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CASE NOTE[1]

Resolving conflict between transitional provisions and zone purposes

"No implication of words going beyond literal meaning"

Andrews and Morrisy Developments Pty Ltd v Port Phillip City Council & Ors [2019] VSC 337 (***Morrisy***)[2] has decided that the transitional provision in the Neighbourhood Residential Zone (**NRZ**), which excludes the NRZ's mandatory height limit of 9m and 2 storeys, does not require other policy in the scheme directed at limiting height on NRZ land to be read down.

The Court's reasons illustrate the correct approach to determining the scope of relevant considerations under the planning scheme where the operation of parts of the scheme are excluded.

The decision also deals with the use of extrinsic materials, such as Explanatory Reports and published reasons for intervention under s20(4), in interpreting the planning scheme.

The potentially conflicting provisions

The NRZ contains a 9m and 2 storey mandatory height limit (clause 32.09-10). Transitional provisions at clause 32.09-15 of the NRZ provide that this height control does not apply to an application lodged before the approval date of Amendment VC110 (i.e., 27 March 2017).

However, the purposes of the NRZ include:

> *"To recognise areas of predominantly single and double storey residential development.*
> *To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics."*

[1] This article was also published on LinkedIn at: https://www.linkedin.com/pulse/resolving-conflict-between-transitional-provisions-zone-sean-mcardle/
[2] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/337.html

Summary of issues and the Court's reasons

The issue on appeal was how these purposes were to be treated in light of the transitional provisions excluding the two storey height limit. The Applicant argued that the competing zone purposes ought to be read down to give effect to the purpose of the transitional provision. The Court disagreed for the following key reasons:

- the words of the transitional provision exclude the mandatory height control, but not other parts of the scheme;
- the Explanatory Reports and published statements from the Minister, which stated that the purpose of the transitional provisions was to ensure "no disadvantage" for permit applications lodged before the mandatory height controls were introduced, could not overcome the express requirements of the planning scheme; and
- there was no direct inconsistency between the exemption provision as drafted and the relevant zone purposes because the former only excludes the mandatory height limit whereas the latter provides that the "identified character" of the area (being a low rise, one to two storey character) is a matter which must be considered when exercising discretion under the zone.

The permit application

The appeal site is occupied by buildings formerly used as the Town Hall Hotel, South Melbourne. The permit application proposed to modify the façade of the building and construct a four storey residential building behind that façade, containing six dwellings together as illustrated by the following montage.

The Tribunal's reasons

The Tribunal, in part relying on the NRZ purpose "to *recognise areas of predominantly single and double storey residential development* purpose", refused the permit finding that the height was excessive. It said:

> *"66. The zoning of the land has changed since the previous decision and to a zone that has a purpose that seeks (among others) "to recognise areas of predominantly single and double storey residential development" and "to manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics."*
>
> *67. I find that the zoning of the land as NRZ does not support this proposal at a scale of four storeys and a height of just over 13 metres. Whilst the proposal benefits from the transitional provisions at clause 32.09-9, just because a proposal takes benefit of these transitional provisions, does not mean that any such proposal automatically 'gets a tick'. It must still be assessed against the purpose of the zone, and all other relevant policies and provisions of the scheme."*

Grounds of appeal

The Applicant argued that the transitional provision should be interpreted as negativing all requirements of the zone which would restrict height above two storeys (see para [24]). The Applicant's grounds of appeal included that (para. [25]):

> *"The Tribunal erred in law at [60-84] in finding that the applicant's proposal to construct a four storey dwelling was "not an acceptable response to its physical and policy context" having regard to the maximum building height requirements of the Neighbourhood Residential Zone (NRZ) in the Port Phillip Planning Scheme (Scheme) <u>because this finding ignores, or fails to give appropriate effect to, transitional provisions in clause 32.09-14 of the Scheme which stated that the maximum building height (and number of storeys) requirements in the NRZ did not apply to the applicant's application for a planning permit.</u>"* (my emphasis).

Reliance on extrinsic materials

The Applicant relied on explanatory material for the amendments that introduced the NRZ and the relevant transitional provisions into the planning scheme (namely, V8, VC104 and VC110). This use of extrinsic material is allowed under s35 of the *Interpretation of Legislation Act 1984* (Vic) which states:

> *"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; and*
> *(b) consideration may be given to any matter or document that is relevant",*

Amendment V8 (1 July 2013) introduced the NRZ into the Victoria Planning Provisions. It contained a mandatory maximum building height of 8m and two storeys but did not contain transitional provisions.

Amendment VC104 (22 August 2013) inserted a transitional provision in the NRZ concerning the mandatory height limit. The VC104 Explanatory Report stated that the purpose of the transitional provision was to:

> *"ensure that existing applications would not be disadvantaged by the new provisions included in the new residential zones and the consequential changes to Clause 55 applying to four storey residential development."*

Further, the Minister's published Reasons for Intervention (VC104 was approved without notice under s20(4) of the *Planning and Environment Act 1987*) stated that the purpose of the transitional provision was *"to ensure that existing applications would not be disadvantaged by the new provisions included in the new residential zone".*

VC110 (27 March 2017) made significant changes to the NRZ by deleting the two dwelling per lot limit and introducing mandatory 'garden area' requirements. At this time, the transitional provision relating to building height were reconfigured (that is, moved to clause 32.09-14 and coupled together with the garden area transitional provision) but not altered in substance. In relation to this Amendment, the Minister's Reasons for Intervention stated:

> *"Amendment VC110 offers comprehensive exemption and transitional provisions to ensure that no individual is unjustly impacted by the changes. All existing planning permit applications and proposals for building permits will be covered by the transitional provisions."*

The Court's reasons

Osborn JA declined to interpret the transitional provisions as requiring other policy in the scheme supporting limiting building height in the NRZ to be read down. He gave six reasons, as follows (para. [49]):

> *"(a) The meaning of the transitional provision is plain. It relates to the mandatory height control. It is not a more general provision providing that the application is to be considered on the basis of the law as it previously was prior to a specified date.*
>
> *(b) The background material cannot overcome the express requirements of the planning scheme which required the responsible authority and in turn the Tribunal to have regard to the purpose of the zone and the municipal planning strategy supporting that purpose. Clause 32.09-13 states that the responsible authority before deciding on a permit application 'must consider, as appropriate' the purpose of the zone. The applicant's case is that the exemption required the responsible authority and in turn the Tribunal to ignore the zone purpose insofar as it identified and bore*

upon the one and two storey character of the area within the zone. No implication of the type contended for could override the express provisions of the scheme.

(c) There is no inconsistency between the exemption provisions and the zone purpose provision. The effect of the exemption is that the mandatory prohibitions contained in the height control are removed. The effect of the zone purpose is that the identified character of the area within the NRZ1 remains a matter which must be considered when exercising the discretion with respect to a permit.

(d) The statement in the Minister's reasons with respect to amendment VC110 that it was intended to offer comprehensive exemption and transitional provisions to ensure that no individual is unjustly impacted by the changes, begged the question as to what constituted unjust impacts. The transitional provisions did convey a very material benefit by way of exemption from the mandatory height control. Views might differ as to whether the application of the balance of the control was unjust.

(e) The statements of the Minister cannot be read as overriding the terms of the relevant amendment itself. There are obvious political reasons why they may have been expressed in strong language. But the Minister's statements cannot stand in place of express provisions of the amendment.

(f) The words said to be implied in the exemption provision were never identified with exactitude by the applicant. To be effective they would need to exclude consideration both of a central part of the zone purpose and of the municipal strategy contained in the planning scheme which supports that purpose."

Discussion

The Court's approach in this case is consistent with the Court of Appeal decision in *Boroondara City Council v 1045 Burke Road Pty Ltd & Ors* [2015] VSCA 27; 49 VR 535. In *1045 Burke Road*, the Court decided that non 'heritage' considerations are relevant under the Heritage Overlay, because the purposes and decision guidelines of the Heritage Overlay specifically require consideration of the State and Local Planning Policy Frameworks, which call up a broader range of considerations than 'heritage' alone.

In *1045 Burke Road*, Garde AJA (Warren CJ and Santamaria JA agreeing) explained (para. [137]):

"The purposes of the Heritage Overlay contained in cl 43.01 of the Scheme are mainly heritage purposes. But they also include the implementation of the SPPF and the LPPF including the Municipal Strategic Statement and local planning policies. The SPPF, the LPPF including the Municipal Strategic Statement and local planning policies contain non-heritage as well as heritage purposes. There is nothing in cl 43.01 that says that only heritage purposes may be considered when an application for a permit is received under the Heritage Overlay."

The decision in *Morrisy Developments* illustrates the Supreme Court's continued reluctance to imply limitations on the scope of relevant considerations contrary to express words in the planning scheme, in this case, the express requirements in clause 71.03 (Operation of Zones) to consider *"the Municipal Planning Strategy, the Planning Policy Framework, the purpose and decision guidelines of the zone and any of the other decision guidelines in Clause 65."*

The transitional provision in *Morrisy Developments* related, specifically, to the maximum building height and number of storeys requirements of Clause 32.09-9. Further exclusion of provisions of the scheme would not be implied having regard to the apparent purpose of the provision in light of extrinsic statements. As Osborn JA noted, the transitional provision in question was *"not a more general provision providing that the application is to be considered on the basis of the law as it previously was prior to a specified date."* The head note to the decision makes the point succinctly: "No implication of words going beyond literal meaning".

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