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Victorian Civil and Administrative Tribunal

104-105 Station Street Pty Ltd v Kingston CC (Red Dot) [2019] VCAT 1546 (3 October 2019)

Last Updated: 8 October 2019

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P1283/20
PERMIT APPLICATION NO. KP-2019/

IN THE MATTER OF 104-105 Station Street Pty Ltd v Kingston CC

BEFORE Jeanette G Rickards, Senior Member

NATURE OF CASE	Construction of a three storey building containing 19 dwellings and basement car park over two lots.
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LAW – issue of interpretation or application	Whether a Cultural Heritage Management Plan is required to be prepared when the activity is over two lots each less than 0.11 hectares or whether the exemption contained in Regulation 10 of th *Aboriginal Heritage Regulations 2018* applies?
LEGISLATION – interpretation or application of statutory provision	Interpretation of Regulation 10 of the *Aboriginal Heritage Regulations 2018*

SUMMARY

The applicant sought to rely upon the exemptions in Regulation 10 of the *Aboriginal Heritage Regulations 2018* (AHR).

Regulation 10 provides:

The construction of 3 or more dwellings on a lot or allotment is an exempt activity if the lot or allotment is –

(a) not within 200 metres of the coastal waters of Victoria, any sea within the limits of Victoria or the Murray River; and

(b) less than 0.11 hectares.

It is proposed to construct a three storey building containing 19 dwellings and a basement car park over two lots.

There was no debate the land is in an area of cultural heritage sensitivity and the activity is a high impact activity.

Regulation 10 (a) was met in that the subject land was 231 metres from the edge of the waters of Port Phillip Bay.

To however obtain the exemption Regulation 10(b) must also be met.

The applicant submitted based on the Tribunal's decision in *Hartland Group Pty Ltd v Mornington Peninsula SC* [2018] VCAT 1722 (31 October 2018) the reference to lot is in the singular. Therefore, as each individual lot is less than 0.11 hectares the exemption applies.

The Tribunal disagreed and determined the activity area covers two lots. The combined area of the two lots is more than 0.11 hectares.

Applying section 37(c) *Interpretation of Legislation Act 1984* 'words in the singular include the plural'. The exemption relates to the high impact activity being undertaken on the whole area to be used for the activity.

Relying on section 35 of the *Interpretation of Legislation Act 1984* when interpreting a provision of a subordinate instrument a construction that would promote the purpose or object underlying the Act or subordinate instrument is to be preferred.

One of the main purposes of the *Aboriginal Heritage Act 2006* (AHA) is 'to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria'. This protection is provided by the undertaking of a cultural heritage management plan to determine the nature of Aboriginal cultural heritage present in the area in which an activity is to occur.

'Allowing the assessment of each individual lot that is to contain the proposed activity would in my view defeat the purpose of the AHA and the AHR'.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NOS. P1283/20
PERMIT APPLICATION NO. KP-2019/

CATCHWORDS

Aboriginal Heritage Act 2006 – Cultural Heritage Management Plan - Regulation 10 *Aboriginal Heritage Regulations 2018* – small lot exemption

APPLICANT	104–105 Station Street Pty Ltd
RESPONSIBLE AUTHORITY	Kingston City Council
SUBJECT LAND	104–105 Station Street ASPENDALE VIC 3195
WHERE HELD	Melbourne
BEFORE	Jeanette G Rickards, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	13 September 2019
DATE OF ORDER	**3 October 2019**
CITATION	104–105 Station Street Pty Ltd v Kingston CC (Red Dot [2019] VCAT 1546

ORDER

1. I declare a Cultural Heritage Management Plan is required to be prepared under the *Aboriginal Heritage Act 2006* and the *Aboriginal Heritage Regulations 2018* for the proposed activity that is the subject of Permit Application No. KP-2019/70.

Jeanette G Rickards Senior Member

APPEARANCES

For applicant	Mr R Hofmann, Solicitor, Rigby Cooke
For responsible authority	Mr A Carnovale, Town Planner

REASONS[1]

1. This is a preliminary hearing to determine whether the applicant can rely upon the exemptions in regulation 10 of the *Aboriginal Heritage Regulations 2018* (AHR) and therefore not be required to provide a Cultural Heritage Management Plan (CHMP).
2. Regulation 7 of the AHR provides that a CHMP is required for an activity if:

(a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and

(b) all or part of the activity is a high impact activity.

3. The subject land consists of two lots at 104 and 105 Station Street, Aspendale. The subject land is in an area of cultural heritage sensitivity.
4. The proposal is to construct a three storey building comprising 19 dwellings over a basement car park. The proposal extends over both lots.
5. Regulation 48 of the AHR provides that:

(1) the construction of 3 or more dwellings on a lot or allotment is a high impact activity.

(2) the carrying out of works for 3 or more dwellings on a lot or allotment is a high impact activity.

6. For the purposes of regulation 7 of the AHR the subject land is in an area of cultural heritage sensitivity and is a high impact activity. A CHMP is therefore required.
7. The applicant seeks to rely upon the provisions of regulation 8 and the exemption contained in regulation 10 of the AHR. Regulation 8 provides:

Despite regulation 7, a cultural heritage management plan is not required under these Regulations for an activity if –

(a) the activity consists solely of a use or development of land that is specified in this Division as being an exempt activity;

8. Regulation 10 of the AHR provides an exemption in relation to 3 or more dwellings on a small lot and provides:

The construction of 3 or more dwellings on a lot or allotment is an exempt activity if the lot or allotment is –

(a) not within 200 metres of the coastal waters of Victoria, any sea within the limits of Victoria or the Murray River; and

(b) less than 0·11 hectares.

9. The applicant provided mapping based on the ACHRIS mapping that indicates the subject land is near Port Phillip Bay but when measured from the edge of the waters of Port Phillip Bay the frontage of the subject land is 231 metres; from the edge of the sand on the beach the land is 215 metres. The applicant also indicated on a map the extent of the 200 metres from the edge of the water showing it fell well short of the subject land.
10. For the purposes of part (a) of regulation 10 the subject land is not within 200 metres of the coastal waters of Victoria. However, to achieve the exemption part (b) must also apply.
11. The subject land comprises two separate lots:

(a) 104 Station Street – identified in Certificate of Title Volume 08058 Folio 590 and more particularly described as Lot 3 on Plan of Subdivision 028089 with a total area of 0.065 hectares.

(b) 105 Station Street - identified in Certificate of Title Volume 08058 Folio 579 and more particularly described as Lot 4 on Plan of Subdivision 028089 with a total area of 0.065 hectares.

12. The applicant submits, and the Kinston City Council (the council) agrees, that based on the Tribunal decision in *Hartland Group Pty Ltd v Mornington Peninsula SC*[2] the reference to lot and allotment in regulation 10 refers to land that is a distinct and separately disposable parcel. The 'small lot exemption' is to be read in the singular:

Mindful of the focus being on the lot or allotment in question, I agree with the Applicant that it should not matter whether a development area is comprised of one lot that meets the two limbs of regulation 10 or of more than one lot that each meet the two limbs of that regulation – the main thing is that each lot that comprises the area proposed for the development of 3 or more dwellings must meet the two limbs of the regulation.[3]

13. The relevant words in regulation 10 are expressed in the singular being 'lot and allotment'. The applicant submits that to read the singular reference in the plural or to consider part (b) to be read as including the combined area of multiple 'small lots' which would, in this instance, comprise the activity area would be inconsistent with the language used and undermine the purpose of the exemption.
14. Individually each lot is less than the specified 0.11 hectares but combined the total area of the two lots is 0.13 hectares.
15. I disagree with the applicant that the exemption is to apply to each small lot forming part of the application.
16. The activity area is defined as 'the area or areas to be used or developed for an activity'. The activity area in this case covers the two lots. It appears to me that relying on each individual lot that makes up the area on which the proposed activity is to be undertaken defeats the reason for the need to undertake a CHMP.
17. I agree regulation 10 only refers to the singular. I am however guided by the provisions of section 37(c) of the *Interpretation of Legislation Act 1984* (ILA) 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.

18. The applicant submits a contrary intention appears. The applicant refers to the definition of 'lot' within the AHR which has the same meaning as in the *Subdivision Act 1988* being 'a part (consisting of one or more pieces) of any land (except a road, reserve or common property) shown on a plan which can be disposed of separately and includes a lot or accessory lot on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan'.
19. The applicant seeks to distinguish the reference to 'activity area' and the singular reference to 'lot' in the heading to regulation 10, namely '3 or more dwellings on a small lot'. The applicant notes the reference to the 'small subdivisions exemption' at regulation 11 is expressed in the plural. The applicant submits that if the intention was to exclude circumstances where two or more 'small lots' combine into an activity area with an area greater than 0.11 hectares then the term activity area should have been used.

20. I disagree. The proposal for 3 or more dwellings is already determined as a high impact activity; the activity area is the whole area to be used for the activity. The exemption relates to the high impact activity being undertaken on the whole area to be used for the activity. In this case the whole area consists of two lots that combined are more than 0.11 hectares.
21. The applicant submits the use of the definitive article when referring to 'the lot' must have features that will exempt the activity. In this respect the applicant referred to the decision in *Fregon v Port Phillip CC*[4] which cited the Supreme Court decision in *Monash City Council v Pellicano Builders Pty Ltd*:[5]
30. The Supreme Court decision also goes into detail about the way in which the exemption operated. This was in the context of whether the word 'building' could be read as 'buildings'. In finding that the exemption did not apply to the subdivision of more than one building, Justice Osborn stated that:

[22] In my view the construction for which the Council contends by way of its primary contention is to be preferred and the Class 2 exemption does not apply to a situation where more than one building is subdivided by way of the one subdivision. First, it reflects the plain meaning of the words used.

...

[25] Fourthly, the meaning of the Class 2 exemption would be materially different from its apparent meaning if Mr Gobbo's construction were preferred.

[26] Fifthly, I am of the view that the use of the definite article within the proviso to the Class 2 exemption is deliberate. (Just as it is in the proviso to the Class 1 exemption). More particularly it appears to me that the choice of the phrase "the building" rather than "a building" is a deliberate one... In my view cl 52.01 provides for the making of contributions upon subdivision of buildings but then exempts a specific and limited class of subdivision of commercial and industrial buildings namely the subdivision of a building where each lot contains part of that building.

22. The applicant submits that the use of 'a lot' in the regulation leads to the conclusion that the exemption is concerned with an activity on an already existing 'small lot' and not 'small lots'. I do not consider the reference to the use of the definite article in this situation is applicable.
23. I disagree that the 'exemption speaks to the characteristics of the lot or allotment in question and does not refer to the development site as "the land" or as the "activity area".'[6] It does not need to refer to the 'activity area' as the exemption only comes into play if the activity is a high impact activity and is to be carried out on a lot that is less than 0.11 hectares.
24. I distinguish the references in regulation 11 as regulation 11 refers to the subdivision of land, not the carrying out of a high impact activity on a lot.
25. The applicant submitted it would be nonsense if the exemption under regulation 10 applied to a 'small lot' and its neighbouring small lot if developed separately, but when combined these are transformed into 'big lots with a heightened sensitivity, to which the exemption is not intended to apply.
26. This may be the outcome of the legislation, but if the lot is less than 0.11 hectares it is not expected that this would lead to a significant development with generally an expectation that at most, 3 or maybe 4 dwellings could be developed on a lot of less than 0.11 hectares.
27. Whilst in this instance the lots prior to the development retain their essential character of being separately disposable parcels of land, immediately upon the carrying out of the development the land would be required to either be re-subdivided or disposed of in its entirety namely two lots.
28. The proposal is for 19 dwellings contained in a three storey building. The proposal cannot be contained on one lot. The activity area is the whole of the area to be used if it covers two lots. It could be over three or more lots and to consider each lot individually would defeat the purpose of the legislation.
29. Section 35 of the ILA provides that:

In the interpretation of a provision of an Act or subordinate instrument –

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

30. One of the main purposes of the *Aboriginal Heritage Act 2006* (AHA) is 'to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria'. This protection is provided by the undertaking of a cultural heritage management plan to determine the nature of Aboriginal cultural heritage present in the area in which an activity is to occur.
31. Section 42 of the AHA indicates what a cultural heritage management plan is:

(1) For the purposes of this Act, the preparation of a cultural heritage management plan for an area involves –

(a) an assessment of the area to determine the nature of any Aboriginal cultural heritage present in the area; and

(b) a written report setting out—

(i) the results of the assessment; and

(ii) conditions to be complied with before, during and after an activity to manage and protect the Aboriginal cultural heritage identified in the assessment.

(2) The written report is the cultural heritage management plan.

32. Regulation 10 allows for an exemption of 3 or more dwellings on a lot if the lot is less than 0.11 hectares. Allowing the assessment of each individual lot that is to contain the proposed activity would in my view defeat the purpose of the AHA and the AHR. The statutory purpose is clearly the protection of Aboriginal heritage. It is considered that a construction that would promote the purpose or object underlying the AHA and the AHR is to be preferred and in this instance where the activity area of a high impact activity is to be across two lots or more, rather than a single lot, then words in the singular include the plural. There is no contrary intention.
33. The application does not meet the second limb of regulation 10 as the lots on which the proposed high impact activity is to be undertaken are not less than 0.11 hectares. A CHMP is therefore required for the activity proposed under Permit Application No. KP-2019/70.

Jeanette G Rickards

Senior Member

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[1] The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

[2] [2018] VCAT 1722 (31 October 2018)

[3] Ibid at [40]

[4] [2019] VCAT 1207

[5] [2005] VSC 321

[6] *Hartland Group Pty Ltd v Mornington Peninsula SC* [2018] VCAT 1722 (31 October 2018) at [24]