

TITLE: WHAT DOES IT MEAN? – CL. 32.08-4 (MINIMUM GARDEN AREA REQUIREMENT)

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WHAT DOES IT MEAN? - CL. 32.08-4 (MINIMUM GARDEN AREA REQUIREMENT).



In a recent Red Dot decision (Clayton Gardens Pty Ltd v Monash CC (Red Dot) [2019] VCAT 1138), the Tribunal referred to an earlier Red Dot decision in Sargentson v Campaspe SC (Red Dot) [2018] VCAT 710 which sought to interpret clause 32.08-4. The preamble to clause 32.08-4 at that time stated:

“Whether or not a planning permit is required for the construction or extension of a dwelling or residential building on a lot, a lot must provide the minimum garden area at ground level as set out in the following table: “

In Sargentson, it was proposed to construct two dwellings on two lots followed by a resubdivision. The Tribunal had determined that at the time the application was lodged a ‘lot’ for the purposes of clause 32.08-4 was that part of the land that could be disposed of separately. This led to a determination that no garden area requirement need be applied to the smaller (400 square metre) lot; whilst a 35% garden area was applied to the adjoining 1,012.06 square metre lot.

The Tribunal in that case considered the meaning of “Ground level”, “lot”, “Garden area” and “Garden area calculation” in some detail and commented that [89]

"it is somewhat perplexing to me that this extent of analysis is required in order to determine whether a mandatory provision of the Scheme is or is not met. Perhaps consideration could be given to some of the matters raised above and further clarity provided".

Following that decision, Amendment VC 143 (15 May 2019) altered the preamble which now provides:

"An application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area as set out in the following table".

The subject land in Clayton Gardens on the other hand comprised three individual, unconsolidated lots. It was proposed to develop the three lots for 15 dwellings with accessways on part of the outside two lots. If the decision in Sargentson was followed, the

Tribunal in Clayton Gardens observed that the middle lot would struggle to meet the garden area requirement [10].

The Tribunal then considered [15] section 37 of the *Interpretation of Legislation Act 1984* (the Act) which provides that:

In an Act or subordinate instrument, unless the contrary intention appears –

.....

(c) words in the singular include the plural; and

(d) words in the plural include the singular

The Tribunal interpreted this to mean [16] that ‘lot’ could also be read as ‘lots and ‘an application for a permit’ could be construed as referring to ‘a permit granted in respect of any lots’.

The Tribunal further considered section 35 of the Act which provides that:

When interpreting a provision of an Act or subordinate instrument:

A construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly state in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.

(Referred to as the purposive approach)

Applying section s35 and s37 of the *Interpretation of Legislation Act 1984* the Tribunal concluded that ‘the garden area requirement is to be applied to the planning unit, not on a per lot basis’ [29].

The Red Dot summary,

"The Tribunal concluded it was appropriate to apply sections 35 and 37 of the *Interpretation of Legislation Act 1984*. In applying section 37 (of that Act) 'words in the singular include words in the plural and words in the plural include the singular'. When interpreting a provision of an Act or subordinate instrument the purpose approach is preferred (s 35 of the Act). The Tribunal concluded that the minimum garden area requirement to be applied is dependent upon the type of application and the composition of the planning unit. As such the garden area is to be applied to the planning unit, not on a per lot basis, if the application includes more than one lot. Compliance with clause 32.08-4 must occur at the time of the application."

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