

# FOLEY'S | LIST

## New Zones – One year on

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Date: 29 April, 2015

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**Victorian Planning & Environmental Law Association**

**New zones seminar – One year on**

**29 April 2015**

**Paper by Peter O’Farrell**

**Isaacs Chambers**

**Victorian Bar**

1. This paper addresses:
  - a) The background of the new residential zones<sup>1</sup> and the Standing Advisory Committees
  - b) What VCAT has found
  - c) What the future may hold

**Background of the new residential zones and the Standing Advisory Committee**

2. Amendment V8 to the Victoria Planning Provisions introduced the Residential Growth Zone, General Residential Zone and Neighbourhood Residential Zone on 1 July 2013.
3. 1 July 2014 was a date that loomed large at many municipalities as this was the date when it was stated by the Government that if a planning authority had not implemented the reformed residential zones into its planning scheme by mid 2014, a General Residential Zone would be applied to all residential land in these planning schemes.
4. On 1 July 2014, Amendment VC116 to the Victoria Planning Provisions and planning schemes, implemented the General Residential Zone into 24 Victorian planning schemes where the reformed residential zones had not been applied

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<sup>1</sup> Much of which has been taken directly from the Department website.

and deleted the Residential 1, 2 and 3 Zones from the Victoria Planning Provisions and planning schemes.

5. On 20 June 2014, the Standing Advisory Committee delivered its Stage One Overarching Issues Report.

**(i) General**

**P1** *The Committee has adopted a cautious approach to the application of the zones, particularly the NRZ, because it has had to consider the amendments on a municipality by municipality basis, rather than on a metropolitan or sub-regional basis.*

**P2** *The 'translation' of existing policy, overlay and zone provisions should occur with the use of the zone that is the closest fit to the status quo where there is no housing strategy, the strategy is not sufficiently robust to inform the application of the zones, or the strategy does not appear to directly link to the zones applied.*

**(ii) State Planning Policy Framework and Plan Melbourne**

**P3** *The application of the new residential zones must support the directions and initiatives of the SPPF, Plan Melbourne and Regional Growth Plans (where relevant). This includes policy that promotes housing diversity and directs housing growth to nodes around activity centres and public transport stops.*

**(iii) Housing Strategies**

**P4** *The application of the residential zones should be based on a housing or similar strategy that specifically addresses where and how housing growth will be accommodated.*

**P5** *Strategic work (other than housing strategies) can be used to inform the application of the new zones. For example, this includes structure plans and the use of the principles and criteria in PN78 as a guide, with reference to the zone purpose to clarify any ambiguity.*

**P6** *Municipal housing capacity analysis and targets for applying particular zones should not be the sole driver in implementing the new residential zones. However, capacity analysis should be undertaken to confirm that the strategy is workable and will meet projected future housing requirements.*

**(iv) Applying the zones**

**Neighbourhood Residential Zone**

**P7** *The NRZ should not be used as the 'default' residential zone.*

**P8** *The application of the NRZ at the municipal level should not be driven by the 50 percent reference in Plan Melbourne or the percentages applied in other municipalities.*

**P9** *The NRZ should not be applied in precincts where there is policy support for significant housing growth, including near PPTN stops and activity centres unless supported by sound strategic justification.*

**P10** *The use of the NRZ in response to identified character should be balanced with policies and strategies to provide housing choice and affordability, and efficient service infrastructure provision.*

**P11** *The use of the NRZ to limit residential development in areas subject to environmental hazards or values should have regard to whether*

*the zone provisions are necessary in addition to the relevant overlay.*

#### **General Residential Zone**

**P12** *The GRZ will typically be the 'default' zone for the R1Z.*

**P13** *The GRZ should not be used as a 'default growth*

**P14** *The GRZ might be suitable for broader application in rural and regional centres in response to more moderate growth expectations.*

*zone' because it only provides for incremental change and there is an expectation that respecting neighbourhood character will influence the scale of built form.*

**P15** *The GRZ, rather than the NRZ, is preferred for broadacre land identified for residential development that is in the process of subdivision and development.*

#### **Residential Growth Zone**

**P16** *The RGZ should be applied where the potential establishment of commercial uses, as permitted by the zone, is unlikely to adversely impact on existing activity centres, particularly in rural and regional centres.*

**P17** *The application of the RGZ or the GRZ is preferred over the NRZ for larger scale housing redevelopment sites (including those for social housing).*

**P18** *The RGZ (or a zone other than one of the three new residential zones) should be applied to nominated or potential urban renewal precincts unless an alternative residential zone is specifically justified.*

**P19** *The RGZ (or a zone other than one of the three new residential zones) is the primary zone for areas identified for significant housing change that are not constrained by 'character'.*

#### **Schedules**

**P20** *Zones should be selected having regard to local policy, overlays and other scheme provisions, and before developing local content in schedules.*

**P21** *Local content in a schedule must be justified in terms of the efficacy of the requirement and the implications for achieving policy objectives.*

**P22** *Schedules should be avoided where they apply new benchmarks for residential development without adequate justification.*

**P23** *Schedules should only be applied where there is a clearly defined need and it can be demonstrated that the provisions of Clause 54 and 55 are not adequate.*

**P24** *The use of local schedules should be minimised and schedules should preferably be applied on a broad scale rather than on a site specific basis.*

#### **(v) Overlays**

**P25** *Existing overlays should be a factor when considering which zone to apply. The overarching consideration is whether the overlay should be accompanied by a restrictive zone or whether the overlay provisions should be allowed to operate with a less restrictive zone. In many instances this should result in translating the Residential 1 Zone to a GRZ.*

**P26** *The existence of the Heritage Overlay does not automatically justify applying the NRZ.*

**(vi) Practice Note 78**

**P27** *The principles and criteria contained in Tables 2 and 3 of PN78 need to be read together and with reference to the existing policy framework and the purposes of the zone.*

**(vii) Covenants**

**P28** *The NRZ should not be applied solely on the basis of single dwelling covenants. The choice of zone should reflect the broader strategic direction for these areas.*

**(viii) Character**

**P29** *The existence of 'character' does not automatically justify applying the NRZ.*

**(ix) Mandatory provisions**

**P30** *Mandatory provisions should be strategically justified and should not be applied where the issues they seek to address are adequately dealt with by existing planning provisions.*

**(x) Clauses 54 and 55**

**P31** *Variations to the Clauses 54 and 55 in the zone schedules should be justified and should not be applied if the existing provisions of Clauses 54 and 55 are adequate.*

6. The individual municipality Advisory Committee reports are available on the Department website.

### **What VCAT has found**

7. The key focus of debate before the Tribunal has been the application of the transitional provisions in the NRZ.
8. The background of this debate is set in the context of:
  - a) the Minister's Reasons for Intervention in Amendment VC104 (which introduced the new zones) – in those the reasons, the Minister stated<sup>2</sup> (underlining added):

*The government in March 2013 committed to including transitional provisions in the residential zones as recommended by the Reformed Zones Ministerial Advisory Committee in its Residential Zones Progress Report dated 14 December 2012. This was to ensure that existing applications would not be disadvantaged by the new provisions included in the new*

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<sup>2</sup> Paragraph 8.

*residential zones and the consequential changes to Clause 55 applying to four storey residential development.*

- b) The Advisory Committee Report on the new zones 14 December 2012 which recommended:

*Recommendation 21: That transitional provisions be drafted so that existing permit holders or applicants suffer no unreasonable disadvantage through the introduction of the new residential*

- c) The State Government response to the recommendations of the Reformed Zones Ministerial Advisory Committee Residential Zones Progress Report, December 2012 which agreed with recommendation 21 above and stated<sup>3</sup>:

*This will occur before the new Residential Zones are introduced into the Victoria Planning Provisions.*

9. As observed by the Tribunal in *Whitefeather Group Pty Ltd v Bayside CC* [2014] VCAT 1193<sup>4</sup> at paragraph 35 ('Whitefeather') (underlining added):

*...we are not so sure that this intent has been entirely achieved. Clearly the transitional provisions create the discretion to allow more than two dwellings to be permitted on the review site. They also exempt proposals from the mandatory height limits under the NRZ. However, they do not set aside the purposes and decision guidelines of the zone, and any supporting policies, that facilitate the provisions side stepped by the transitional provisions. In our view therefore the transitional provisions do not achieve all that was intended. Our focus must be on applying the words and content of the Bayside Planning Scheme as we find it, rather than the intent of a particular planning scheme amendment.*

10. The debate that has taken place was described by the Tribunal in *Whitefeather* as follows<sup>5</sup>:

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<sup>3</sup> Page 3.

<sup>4</sup> A proposal for 25 two storey dwellings on a site of 3908m<sup>2</sup>.

<sup>5</sup> At paragraph 27.

*This proposal is exempt from the ‘game changing’ prohibition on more than two dwellings, as it has the benefit of transitional provisions that apply to applications lodged prior to the introduction of the new residential zones. This begs the question of what the Zone says about these transitional proposals. There is much consternation throughout the planning industry over the meaning of the third purpose of the NRZ, which seeks:*

- *To limit opportunities for increased residential development.*

*There is now an established line of Tribunal decisions<sup>6</sup> which, to varying degrees, have addressed the meaning of this purpose. Each decision turns on its own facts and circumstances yet a consistent line of thought is emerging. We will focus on this line of thought contained in two more recent decisions.*

11. In *Whitefeather*, the Tribunal then proceeded to discuss and compare *Verbuk v Bayside CC* [2014] VCAT 967 (‘Verbuk’) and *Bayside Property Projects Pty Ltd v Bayside CC* [2014] VCAT 958 (‘Bayside Property’).
12. In *Verbuk*<sup>7</sup> the Tribunal stated at paragraph 14:

*As identified above, the application of the Neighbourhood Residential Zone has altered the balance to be given to different policy intents in this neighbourhood. In some ways, the new zone is a ‘game changer’ to the way that applications like this are now considered. They shift the primary intent of the Bayside Planning Scheme as a whole away from an even balance between encouraging urban consolidation and respect for neighbourhood character, to a more clear intent to restrict new residential development in favour of protecting the existing neighbourhood character. This significant change in focus is evident despite the fact that the local policies have not yet caught up with the change of zoning, and in some cases the Neighbourhood Residential Zone has been applied to locations*

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<sup>6</sup> Including those of *Steward v Glen Eira CC* [2014] VCAT 441; *Thistle Nominees Pty Ltd v Glen Eira CC* [2014] VCAT 664; and *Highett Grove Pty Ltd v Bayside CC* [2014] VCAT 890.

<sup>7</sup> A proposal for 3 dwellings, two of which were 2 storey.

*also identified as residential opportunity areas (Having said this, I might have interpreted the Bayside Planning Scheme as a whole providing a different balance or emphasis if the review site were within a central portion of a residential opportunity area and therefore much closer to an activity centre, but still affected by the Neighbourhood Residential Zone).*

13. In *Bayside Property*, the Tribunal adopted a contextual approach including the characteristics of the site, built form considerations and management of amenity impacts. The Tribunal said at paragraph 32:

*Essentially, whether opportunity for increased residential development is appropriately “limited” in the case of a transitional application will turn on the individual circumstances of each case.*

14. There have been many cases where the debate has continued. A useful summary of the cases to date is found in *Bell v Maroondah CC* [2015] VCAT 381 ('Bell'), the Tribunal observed<sup>8</sup>:

*There are now a significant number of decisions dealing with the application of these transitional provisions. The consensus is that transitional applications are subject to greater constraint than would have been the case under the Residential 1 Zone notwithstanding the stated intent of Amendment VC104 that these applications would not be disadvantaged by the introduction of the new residential zones.*

*The debate has essentially focused on the proper application of the zone purposes in particular the purposes in respect of neighbourhood character and the third purpose in respect of limiting opportunities for increased residential development. The zone purposes is set out below:*

- *To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.*

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<sup>8</sup> Paragraph 15.

- *To recognise areas of predominantly single and double storey residential development.*
- *To limit opportunities for increased residential development.*
- *To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.*
- *To implement neighbourhood character policy and adopted neighbourhood character guidelines.*
- *To allow educational, recreational, religious, community and a limited range of other nonresidential uses to serve local community needs in appropriate locations.*

*I have found that the decision of Senior Member Baird and Member Carew in 360 New Street Brighton Pty Ltd v Bayside CC [2014] VCAT 1322 provides a particularly helpful summary of the approach adopted by the Tribunal to date:*

*Our attention was drawn to various Tribunal cases and the approach taken with respect to permit applications relying on the transitional provisions of Clause 32.09. We do not believe it to be contentious that:*

- *An application must respond to its physical and strategic contexts.*
- *The Zone purpose must be considered in assessing an application.*
- *Compared with the former Residential 1 Zone, the language of the purpose of the Neighbourhood Residential Zone with respect to neighbourhood character has raised the obligation to respond positively to, and implement, the preferred character.*

- *Different outcomes can be contemplated for proposals relying on the transitional provisions (because they are not bound by the mandatory limitations such as the number and height of dwellings) but the response to the preferred neighbourhood character is an important consideration in an assessment of the merits.*

*I adopt this approach.*

15. In *Bell*, the Tribunal also provided a useful table comparing the outcome in a variety of transitional cases. The Tribunal observed at paragraph 20:

*The variety of the outcomes evident are what should expect given the contextual approach which has emerged from the Tribunal decisions to date.*

| <b>Case</b>                                                                      | <b>Dwellings</b> | <b>Site Area (sqm)</b> | <b>Decision</b> |
|----------------------------------------------------------------------------------|------------------|------------------------|-----------------|
| <i>Steward v Glen Eira CC</i> <a href="#">[2014] VCAT 441</a>                    | 9                | 1142                   | Not granted     |
| <i>Bayside Property Projects PL v Bayside CC</i> <a href="#">[2014] VCAT 958</a> | 8                | 1621                   | Granted         |
| <i>Verbuk v Bayside CC</i> <a href="#">[2014] VCAT 967</a>                       | 3                | 815                    | Not granted     |
| <i>360 New Street Brighton PL v Bayside CC</i> <a href="#">[2014] VCAT 1322</a>  | 13               | 2775                   | Granted         |
| <i>Whitefeather Group Pty Ltd v Bayside CC</i> <a href="#">[2014] VCAT 1193</a>  | 25               | 3908                   | Granted         |

16. There has been some suggestion that the debate is different in the context of a 3 storey proposal because of the reference to ‘single and double storey residential development’ in the zone purpose. A three storey proposal was approved by the Tribunal in *Scarfe v Boroondara CC* [2014] VCAT 1520. Again, the Tribunal adopted the contextual approach as stated at paragraph 25:

*During the hearing, some emphasis was placed by the applicants for review, and Mr Milner, on that purpose of the NRZ3 to limit opportunities for increased residential development. It was submitted that in several of the Tribunal decisions referred to me, the Tribunal had regarded that*

*purpose as an unambiguous direction that increased residential densities are not envisaged within the zone. I agree that this purpose reinforces the view that I have already expressed, that being that neighbourhoods that have had the NRZ3 applied to them, are not intended to play a significant role in the achievement of urban consolidation objectives. Because of the transitional provisions as they operate in the zone, the consideration of this application is not constrained by a restriction on the number of dwellings. In this context, whether the proposal achieves an acceptable outcome for this site, and responds in an acceptable manner to the zone purpose, will be dependant upon its built form response and its respect for the existing or preferred character of the neighbourhood. My assessment of this aspect of the proposal follows.*

### **What the future holds**

17. In many respects, it is probably too early to understand the town planning implications of the new residential zones. It is expected that it may take several years to determine the true impacts on our cities.
18. In terms of permit applications under the new residential zones, many applications which have the benefit of transitional provisions are still working their way through the system and are likely to do so for another year or so.
19. Once that round of permit applications are determined, it will be interesting to see how permit applicants without the benefit of transitional provisions will respond to the new zones.
20. It wouldn't be surprising if there were a large number of land owners who are yet to fully appreciate the consequences of the roll-out of the new zones.
21. It is anticipated that there will be a new approach adopted for many sites, particularly those affected by the Neighbourhood Residential Zones and where there is a 'two dwelling per lot' limitation.
22. Many of the new zone schedules do not prevent subdivision. It may be that subdivision will be brought forward in the land development process so as to

facilitate additional dwellings on the land that has the 'two dwellings per lot' restriction.

23. It may also be that permit applications will be made for large dual occupancy developments on relatively large land parcels.
24. It may be that there is a return of the level of debate that took place before the advent of ResCode 2 in relation to dual occupancy development.
25. It is also anticipated that there will be a series of site specific amendment requests to deal with sites that are not appropriate for the Neighbourhood Residential Zone (either because of the height limitation or the '2 dwelling per lot' limitation).
26. As to public process, it will be of interest to see whether those municipalities that haven't been through the Advisory Committee process are required to do so.

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