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Calculating garden area:

'existing lot', 'created lot' or 'planning unit'?

The recent decision of *Clayton Gardens Pty Ltd v Monash CC* [2019] VCAT 1138 (31 July 2019) (*Clayton*)[1] has gone against three previous Tribunal decisions – *Sargentson, Dromana* and *Terrigal*[2] – to decide that garden area should be calculated on a planning unit rather than existing lot basis.

The garden area requirement

The garden area requirement was introduced into the General Residential Zone (GRZ) and Neighbourhood Residential Zone (NRZ) by Amendment VC110 on 27 March 2017.

VC110 was the Government's response to the Managing Residential Development Advisory Committee's review of the reformed residential zones which were introduced through V8 in July 2013.[3] The Committee "raised concerns about whether the application of the zones had limited capacity to accommodate future housing growth".[4] The Government's response, through VC110, represented a trade-off between supporting more growth and managing amenity impacts by:

- deleting the two dwelling per lot cap in the NRZ;
- amending the purpose of the GRZ to clarify its growth expectations, as follows:

  "To encourage ~~provide~~ a diversity of housing types and ~~moderate~~ housing growth particularly in locations offering good access to services and transport"; and

[1] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1138.html
[2] *Sargentson v Campaspe SC (Red Dot)* [2018] VCAT 710 (7 May 2018), http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/710.html; *Dromana Beach Pty Ltd v Mornington Peninsula CC* [2018] VCAT 666 (11 May 2018), http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/666.html; *Terrigal Crescent Development Pty Ltd v Yarra Ranges SC* [2018] VCAT 1253 (7 September 2018), http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/1253.html.
[3] Being the NRZ, GRZ and Residential Growth Zone.
[4] Amendment VC110, Minister's Reasons for Intervention, 10 March 2017. Note that the Committee did not consider the concept of 'garden area'.

- introducing the garden area requirement "to protect the garden suburban character of existing urban areas."[5]

Amendment VC143 (approved 15 May 2018) made changes to the drafting of the garden area requirement and the definition of garden area. The changes were described as 'clarification'[6] and presumably intended to be policy neutral.

For an application to construct dwellings, the GRZ and NRZ now state:

> "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:

Lot size	Minimum percentage of a lot set aside as garden area
400 - 500 sqm	25%
Above 500 - 650 sqm	30%
Above 650 sqm	35%"

How is garden area calculated?

Three questions arise.

How much area?

First, because the quantum of required garden area depends on lot size, what is used as the relevant 'lot' affects how much area needs to be provided.

For example, the subject land in *Sargentson*, a proposal for two townhouses, comprised two lots (refer Figure 1):

- one small lot of 24m2; and
- a larger lot of 1012m2.

Figure 1 *Sargentson*, left – lot plan showing 'planning unit' (blue) over two lots; right – street view showing 'lot 2' developed as a driveway

On the facts in *Sargentson*:

- using the planning unit (Lot 1 + Lot 2 =1036m2), 35% garden area would be required;
- using the created lot approach, where each town house was to have a little over 500m2 each, 30% garden area would be required; and

[5] VC110 Explanatory Report. The VC143 Explanatory Report contains the same statement.
[6] VC143 Explanatory Report.

- using the existing lots:
    - Lot 2 would have a 0% requirement because it is less than 400m2 (but it also can't contribute to the garden area provided for Lot 1, that is, any 'garden area' provided on Lot 2 doesn't count); and
    - Lot 1 would have a 35% requirement.

Sargentson decided that the 'existing lot' approach was correct because the requirement is expressed to apply to 'a lot' and 'lot' has a defined meaning in the planning scheme, being an area of land shown on a plan that can be disposed of separately. *Dromana* referred to *Sargentson* with approval and reached the same conclusion.

It should be noted that *Sargentson* and *Dromana* were decided under the VC110 version of the requirement which was worded:

> "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:" (my underlining)

Arguably, this wording places greater emphasis on a lot, itself, providing the required amount of garden area than the current wording under VC143 which is:

> "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". (my underlining)

Terrigal, however, was decided after VC143 and followed *Sargentson*, applying the requirement on an existing lot basis.

No trading off – each lot must provide the required percentage of garden area

The facts in *Dromana* and *Terrigal* illustrate a second issue, being that if the requirement is applied to each lot, there is no opportunity for 'trading off' over provision on some lots against under provision on others.

For example, in *Dromana*, a proposed three-storey apartment building over 5 lots, the middle lot of 1205m2 only provided 31.8% garden area against a 35% requirement. The Tribunal held that the application did not meet the requirement, even though it provided more than 35% garden area overall.

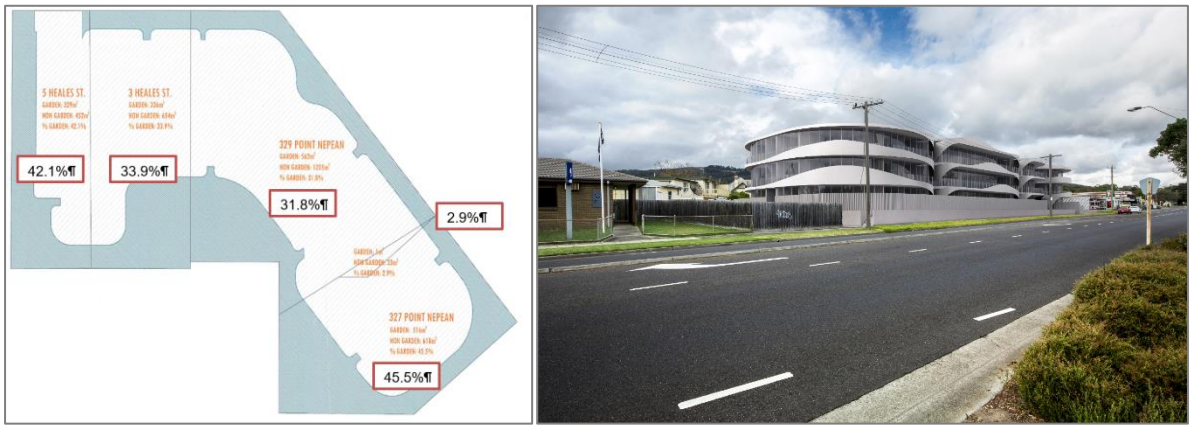


Figure 2 *Dromana*, left - garden area plan included in the decision (percentages added); right - photomontage included in the decision

The same issue arose in *Terrigal* (refer Figure 3, overleaf). Development on the middle lot did not meet the 35% requirement and therefore the Tribunal considered the garden area requirement was not met, even though the proposal provided greater than 35% garden area overall.

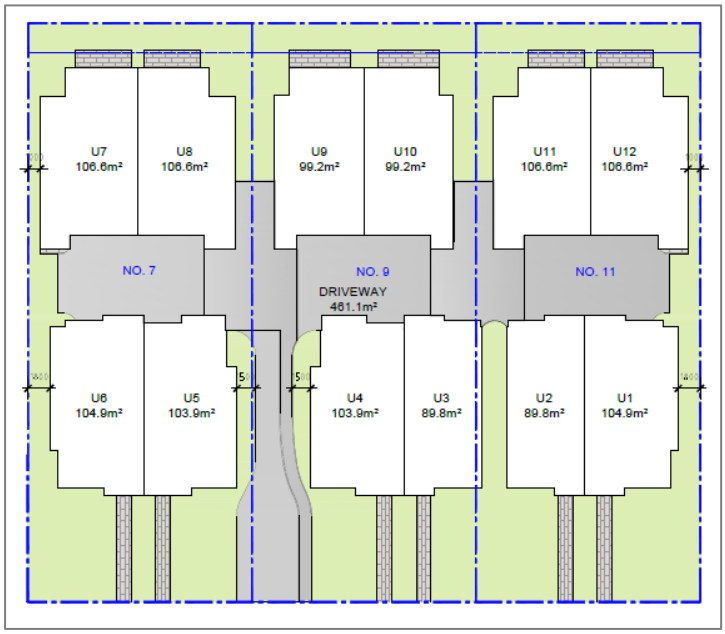


Figure 3 *Terrigal*, site plan included in the decision

Clayton – the planning unit approach

In *Clayton*, Senior Member Rickards decided, as a question of law, that the garden area requirement for an application spanning multiple lots is to be calculated on a 'planning unit' rather than 'existing lot' basis.

The critical difference in reasoning from the previous decisions was section 37 of the *Interpretation of Legislation Act 1984* which provides:

> "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."

In other words, 'lot' means 'lots'.[7] Accordingly:

- an 'application' must provide the required amount of garden area on a 'lot' or 'lots'; and
- the reference to 'lot size' in the table can be read as the size of the 'lots' the subject of the application.

[7] *Clayton*, [16].

Conclusion

Clayton appears sound and is likely to be followed in subsequent decisions because:

- *Sargentson* and *Dromana* were dealing with the VC110 version of the garden area requirement which arguably placed greater emphasis on 'a lot' providing the garden area than the current wording;
- *Terrigal*, which did consider the current wording of the requirement, followed *Sargentson* rather than setting out a detailed, independent analysis of the issue;
- it was not necessary for the Tribunal in *Sargentson*, *Dromana* or *Terrigal* to decide the garden area point because:
    - *Sargentson* and *Dromana* were refused on the merits;
    - in *Terrigal* the Tribunal required changes on the merits which had the effect of bringing about compliance with the requirement;
- in contrast, *Clayton* was a legal ruling directly on point; and
- *Sargentson*, *Dromana* and *Terrigal* did not consider section 37 of the *Interpretation of Legislation Act 1984*.

Sean McArdle
Issacs Chambers
8 August 2019

Appendix – background

VC110 and VC143

VC110 (approved 27 March 2017) introduced minimum 'garden area' requirements in the NRZ and GRZ and a definition of 'garden area'. The garden area requirement as at VC110 was as shown in Figure 4.

32.08-4 **Construction or extension of a dwelling or residential building**

27/03/2017
VC110

Minimum garden area requirement

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:

Lot size	Minimum percentage of a lot set aside as garden area
400 - 500 square metres	25%
501 - 650 square metres	30%
Above 650 square metres	35%

Figure 4 GRZ drafting of garden area requirement as at VC110

VC143 (approved 15 May 2018) made several drafting changes to the garden area requirements and the definition of garden area. The drafting changes to the requirement in the GRZ is shown in Figure 5.

32.08-4 **Construction or extension of a dwelling or residential building**

27/03/2017
~~VC110~~
Proposed
VC143

Minimum garden area requirement

~~Whether or not a planning permit is required for the~~An application to construct~~ion~~ or extend~~sion of~~ a dwelling or residential building on a lot~~, a lot~~ must provide a~~the~~ minimum garden area ~~at ground level~~ as set out in the following table:

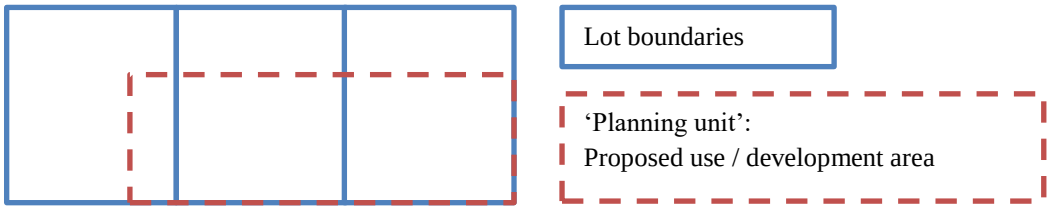
Lot size	Minimum percentage of a lot set aside as garden area
400 - 500 sqm~~uare metres~~	25%
Above 500~~1~~ - 650 sqm~~uare metres~~	30%
Above 650 sqm~~uare metres~~	35%

Figure 5 GRZ drafting of garden area requirement as at VC143

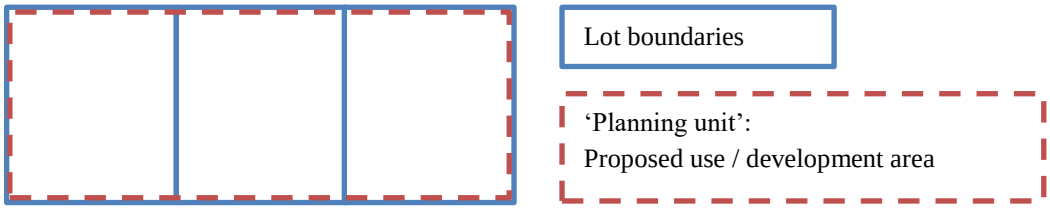
What is a 'planning unit'?

'Planning unit' is the industry term to describe the area of land a permit application relates to. It may coincide with title boundaries, but it need not.[8]

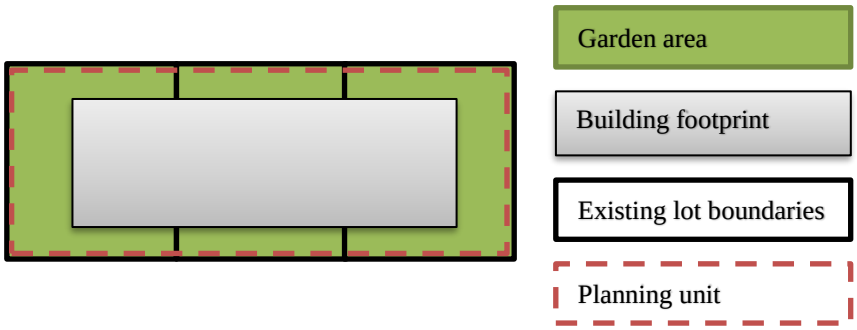
Example 1[9]



Example 2[10]



Example 3: (garden area example)



[8] *Able Demolitions & Excavations Pty Ltd v Yarra Ranges Shire Council* [2008] VSC 294, Kyrou J [22] citing *Eaton & Sons Pty Ltd v Council of the Shire of Warringah* (1972) 129 CLR 270, 274, 288; *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485, 509.

[9] This typology is more common for larger lots and non-residential proposals that need to comply with a mandatory setback, e.g. a 'transfer station' must be 30m from a residential zone in the Commercial 1 Zone or Industrial 1 Zone.

[10] Typical residential 'planning unit' typology covering the entire area of existing lots.