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Ronchi & Anor v Wellington SC (includes Summary) (Red Dot) [2009] VCAT 1206 (16 July 2009)

Last Updated: 29 July 2009

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. P3832/2008 PERMIT APPLICATION NO. P211/2008
IN THE MATTER OF	Ronchi & Campbell v Wellington SC

BEFORE	Margaret Baird, Senior Member
NATURE OF CASE	Need for coastal vulnerability assessment for two dwellings on land in a Township Zone that is low lying and sits between a river and foredune – need to fill gap in assessment process
LOCATION OF PASSAGE OF INTEREST	Paragraphs 19 – 22.
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
PLANNING SCHEME – interpretation or consideration of VPP provision	Consideration and application of Clause 15.08 relating to the consideration of climate change in a development proposal for two units.
POLICY – interpretation or application of policy	
APPLICATION – significant, interesting or unusual use or development; application of policy, provision or principle; or circumstances	
CHANGE TO LEGISLATION OR VPPS - whether change to VPPs or statutory provisions is required or desirable	A gap in respect of an assessment of coastal/river hazards for single dwellings that do not require a planning permit in this location should be addressed by provisions that ensure consistency in requirements for new development.

SUMMARY

The proposal for two dwellings in Seaspray is of interest because of the introduction of amendments to Clause 15.08 that have occurred since a Notice of Decision to Grant a Permit was issued by the Council. While the Application for Review has been allowed on character grounds, the decision refers to the application of Clause 15.08 in the context of this case and the need for any future permit application to be informed by an assessment of the site’s vulnerability to the impacts of river and coastal hazards. Arguments by the Council and Respondent that such matters should not be applied, or should be dealt with by conditions, were not

accepted having regard to the policy direction at Clause 15.08. It is also suggested that a gap with respect to single dwellings that do not require a planning permit, and may therefore avoid a vulnerability assessment, should be addressed such as through a Scheme amendment.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO.
P3832/2008
PERMIT APPLICATION NO.
P211/2008

CATCHWORDS

Section 82 of the Planning & Environment Act 1987; Wellington Planning Scheme; Township Zone; Design and Development Overlay DDO3; Two Dwellings; Neighbourhood Character; Impacts on Abutting Properties; Climate Change; Clause 15.08.

APPLICANT	L Ronchi, J Campbell
RESPONSIBLE AUTHORITY	Wellington Shire Council
RESPONDENT	A J Stephenson
SUBJECT LAND	No. 28 Buckley Street, Seaspray
WHERE HELD	Sale
BEFORE	Margaret Baird, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	1 July 2009
DATE OF ORDER	16 July 2009
CITATION	Ronchi & Anor v Wellington SC (includes Summary) (Red Dot) [2009] VCAT 1206

ORDER

1. The decision of the Responsible Authority in relation to permit application no. P211/2008 is set aside. A permit is not granted and no

permit is to be issued.

Margaret Baird
Senior Member
APPEARANCES

For Applicant

Ms L Ronchi in person.

Ms J Campbell in person.

For Responsible Authority

Mr J Traa, town planner.

For Respondent

Mr A Stephenson & Mr E Hug (co-property owners).

INFORMATION

Description of Proposal

It is proposed to construct two double storey dwellings on the land. The dwellings have a side by side, mirror image, format. Each would contain three bedrooms and be provided with a double car garage. Living rooms are proposed at ground and first floor levels with rear decks and balconies. The ground level would be built from boundary to boundary across the front of the site with the balance of the side elevations being setback 1-2 metres at ground level and 2 metres at the first floor level. The front setbacks to Buckley Street would be 4.5 metres with balconies partly cantilevered over.

Zone and Overlays

Township Zone. Design and Development Overlay DDO3 Coastal Towns.

Permit Requirements

Clause 32.05. Clause 55 applies.
[DDO3 is not triggered].

Relevant Scheme Policies & Provisions

Clauses 11, 12, 14, 15.08, 15.12, 16.02, 19.03, 21 and 65. I was also referred to the provisions of proposed Amendment C50 that are currently being reviewed by an independent Panel.

Land Description

The review site has an area of 506 square metres. It is located on the north-west side of Buckley Street and extends through to a

reserve at the rear. That reserve is associated with the Merrimans Creek. The land is opposite a public open space reserve that abuts part of Buckley Street.

Seaspray is a relatively small coastal settlement wedged between a foredune and the Merrimans Creek. It comprises predominantly older dwelling stock much dating from c. 1960s. There is some recent double storey detached dwelling development. The town has recently been sewerred.

1 July 2009 after the hearing.

Tribunal Inspection

REASONS

What is this review about?

1. Mr Stephenson & Mr Hug propose two double storey dwellings on a site in Seaspray. The Wellington Shire Council determined to grant a permit for the proposal, a decision that Ms Ronchi and Ms Campbell have separately applied to be reviewed by the Tribunal. The Tribunal must decide whether to grant a permit. Having considered all submissions with regard to the applicable policies and provisions of the Wellington Planning Scheme, I will set aside the Council's decision for reasons that follow.

In summary, what are the parties' positions?

1. The Applicants both submitted the proposed development is too big, too bulky, has too strong a presence of garages and concrete, and does not fit with the existing neighbourhood character or the proposed DDO15 objectives to retain the character of Seaspray. In support of their views, they referred to the existing pattern of development in Buckley Street, the lack of unit developments, the presence of spacing around dwellings, the lack of boundary to boundary development, and the lack of high fencing. They variously referred to their concerns about a loss of views to a park from the side deck at No. 30 Buckley Street, the visual impact from the rear yard of No. 26 Buckley Street, a loss of light to a bedroom window in No. 26, overshadowing, loss of views to sunsets and impacts on seabreezes.

2. The Council and Respondent contended the proposal is an acceptable response given the town has been sewerred and more intensive development can now be expected. Mr Traa noted elements of the design differ from the existing character and said that is acceptable given the area's character has been static and will change. Mr Stephenson and Mr Hug emphasised the design's compliance with Rescode standards and the presence of varied building styles including double storey homes and one that is higher. They noted plan modifications that have addressed concerns about overlooking.
3. Mr Traa referred to the provisions of Clause 15.08 relating to climate change that were introduced after the Notice of Decision issued. Referring to ground levels, Mr Traa indicated the floor levels of the proposed units may need to be raised, potentially by 900mm, triggering an assessment under DDO3 and giving rise to implications in terms of redesign, character and amenity. However, he also questioned the equity in applying a climate change assessment to a development application in this case because single dwellings in Seaspray do not require a planning permit (if DDO3 is met) and are therefore not subject to the same assessment. Mr Traa suggested conditions that could attach in a permit as have been used by the Council in The Honeysuckles to address climate change. Mr Stephenson and Mr Hug referred to Clause 15.08 and the associated Practice Note. They said they are aware of the risks, which they accept, and prefer not to elevate the units.

What are the Tribunal's findings?

1. In principle, there is no reason why the review site would be unsuitable for two dwellings given the land's physical circumstances. Although the land is not is large, its size, orientation, lack of vegetation and topographic constraints, are all elements that mean the site would normally not seem unduly complicated. The land is, however, very close to the Merrimans Creek and within a low lying coastal settlement. It is not in any Overlay area under the Scheme but the provisions of Clause 15.08 mean that inundation arising with climate change is a relevant design consideration as I discuss later in these reasons.
2. The planning context for an assessment of the permit application includes the purpose of the Township Zone and provisions of Clause

55. A purpose of the Zone is to “*provide for residential development in small towns*”. The proposal would accord with that aim and, by providing an alternative to the existing pattern of detached single dwellings, would support other general policies such as expressed through Clause 16.02.

3. Another purpose of the Township Zone is to encourage residential development that respects the neighbourhood character. Respect for neighbourhood character is one of several key objectives for new residential development. Clause 55 requires a new development to respect the existing character or contribute to a preferred character. There are no local policies in the Scheme to guide decisions as to what might be regarded as a suitable fit; no permit is required for the proposed dwellings under DDO3 and there is no statement of preferred character. The land is not within the local policy relating to development along the Ninety Mile Beach. The only guidance is Clause 21.04 that states, with respect to Seaspray:
 - Ensure that any further development in the town has an appropriate effluent treatment system.
 - Ensure that any further subdivision in the town is serviced by a reticulated sewerage system.
 - Discourage further expansion of tourist facilities in the town until adequate effluent treatment facilities have been provided.
 - Preserve and enhance the coastal dune systems.
4. With a reticulated sewerage system now installed, the extent of development on lots can be expected to change. Servicing has been a limitation however it has also resulted in a low key and low scale character. New developments that are approved will set a pattern for what might come although single dwellings that do not need a planning permit could have a significant visual impact. Proposed Amendment C50 endeavours to fill that void in part and, although the Amendment cannot be given influential weight because it is still being considered by a Panel, its direction is toward maintaining the existing character and the preparation of design guidelines applicable to the “*unique character of the older parts of Seaspray*”.
5. Proposed DDO15 would apply to Seaspray via Amendment C50. It would set design objectives and development permit triggers of (inter alia) 5 metres in height and side setbacks of 2 metres. Proposed design standards include front setbacks providing opportunities for

landscaping.

6. In the current planning context, the proposal must be assessed on the basis of whether it respects the existing character. The site's existing context will influence the outcome but that must be mindful of an expectation of new development and more intensive built. Two storey contemporary designs are an anticipated part of this. Even so, I am not persuaded that the extent, breadth and depth of the proposed units would produce an acceptable outcome. The design has been formulated to accord with numerical Rescode standards such as B17 and B18 but that does not necessarily produce a site responsive design or one that is respectful in character terms.
7. Neighbourhood character requires a critical assessment not just compliance with the numerical standards as evident in the provisions of Clause 55.02-1. While there is no consistent architectural style, the area of the review site has some clearly identifiable themes. Aside from the single storey scale, the themes include spacing around dwellings, side setbacks, recessive garages/carport/parking structures, landscaped front setbacks, often shallow front setbacks, and low, open or no front fencing. These seem to be picked up through some provisions for Seaspray proposed in Amendment C50.
8. The proposal has a shallow front setback at ground and first floor levels (4.5 metres at ground level reduced to 4 metres at first floor level). The ground level is proposed to extend from boundary to boundary across the front of the site with two x double garages and two x double width concrete paved driveways. The Council's proposed conditions seek a maximum of 40% of the frontage for the vehicle crossings to accord with Standard B16 but the outcome would still be a significant amount of garage and paving presenting to the street. That clearly departs from the existing character.
9. The dwellings would have side setbacks in a single plane at the upper levels at 2 metres although variety in materials seeks to provide some articulation. The length would be some 19 metres (including balcony screening) or around two thirds of the depth of the site. The upper level front façade would extend across nearly 80% of the site's breadth with articulation provided through one metre recesses to each end for balconies and varied materials. With a front setback of 4 – 4.5 metres and considerable hard paving, there would be limited room for landscaping to contribute to the landscaped presence that is

a noticeable existing character feature. The high central diving wall would exacerbate the streetscape impact.

10. I find the outcome of the proposal would be visually dominating to the street and would not respect the area's character. Where two storey buildings have been built there is spacing along all boundaries and more recessive upper levels than proposed here. I find the proposal fails the character test and smaller dwellings with spacing are necessary.

What about other objections raised by the Applicants?

1. The Applicants raised a number of matters relating to impacts on their amenity upon which I briefly summarise my conclusions given my primary finding above:
 - Loss of views. The proposal would change the outlook from a side verandah associated with No. 30 Buckley Street. It will be difficult to retain an outlook to the park given the orientation of this space as even one house erected on the review site could mask the views. Similarly, retention of sunset views is not a reason to find against the proposal. However, I accept that the proposal's bulk and mass down the site is excessive in character terms and as it would present to abutting properties particularly the rear of No. 26 Buckley Street.
 - Loss of seabreezes. This is not a factor that would cause the proposal to fail.
 - Shadowing. Shadow impacts appear to comply with Standard B21 of Clause 55.
 - Overlooking. This issue is substantially resolved through proposed screening devices including additional measures shown on the plans dated 19/11/08.
 - Loss of daylight to bedroom window. A bedroom window in No. 26 Buckley Street would face a boundary garage wall. The outcome would not fail any of the numerical standards of Clause 55.
 - Impact on a tree. This matter was only mentioned in passing by Ms Campbell. It relates to a tree on her land that is close to the common boundary with the review site. The tree is not shown on the plans but seems to abut a proposed garage wall. I think it is possible that tree protection measures would be needed to

ensure the tree's retention.

2. In my view, some of these matters demonstrate that the design response has not fully appreciated the site's context and particular points of sensitivity.

What about climate change considerations?

1. Since the Notice of Decision was issued, Clause 15.08 has been amended to give direction with respect to the consideration of climate change. It states:

Planning to manage coastal hazards and the coastal impacts of climate change should:

- Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.
- Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.
- Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.
- Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

1. The consideration of climate change is elevated by the Scheme in a way that places a much more significant onus on permit applicants to respond to it in design. Similarly, there is an onus on decision makers to take climate change into account. Mr Traa suggested this is limited to strategic planning but I am not persuaded to agree. The wording of Clause 15.08 makes clear that the provisions apply to development; it is not limited to planning authorities (as distinct from responsible authorities). Moreover, the General Practice Note *Managing coastal hazards and coastal impacts of climate change*[\[1\]](#) expressly addresses the assessment of applications for planning permits as well

as rezonings. I cannot, therefore, agree with Mr Traa that the issue could be effectively ignored here for equity reasons. Rather, the lack of control for detached dwellings (and possibly other forms of development) which Mr Traa highlighted should be addressed by ensuring such control is obtained. One approach would be a Scheme amendment (noting that the current Amendment C50 process could be an opportunity).

2. I also do not agree that an acceptance by the owners of the potential risk is a responsible way forward. Decision making is directed by Clause 15.08 to take a precautionary approach and that means making decisions that minimise adverse impacts to current and future generations.[\[2\]](#) Orderly planning, referred to as a decision guideline in Clause 65, and Clause 15.08, both require a different and planned response. In Seaspray, much land is low lying being wedged between the river and foredune. Mr Traa's assessment demonstrates the potential risks. His submission also indicates potential solutions could significantly affect the design response. These are reasons why I do not support addressing this matter through conditions.
3. I therefore consider an assessment of the site's vulnerability to the impacts of river and coastal hazards would be required in a future development application based on the current Scheme directions on this matter.
4. That would be consistent with the principles in the General Practice Note and the Tribunal's decision in *Myers*.[\[3\]](#)

Conclusion

1. The development of the site for two units may be acceptable in principle but the proposed design is not sufficiently responsive of the specific character of this part of Seaspray. This permit application is an example of a design that has met the numerical requirements of Clause 55 but does not suitably or sufficiently integrate with the street or locale. I also find that the proposal needs to be assessed against climate change considerations that are now included in the Scheme. At least, that assessment might result in re-design with the potential for consequential impacts in terms of off-site amenity impacts and character outcomes. Such an assessment may too raise some more fundamental questions about the development capacity of the land.

2. For the above reasons, the Application for Review is allowed. I will set aside the decision made by the Responsible Authority and direct no permit be issued.

Margaret Baird
Senior Member

[1] Department of Planning and Community Development, December 2008.

[2] General Practice Note *Managing coastal hazards and coastal impacts of climate change* at page 3.

[3] *Myers v South Gippsland SC* (includes Summary) (Red Dot) [2009] [VCAT 1022](#).

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