

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P2997/2004  
PERMIT APPLICATION NO. 708809

**CATCHWORDS**

Application under S.79 of the *Planning and Environment Act 1987* for review of the **failure to grant a permit within the prescribed time.**

<b>APPLICANT</b>	Mainline Investments Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	City of Whittlesea
<b>SUBJECT LAND</b>	1485 Plenty Road, Mernda
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Anthony Liston, Senior Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	12 August 2005
<b>DATE OF ORDER</b>	9 September 2005
<b>CITATION</b>	[2005] VCAT 1917

**ORDER**

The order of the Tribunal is that the decision of the Responsible Authority is affirmed. The Tribunal directs that a permit must not be granted as the land is required for a public purpose.

A P Liston  
Senior Member

**APPEARANCES:**

For Applicant

Mr Nicholas Tweedie, Barrister. Mr Tweedy called Mr Roger Greenwood Arborist as a witness in support of his submissions.

For Responsible Authority

Mr Chris De Silva, Town Planner.

## REASONS

- 1 This is a dispute about the subdivision of land which is to be acquired for regional open space for the newly developing urban areas to the north of Melbourne at Mernda. The parties agree that the application for subdivision of the land should be refused on the basis that the land is required for a public purpose. The purpose of the dispute is to resolve an appropriate scheme for the subdivision of the land, because while such a scheme will never proceed, it will be a useful basis for determining the value of the Land Act acquisition.
- 2 At the commencement of the hearing Mr Tweedie applied to amend the permit application by the substitution of a plan prepared by Chris Runting and Associates Pty Ltd entitled *Response to Whittlesea Council Plan* for the plan which accompanied the application. This application was not opposed, and I ordered the amendment of the permit application accordingly.
- 3 The parties and the witness at the hearing of the application for review relied on both written and oral submissions and a number of photographs, plans and other documents were tendered to the Tribunal.
- 4 This amending plan was the combination of a lengthy permit application process and accordingly Mr De Silva in his submission outlined how the issues in dispute had been narrowed to:
  - The proposed removal of River Red Gum trees Nos. 9 and 10;
  - The proposed setback for the River Red Gum tree no.7;
  - The proposal to create a separate lot for the existing dwelling.
- 5 A letter received from Melbourne Water, late in the day, raised a further issue debated at the hearing, and I will comment on this later in these reasons.
- 6 The subject land falls within a residential 1 zone and is affected by the following overlays:
  - Heritage Overlay (HO68)
  - Development Plan Overlay (DPO5)
  - Design and Development Overlay (DPO4)
  - Incorporated Plan Overlay (IPO1)The policy framework underlining these provisions is if anything more comprehensive. I do not intend to describe the planning provisions, the policy framework, or the Mernda Strategy Plan in any detail, these are dealt with at length in Mr De Silva's submission.
- 7 The river red gums 9 and 10, are large old trees located close to each other but otherwise isolated within an agricultural landscape. The amended plans shows them located within lots, and they are proposed to be removed.

Mr Greenwood has ascribed to these trees a value of *very high*, but recommends their removal because of the difficulty of safely incorporating them into urban lots.

- 8 The policy framework, and the strategy plan place considerable weight on the retention of red gums within the Mernda landscape. This policy framework does not just value these trees because of their contribution to the existing rural landscape, but also because their potential they present to contribute to and perhaps define the urban landscape which is to be developed in this locality.
- 9 In this policy context I think there would need to be a very good reason to allow the removal of these trees in this urban context. I am satisfied on the basis of Mr De Silva's submissions that these trees could be safely and usefully retained within a pocket park for the achievement of these important planning objectives.
- 10 Tree no.7, is another large old river red gum on adjoining land. This tree is potentially affected by the road proposed along the northern boundary of the subject land.
- 11 As already discussed, the planning policy framework places great emphasis on the preservation of these trees within the developing urban landscape. I am satisfied on the basis of Mr Greenwood's evidence that while it might be possible to construct a road in its proposed location, without damaging the tree, it could only be done so by adopting unusual and in my view unnecessary construction techniques. It is my opinion that this road should be relocated towards the south, so that it does not impinge to any significant degree on the area of *optimum proximity* identified by Mr Greenwood.
- 12 There is an existing dwelling on the land, and the dwelling has heritage significance. In the amended plan of subdivision the existing dwelling is to be retained within its own large lot, which in turn adjoins an even larger area of land set aside as public open space.
- 13 The house should be preserved because of its heritage value, desirably it should be preserved in a way which preserves something of its original setting so that future generations can appreciate it as a dwelling which was originally set within a rural environment. However, the Applicant's proposal to create a large lot for the house surrounded by the proposed public open space achieves this purpose. Moreover, I think it is difficult to argue that the heritage value of the house would be better preserved as a building within open space being used for some as yet undefined purpose, than it would be by being continued to be used for a residential purpose.
- 14 Ultimately I am of the view that the arrangement proposed in the amended plan is satisfactory and while there is some basis for arguing that the house and its land should be part of the public open space, these arguments are not so convincing that they should overturn the intention expressed by the permit applicant in its plan.

- 15 The day before the hearing Melbourne Water wrote to Mr De Silva indicating among other things that they would like a strip of land along the northern boundary of the subject land to be set aside for drainage purposes. Melbourne Water had done no hydraulic calculations, but they estimated that the land required for this purpose would need to be in the order of 10 to 15 metres wide.
- 16 Melbourne Water did not attend the hearing, and I think it would be unjust to give this unargued request much weight at this the final act in what has been a lengthy permit application process. Mr De Silva remained concern about this approach, because it raises the risk that the council would ultimately be required to acquire land which in part at least was required for a drainage purpose and not for open space. I do not think I can usefully deal with this issue any further in the context of this application, but do observe that I agree with Mr De Silva that land required for a drainage purpose, should be acquired for that purpose, although I acknowledge that floodways can often be useful open space.
- 17 It follows from the above discussion that it is my conclusion that the application for review should be disallowed, and that no permit should be granted because the land is required for a public purpose. However, if a permit was to be granted, then a permit could issue on the basis of the amended application plan, subject to it being amended to show:
- Trees 9 and 10 being retained within an area of public open space sufficient to enable their safe retention within an urban environment;
  - The relocation of the northern road so that it does not significantly intrude upon the area of optimum proximity as defined by Mr Roger Greenwood Arborist in his report dated 18 April 2005.

A P Liston  
**Senior Member**