF ORDER 22 December 2010
CITATION Kala Developments Pty Ltd v Surf Coast SC [2010] VCAT 2106

ORDER

- 1 This matter is listed for hearing on Thursday 17 February 2011 at 10.00 am for one day.

Helen Gibson
Deputy President

APPEARANCES:

For Kala Developments Pty
Ltd

Mr James Lofting, Solicitor, of Best Hooper

For Surf Coast Shire Council

Mr Phillip Rosevear, Town Planner

For Noel Fuller

Mr N Fuller, in person

REASONS

- 1 This proceeding is an application under section 87A of the *Planning and Environment Act* 1987 to amend a permit¹ issued at the direction of the Tribunal in 2008². The permit allows:
 - Use and development of the land for construction of five shops, a restaurant, dwellings, waiver of part of the parking requirements, waiver of part requirement for loading bays, construction of a fence, subdivision of land and buildings, removal of native vegetation and construction of access to a main road.
- 2 It is proposed to change the land use mix to 24 dwellings and one restaurant in lieu of 18 dwellings, five shops and one restaurant. New plans have been prepared and other consequential changes to conditions are proposed.
- 3 Statements of grounds were submitted by a number of people who were objectors and parties to the initial VCAT proceeding in 2008. They raised concerns about various aspects of the amended proposal, including height and other built form issues, and potential coastal impacts on the proposal due to climate change.
- 4 The proceeding was the subject of mediation on 13 October 2010. Amongst the objectors who attended were Noel and Julie Fuller, Peter Judkins and Irene Stephen. At the mediation, the parties present agreed as follows:
 - A. The mediation is adjourned to deal with issues listed in parts B and C of this settlement.
 - B. The applicant will prepare and present to the responsible authority a copy of the Coastal Hazard Vulnerability Assessment.
 - C. The responsible authority will obtain condition(s), if any, in relation to salinity from DSE, and forward them to the applicant in order to insert a condition on permit by consent.
 - D. The matters in B and C will, if not settled prior, will be discussed at the adjourned mediation at 2.15 on 5 November 2010.
- 5 The parties further agreed that in the event that an amended permit issued, various amendments to conditions would be made to accommodate an agreed outcome regarding built form issues.
- 6 The mediation was adjourned to 5 November 2010. All parties were sent a hearing notice for the adjourned mediation.
- 7 Mr Noel Fuller attended the adjourned mediation and filed correspondence with the Tribunal indicating that he wished to be a party in relation to

¹ Permit no. 07/0546 issued on 27 June 2008

² *Shenfield v Surf Coast C* [2008] VCAT 1141 (Application P160/2008)

addressing matters relating to coastal issues. A further objector, who was not in attendance at the first mediation, attended the adjourned mediation and he, the council and the applicant agreed to changes to the amended building.

- 8 There was a dispute at the adjourned mediation about whether Mr Fuller, who had signed the terms of settlement in the first mediation, could further participate. The mediator said he could not participate. The applicant and the council were able to settle one further issue relating to salinity at the adjourned mediation and undertook to sort out the remaining coastal impacts issues prior to the hearing on 22 November 2010.
- 9 The proceeding was listed for a hearing on 22 November 2010, but the day prior the applicant and council submitted a proposed consent order to the Tribunal and the hearing was vacated.
- 10 Following the mediation but prior to the listed hearing, both Mr Judkins and Mr Fuller advised the Tribunal that they wished to be heard regarding coastal issues and have an opportunity to comment about the coastal hazard vulnerability assessment, which was prepared for the subject land following the initial mediation in October.
- 11 The purpose of this practice day hearing was to consider whether to make final orders based on the minutes of consent orders submitted by the permit applicant and responsible authority dated 19 November 2010.
- 12 At the practice day hearing, Mr Fuller submitted that he understood the terms of settlement he signed at the mediation on 15 October 2010 entitled him to continue to participate in the mediation regarding coastal issues and to comment on the coastal hazard vulnerability assessment and any conditions that might arise from it. The applicant and council submitted it was their understanding that only they would be involved in the further consideration of the coastal hazard vulnerability assessment and related conditions.
- 13 I consider that the terms of settlement are ambiguous and could be read either way. I consider it was open to Mr Fuller to believe that he was entitled to participate further in considering issues arising from the coastal hazard vulnerability assessment, at the adjourned mediation and that he should not have been excluded from participation..
- 14 The subject land is situated close to the banks of the Anglesea River estuary and close to its confluence with the sea. Since the permit was first issued in 2008, the Victorian Coastal Strategy and Clause 13.01 of the State Planning Policy Framework of the Surf Coast Planning Scheme have changed and now establish an obligation to plan for a sea level rise of not less than 0.8 metres by 2100, and to ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift. These matters were not considered when the permit

was first granted, however I consider that the location of the site means they should now be considered before the permit is amended.

- 15 The applicant had a coastal hazard vulnerability assessment prepared, which indicates that:
- The eastern boundary of the property fronting the Great Ocean Road will be at risk of exposure to both 1% AEP storm tide and catchment generated flooding risks at 2070. This is considered to result in a medium risk ranking for inundation hazards at 2070.
 - By 2100, the 10% AEP storm tide may impinge on the property and the 1% AEP storm tide and catchment generated flood may result in flooding at depths exceeding 0.5m on the property.
 - Dry weather flooding behind the estuary entrance berm as a result of sea level rise may cause indirect, nuisance flooding risks in the estuary that impinge on the property or prevent the free egress of stormwater from the property.
 - The combination of the different flood risks, their potential frequency and the potential depth of inundation are considered to result in a high risk ranking for inundation hazards by 2100, inundation risk of this magnitude would require mitigation.
- 16 In my view, having regard to the Tribunal's obligations under section 84B of the *Planning and Environment Act* 1987, and to the general guidelines in clause 65 of the planning scheme, the Tribunal must be satisfied that any proposed amendments to the permit result in an acceptable outcome³. The Tribunal needs to be independently satisfied about what constitutes an acceptable outcome in the circumstances of this case, rather than simply giving effect to a consent position arrived at by the parties, or some of the parties.
- 17 Notwithstanding the terms of settlement signed at the mediation, I consider there is no longer consent between all the parties. The coastal hazard vulnerability assessment was not available to all parties at the initial mediation. Mr Fuller and Mr Judkins, at least, are both unclear whether conditions to address coastal impacts will impact on the height and built form of the development and say that if they do, any agreements made should be set aside.
- 18 Notwithstanding the efforts that have been made to resolve the proceeding at mediation, I consider it is a situation where I must apply the principle to act fairly that is embodied in section 97 of the *Victorian Civil and Administrative Tribunal Act* 1998, namely:
- The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.

³ *Rozen v Macedon Ranges Shire Council and anor* [2010] VSC 583 at [175]

- 19 I find that this principle and the requirements of natural justice require that all the respondent/objectors and other parties be given an opportunity to be heard on the merits of the proposed amendments to the permit now that they have available to them the information contained in the coastal hazard vulnerability assessment. Likewise, the Tribunal needs to hear from all parties regarding these issues having regard to its obligations under the *Planning and Environment Act 1987* and the planning scheme.
- 20 Accordingly, I propose to list this matter for a hearing on its merits at which all parties will be given an opportunity to be heard on all matters.

Helen Gibson
Deputy President