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TITLE: **A PLETHORA OF PLANNING PERMISSIONS**

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HOW MANY PLANNNING SCHEME PROVISIONS CAN A KOALA BEAR?

Ten??? In Red Dot decision Department of Environment, Land, Water and Planning v Yarra Ranges SC (Red Dot) [2019] VCAT 323 (DELWP v Yarra Ranges), Deputy President Helen Gibson AM and Member Christopher Harty considered a multiplicity of planning scheme provisions impacting a site located at the base of Myers Creek Valley in the Yarra Ranges upon which the permit applicant (Mr Gray) wished to construct a dwelling, outbuilding, swimming pool and remove vegetation in a Rural Conservation Zone Schedule 1.

Apart from the 10 permit requirements, there were three overlays (ESO1, EMO and BMO) and a number of relevant scheme policies and provisions. I will leave it to readers to contemplate those controls. The responsible authority (the Council) had issued a Notice of Decision to grant a permit. DELWP reviewed the decision and the CFA were a Referral Authority.

This was the third attempt by Mr. Gray to obtain a permit (and the third review before VCAT). Interestingly, the Council commissioned an independent solicitor who was also a town planner to assess the permit application. The recommendation was that council should resolve to refuse the permit application (the basis for which is set out at [35]). Council resolved instead to issue a notice of decision to grant a permit.

The Tribunal in this case referred to, amongst many other things, the principles of integrated decision making set out in clause 71.02 and in particular 71.02-3 of the planning scheme. The Tribunal observed that the full range of relevant policies and objectives under

the Planning and Environment Act 1987 and the planning scheme can be taken into account in making a decision about each applicable control and whether a permit should be granted in respect of that control; the critical question being what is relevant and what weight should be given to the various policies and objectives [45].

In a detailed consideration of the issues before it, the Tribunal considered the various permissions fell into three categories:

- Permit for use and development in RCZ
- Other permits for development and vegetation removal
- Bushfire risk.

However there were a number of other matters that required consideration:

- Status of, and owners right to use, an access track
- Whether the permit application was futile
- Adequacy and accuracy of plans

The Tribunal found (inter alia) that the RCZ is a zone that does not support the use of and for a dwelling unless the impacts from an environmental perspective are minimal and the use is subservient to the zone's purpose, which is to protect and enhance environmental values [123]. The Tribunal's view was reinforced by changes to Biodiversity, River corridors (etc) and Bushfire policies (clauses 12.01-1S, 12.03-1 and 13.02-IS.

> "The changes to these policies have, if anything, heightened the need for the proposal to address, to an acceptable level, their outcomes. We consider this has not been satisfactorily achieved in this instance". [124]

This finding put paid to the use of this parcel, and others like it, for residential purposes. The Council submissions had included comment in this regard, drawing attention to the sterilisation and diminution of the value of the land –

> "effectively through the planning controls, with no compensation. One might say bad luck however it is a very drastic consequence" [112].

Ultimately, Mr Gray sought leave to appeal to the Supreme Court (Gray v Minister for Energy, Environment and Climate Change [2019] VSC 382). Osborn J A considered five grounds of appeal and determined that none had a real prospect of success. Leave to appeal was therefore refused. Notwithstanding Mr Gray's failure to succeed with respect to particular development controls he was also unable to overcome the Tribunal's decision as to the acceptability of the proposed use. The Court found that the proposed grounds of appeal did not impugn the conclusion of the Tribunal.

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